IN THE SUPREME COURT FOR THE STATE OF CALIFORNIA

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

APPELLANT'S SECOND SUPPLEMENTAL 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

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ARGUMENT

THE ERRONEOUS OMISSION OF THE CONFIDENTIAL RECORD OF THE TRIAL COURT'S SECOND-STEP *PITCHESS* RULING, WHICH HAS BEEN IRRETRIEVABLY LOST OR DESTROYED AND IS INCAPABLE OF RECONSTRUCTION OR SUBSTITUTION THROUGH SETTLEMENT, HAS DEPRIVED MR. TOWNSEL OF HIS RIGHTS TO APPELLATE REVIEW OF THE TRIAL COURT'S RULING IN VIOLATION OF STATE LAW AND THE EIGHTH AND FOURTEENTH AMENDMENTS AND REQUIRES REVERSAL OF THE DEATH VERDICT

A. Procedural History

1. Mr. Townsel's *Pitchess* Motion at the Penalty Phase of Trial And his Attempt to Exercise his Right to Review of the Trial Court's Ruling on Appeal

On April 16, 1991, and prior to the commencement of the penalty phase, defense counsel moved for discovery of information from the personnel records of Madera County Correctional Officer Frank Reiland, a penalty phase witness prepared to testify in accord with an incident report he wrote on June 28, 1990, that Mr. Townsel had assaulted him in the jail during his trial. ("*Pitchess* motion") (2 CT 498-505; *Pitchess v. Superior Court* (1974) 11 Cal.3d 531; Evid. Code, §§ 1043, 1045; Mr. Townsel's Opening Brief ["AOB"] 257-261 [Argument VIII].)[1] On the same date in response, Madera County Counsel Doug Nelson, 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 as

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[1] "CT" refers to the clerk's transcript on appeal, preceded by volume number and followed by page number. "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.

described by the trial judge, the Honorable Paul R. Martin: (1) Officer 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; Respondent's Brief ["RB"] 252-253; AOB 258.) Following Judge Martin's in-camera review of those files, he ruled that only one "report" contained therein was relevant and disclosed it to counsel for both parties; he ruled that the remaining information in the files was not discoverable. (15 RT 3519-3520; AOB 258-259.)

On December 30, 1997, after judgment was imposed and during the record correction, completion and certification proceedings in the superior court, the trial "court order[ed] 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].) This order was consistent with Penal Code section 190.7 and the Rules of Court under which lodged records are necessarily part of the normal record in a capital case. (Pen. Code, § 190.7, subd. (a) (eff. Jan. 1, 1997); 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"]; accord, Current Rules 8.610, subd. (a)(1)(P) and Rule 2.585, subd. (b).)

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); AOB 259; RB 252-253.) On May 13, 2010, Mr. Townsel filed his opening brief in which he attempted to exercise his right to appellate review of the trial court's *Pitchess* ruling based, inter alia, on the sealed appellate record of the files the court reviewed. (AOB 257-261, Argument VIII, and authorities cited therein.) On September 15, 2011, respondent filed its brief in which it agreed that Mr. Townsel was entitled to appellate review of that ruling based on the same confidential record under long standing California law. (RB 252-253, and authorities cited therein; see also Appellant's Reply Brief ["ARB"], filed August 26, 2013, at p. 216.)

2. This Court's Discovery and Notice to the Parties That the Confidential Appellate Record Was Missing from Both the Record Transmitted to this Court and the Superior Court's Own Files And Its September 18, 2013 Order for Supplemental Briefing to Address the Impact Thereof on this Appeal

On September 18, 2013, and after the parties submitted their briefing on appeal, this Court issued the following order:

> Regarding Argument VIII of Mr. Townsel's opening brief, the parties are advised the record on appeal does not contain the files that the trial court reviewed in camera in ruling on Mr. Townsel's motion for discovery under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, and that, as reflected in the 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 file supplemental briefing addressing the impact on this appeal of the files' absence from the record.

3. The Parties' Agreement That the Omission of the Confidential Record Was Erroneous and Remedy Through Reconstruction Should Be Attempted and this Court's April 16, 2014 Order Remanding to the Superior Court to Attempt that Remedy

In response to this Court's order, the parties filed supplemental briefing in which they agreed that the superior court had erred in failing to transmit that part of the confidential record to this Court. They further agreed that the error could be remedied if the record could be reconstructed by having the custodians of the reviewed files re-produce them for inclusion in the record. (Supplemental Appellant's Opening Brief ["1SAOB"] 1-38; Supplemental Respondent's Brief ["1SRB"] 1-14; Supplemental Appellant's Reply Brief ["1SARB"] 1.)

For his part, Mr. Townsel argued that the trial court's oral list of the files County Counsel had produced for its review, corroborated by other record evidence, established that the court reviewed the identified files in toto and without qualification. (1SAOB I 19-23; 1SARB 1-6.) Hence, that description was sufficient for this Court to attempt to remedy the error by directly ordering the files' custodians, through County Counsel, to produce them for reconstruction. (*Ibid.*, and authorities cited therein.)

Respondent agreed that "[t]he error may be remedied" through reconstruction, but argued that the trial court's description of the files was insufficient for this Court to determine "what specific records" the trial court reviewed and thereby attempt to remedy the error itself. (1SRB 12.) Instead, respondent argued that the Court should order remand for the reviewed files to "be reconstructed or settled upon in the superior court and then provided to this Court." (1SRB 12 and *id.* 8-13.)

In addition, Mr. Townsel argued that the trial court further erred in

refusing appellate counsel's request, made during the postjudgment record correction and completion proceedings, to identify for the record the one "report" it did disclose following its *Pitchess* review. (1SAOB I 24-37; 1SARB 6-9.) However, Mr. Townsel further argued that remand was unnecessary to remedy the error because the record as a whole was sufficient for this Court to identify the disclosed report as the June 28, 1990 "incident report" Officer Reiland wrote alleging that Mr. Townsel committed the battery to which he proposed to testify at the penalty phase. (*Ibid.*)

Although it was respondent People who produced and identified the incident report as the disclosed report during the record correction and completion proceedings before the trial court, respondent argued on appeal before this Court that the record was insufficient to identify the disclosed report as the incident report. (1SRB 3-6, 13 & fn. 12; see also 1SARB 6-9.) For this reason, as well, respondent argued that the matter should be remanded to the superior court. (1SRB 13014 & fns. 10, 12.)

Following submission of the parties' supplemental briefing, on April 16, 2014, this Court ordered that the matter be remanded to the superior court to attempt to identify and reconstruct the missing record:

> During the trial of this matter, the superior court reviewed certain records in ruling on appellant Anthony Letrice Townsel's *Pitchess* motion. (See 15 RT 3519; *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.) During record correction proceedings, the superior court ordered that those records be sealed and transmitted to this court. (See 7 CT 1651, 1655.) That order was not complied with, and the record on appeal consequently does not contain the material the superior court reviewed in ruling on Mr. Townsel's *Pitchess* motion. To enable this court to review the ruling, the superior court is directed (1) to order the custodian of the

> records to produce in the superior court the records that the custodian previously produced and the court reviewed in ruling on Mr. Townsel's *Pitchess* motion, (2) when the records are produced, to review them and confirm whether they are the records it reviewed in ruling on Mr. Townsel's *Pitchess* motion, (3) to identify the particular document it ordered disclosed to Mr. Townsel at trial, and then (4) to transmit all of the documents it has reviewed under seal to this court. If the custodian is unable to produce the files, he or she must submit a declaration under penalty of perjury so stating, with an explanation of why such production is not possible, and the superior court must then transmit that declaration to this court. The superior court is further directed to hold any hearings it may deem necessary to comply with this order, and is directed to transmit a record of any such hearings and any resultant findings, along with any sealed files and any declaration by the custodian of records, to this court . . . .

(4/16/14 SCT 13.)[2]

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

4. Evidence Received on Remand That the Confidential Appellate Record Has been Irretrievably Lost or Destroyed, Cannot be Reconstructed, and No Adequate Substitute Can be Obtained

In response to this Court's order, on April 28, 2014, the superior court ordered the custodians of the original files, as described by Judge Martin, to produce them on May 5, 2014. (4/16/14 SCT 14-16.) In response, on May 5, 2014, Madera County Counsel Doug Nelson produced, and the superior court filed, the declarations of the custodians of records for the Madera County Departments of Corrections and Human Resources – Sergeant Chris Rodriguez and Deputy County Administrative Officer Adrienne Calip, respectively. (4/16/14 SCT 27-31; 4/16/14 SRT 53-57.) As discussed in more detail in Part C-2, *post*, in their declarations the custodians attested that the original files could not be located and presumably had been destroyed. (4/16/14 CT 27-30.) On May 30, 2014, the custodians testified under oath to substantially the same effect. (4/16/14 SRT 84-108.)

Having received undisputed evidence that the files which constituted the missing appellate record have been irretrievably lost or destroyed and hence that record cannot be reconstructed, the superior court ruled that further proceedings were appropriate to determine whether an adequate substitute could be obtained through settlement. (4/16/14 SRT 109-131; see *Marks v. Superior Court* (2002) 27 Cal.4th 176, 196-197; *People v. Mooc* (2001) 26 Cal.4th 1216, 1221, 1232.) To that end and as discussed in more detail in Part C-3, *post*, on May 30, June 9, and July 11, 2014, the superior court took undisputed evidence that the only people privy to the contents of the missing confidential record – County Counsel Doug Nelson, who

originally produced and lodged the files with the court, and Judge Martin (now retired), who reviewed them – had no memory at all of their contents despite efforts to refresh their recollections. (4/16/14 SRT 135-172, 194-198; see also 4/16/14 SCT 75-76, 84-86, 98-107, 120-121.) The superior court also took evidence from the trial prosecutor, undisputed by the sworn statements of both trial defense attorneys, that Officer Reiland's June 28, 1990, incident report was the one report Judge Martin did disclose to the parties. (4/16/14 SCT 55-63; 4/16/14 SCT 110-113, 123-124, 137-140, 154-157.)

Although Mr. Townsel moved for the superior court to make factual findings based upon the evidence received (4/16/14 SRT 177-178, 182-184, citing *Marks, supra*, 27 Cal.4th at pp. 196-197), the court declined to do so and instead ruled that it would simply present that evidence to this Court for it to make any appropriate findings (4/16/14 SRT 184-186; see also *id.* 194-198; 4/16/14 SCT 75-76, 84-86, 98-107, 115-121). On September 15, 2014, the superior court filed in this Court a supplemental clerk's and reporter's transcript of the proceedings, including a written "order" dated June 12, 2014 summarizing the evidence received on remand (4/16/14 SCT 75-76), which was amended in writing on June 18, 2014 (4/16/14 SCT 84-86), and again amended by oral order on July 11, 2014 (4/16/14 SRT 194-198; 4/16/14 SCT 120-121).

5. This Court's October 1, 2014 Order for Supplemental Briefing

In their supplemental briefing submitted to this Court prior to its April 16, 2014 remand order, the parties contemplated the possibility that the record would be incapable of reconstruction or substitution, in which case they agreed that further briefing would be necessary to address the

impact thereof on this appeal. (1SAOB 38-39; 1SRB 14.) Consistent with the parties' positions and after the record of the proceedings on remand was filed with this Court, the Court issued the following order on October 1, 2014:

> In view of the superior court's order dated June 12, 2014, acknowledging that the custodian is unable to produce the records the superior court reviewed in ruling on appellant's. *Pitchess* motion . . . the parties are directed to provide supplemental briefing addressing the impact on this appeal, including as to the merits of Claim VIII raised in appellant's opening brief, of the records' absence from the appellate record. . . .

B. California Defendants Who Have Been Sentenced to Death are Entitled to Appellate Review of Trial Courts' Second-Step *Pitchess* Rulings and a Record Adequate to Conduct Such Review As Part of their Automatic First Appeal as of Right, Which is Protected by the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment

1. California Defendants are Absolutely Entitled to a First Appeal as of Right from Judgments of Death and to a Record Adequate to Satisfy the Eighth and Fourteenth Amendment Demands for Meaningful Appellate Review

California provides defendants with a first appeal as of right from judgments in criminal cases. (Pen. Code, §§ 1237, 1239.) In order to assure the heightened reliability demanded of death judgments under state law and the federal constitution, the appeal is automatic from judgments of death and unwaiveable. (Pen. Code, § 1239, subd. (b); *People v. Stanworth* (1969) 71 Cal.2d 820, 833-834; *People v. Chadd* (1981) 28 Cal.3d 739,

750-753.)[3]

Although the federal constitution does not contain an independent guarantee to appeal, when a state – like California – elects to provide for a first appeal as of right, "the procedures used in deciding appeals must comport with the demands of the Due Process . . . Clause[] of the Constitution." (*Evitts v. Lucey* (1985) 469 U.S. 387, 393 and *id.* at pp. 400-401, and authorities cited therein.) Due process demands "certain minimum safeguards necessary to make that appeal 'adequate and effective.'" (*Evitts*, *supra*, at p. 392, quoting *Griffin v. Illinois* (1956) 351 U.S. 12, 20.)

Typically, two "basic tools" are constitutionally necessary to an "adequate and effective" or "meaningful" appeal: (1) a complete and accurate record of the proceedings resulting in the judgment appealed from; and (2) representation by, and the effective assistance of, counsel. (See, e.g., *Evitts v. Lucey*, *supra*, 469 U.S. at pp. 393-398, 403-405, and authorities cited therein; *Entsminger v. Iowa* (1967) 386 U.S. 748, 749-752 [clerk's transcript constitutionally inadequate to permit appeal to which defendant was entitled under state law]; *Hardy v. United States* (1964) 375 U.S. 277, 279-280, 282; *Chessman v. Teets* (1957) 354 U.S. 156, 165-166; *Griffin v. Illinois*, *supra*, 351 U.S. at pp. 17-18, 20.) California law is consistent with these principles. (See, e.g., *People v. Alvarez* (1996) 14 Cal.4th 155, 196, fn. 8; *People v. Howard* (1992) 1 Cal.4th 1132, 1165-1167; *People v. Barton* (1978) 21 Cal.3d 513, 518-520.)

Of course, in capital cases, the Eighth Amendment demands a heightened degree of confidence in the reliability of death judgments. (See,

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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.

e.g., *Monge v. California* (1998) 524 U.S. 721, 732, and authorities cited therein.) Accordingly, the United States Supreme Court has "emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally." (*Parker v. Dugger* (1991) 498 U.S. 308, 321, and authorities cited therein.) As a necessary corollary, the Court has consistently "emphasized . . . the importance of reviewing capital sentences on a complete record" adequate to satisfy the heightened demand for confidence in the reliability of death judgments. (*Dobbs v. Zant* (1993) 506 U.S. 357, 358; *Parker v. Dugger, supra*, at p. 321; *Gardner v. Florida* (1977) 430 U.S. 349, 361; *Gregg v. Georgia* (1976) 428 U.S. 153, 167, 198.)

As this Court has succinctly put it: "a criminal defendant is . . . entitled to a record on appeal that is adequate to permit meaningful appellate review. That is true under California law. [Citation.] It is true as well under the United States Constitution – under the Fourteenth Amendment generally, and under the Eighth Amendment specifically when a sentence of death is involved." (*People v. Alvarez, supra*, 14 Cal.4th at p. fn. 8; accord, e.g., *People v. Howard, supra*, 1 Cal.4th at pp. 1165-1167, and authorities cited therein.)

Consistent with these guarantees, Penal Code section 190.7, subdivision (a) 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.

(Eff. Jan. 1, 1997, italics added; see also§ 190.9; rule 8.610; see also Former § 190.6 (en. 1977); Former rule 39.5, subd. (c)(3) (eff. 1983); Former rule 39.51 (eff. March 1, 1997).)

When part of the entire record is missing and irretrievably lost or destroyed in violation of state law, this Court has held that the error does not necessarily violate the federal constitution or result in prejudice. If an adequate substitute for that part of the record can be obtained on which meaningful review is possible, it is sufficient to satisfy the federal constitution and render harmless the state law violation. (See, e.g., *People v. Galland* (2008) 45 Cal.4th 354, 370-372, and authorities cited therein; *Griffin v. Illinois*, *supra*, 351 U.S. at p. 20.) Hence, before a missing record can be deemed constitutionally inadequate, there must be a preliminary showing that an adequate substitute cannot be obtained through reconstruction or settlement despite reasonable efforts to do so. (See, e.g., *People v. Frye* (1998) 18 Cal.4th 894, 941, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 290, 421, fn. 22; *People v. Jones* (1981) 125 Cal.App.3d 298, 300-301.)

Once that preliminary showing is made, the state and federal constitutional guarantees to meaningful appellate review are violated when "'"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."' [Citations.]" (*People v. Galland*, *supra*, 45 Cal.4th at p. 370.) The defendant bears the burden of proving that the record is inadequate to permit meaningful appellate review by "identify[ing] [a] claim with respect

to which the record is inadequate for determination of the issue" or showing that he "has been prejudiced by the state of the record" because the missing record "relat[es] to an issue that he raises on appeal." (*People v. Samayoa* (1997) 15 Cal.4th 795, 820-821.)

Under these principles, this and other courts have found violations of the right to meaningful appellate review from the irretrievable loss or destruction of part of a record critical to review of an issue raised on appeal for which no adequate substitute was available in a variety of circumstances. (See, e.g., *In re Steven B.* (1979) 25 Cal.3d 1, 7-9 [destruction of reporter's notes for one day of a two-day juvenile court hearing for which substitute not possible to furnish "an adequate record to enable the court to pass upon the questions sought to be raised," being insufficiency of the evidence to sustain verdict]; *People v. Bradford* (2007) 154 Cal.App.4th 1390, 1417-1421 [irretrievable loss of reporter's transcript of judge's ex-parte communications with jurors during deliberations for which proffered substitute was inadequate to permit meaningful appellate review of whether interactions amounted to prejudicial error]; *In re Roderick S.* (1981) 125 Cal.App.3d 48, 52-54 [destruction of physical exhibit consisting of knife, which was "critical" evidence to conviction for possessing particular kind of knife, violated due process right to meaningful appellate review of sufficiency of evidence to sustain verdict]; *People v. Apalatequi* (1978) 82 Cal.App.3d 970, 971-974 [irretrievable loss of reporter's notes of closing arguments and no substitute available to review claim of prosecutorial misconduct]; see also *Hart v. Eyman* (9th Cir. 1972) 458 F.2d 334, 337-338 [lost reporter's transcript for which there was no adequate substitute to review claim of coerced confession violated defendant's due process rights].)

Ordinarily, when only part of the record is missing, the defendant was present (personally or through his counsel) during the unrecorded proceedings, and is represented by counsel on appeal, he has the ability to allege that the unrecorded proceedings are critical to conducting meaningful review of a specific claim of error on appeal. (See, e.g., *People v. Apalatequi*, *supra*, 82 Cal.App.3d at pp. 971-974 [defendant and his trial counsel were present during arguments in which defendant alleged the prosecutor committed misconduct; irretrievable destruction of record of arguments precluded appellate review of claim of prosecutorial misconduct].) Under these ordinary circumstances, in order to "identify [a] claim with respect to which the record is inadequate for determination of the issue" (*People v. Samayoa*, *supra*, 15 Cal.4th at pp. 820-821), this Court has required appellants to identify a specific claim of error that is incapable of meaningful appellate review (e.g., *People v. Pinholster* (1992) 1 Cal.4th 865, 922-923, disapproved on another ground in *People v. Williams* (2010) 49 Cal.4th 405, 459; *People v. Young* (2005) 34 Cal.4th 1149, 1170). This general rule is based on the general legal principles governing the appellate process itself.

That is, a criminal defendant is entitled to counsel, and the effective assistance thereof, on his or her first appeal as of right. (See, e.g., *Evitts v. Lucey*, *supra*, 569 U.S. at pp. 395-397, 404-405; *Douglas v. California* (1963) 372 U.S. 353, 358; § 1240.) With that assistance, the defendant ordinarily must present cognizable and clearly articulated claims of error, supported by citations to the record, argument, and authorities. (See, e.g., *People v. Stanley* (1995) 10 Cal.4th 764, 793; *People v. Williams* (1997) 16 Cal.4th 153, 206; *People v. Myles* (2012) 53 Cal.4th 1181, 1222, fn. 14.)

Hence, absent very limited exceptions, the appeal to which a

defendant is entitled "requires more than a mere assertion that the judgment is wrong" (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852) and does not require the reviewing court's "independent, unassisted study of the record in search of error . . . [to undermine] the judgment. [Citations]" (*Chapman v. Superior Court* (2005) 130 Cal.App.4th 261, 271). (But see *People v. Wende* (1979) 25 Cal.3d 436, 440-442 ["*Wende* brief" creates a rare exception to the general rules of appellate procedure by triggering appellate court's duty to independently review entire record in search of arguable error].) Hence, an appellant's failure to raise a claim of error, supported by citations to the record and argument, ordinarily forfeits his right to appellate review under state law. (See, e.g., *People v. Stanley*, *supra*, 10 Cal.4th at p. 793.)

In short, under the general rules of California appellate procedure, the right to appeal only entitles a defendant to appellate review of specific claims of error. Therefore, when part of the record is missing but the defendant does not show that it is necessary to review such a claim, this Court has held that there is no deprivation of the appeal to which the defendant is entitled under state law and hence no violation of his federal constitutional rights.

However, as shown below, California has created an exception to those general principles of appellate procedure when the defendant appeals from a judgment that follows a trial court's "second-step" *Pitchess* ruling denying discovery from a peace office's personnel files. Under that special appellate procedure, the irretrievable loss or destruction of the required confidential record of second-step *Pitchess* proceedings for which there is no adequate substitute deprives the defendant of his well-settled state law right to appellate review of such a ruling and, hence, his federal

constitutional rights meaningful appellate review.

2. The Erroneous Omission of the Required, Confidential Record of a Second-Step *Pitchess* Proceeding Violates the Defendant's Right to Appellate Review of a Second-Step *Pitchess* Ruling Under State Law and Consequently the Due Process Clause of the Fourteenth Amendment, and – In Capital Cases – the Eighth Amendment

a. *Pitchess* Procedure at Trial

Under state law, a peace officer has a legitimate expectation of privacy in his or her personnel files. (See, e.g., *People v. Mooc*, *supra*, 26 Cal.4th at pp. 1220, 1226-1227; §§ 832.7, 832.8.) Those records are confidential and can only be subject to criminal discovery pursuant to a two-step process commonly referred to as a "*Pitchess* motion" or "*Pitchess* proceeding." (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 81-84; Evid. Code, §§ 1043, 1045; *Pitchess v. Superior Court*, *supra*, 11 Cal.3d 531.) The first step is a foundational one, requiring the defendant to show that good cause exists to believe that the files may contain relevant and discoverable information and hence justify the limited intrusion into the officer's privacy interest that is entailed in the second step. (Evid. Code, § 1043; *People v. Mooc, supra*, at p. 1226; *City of Santa Cruz*, *supra*, at pp. 81-84.) Once the trial court determines that limited intrusion is justified, the second step requires the custodian of the officer's records to produce and lodge them under seal with the court for the court to review in-camera and determine whether they contain relevant and discoverable information under state law and/or the defendant's constitutional rights under *Brady v. Maryland* (1963) 373 U.S. 83, and its progeny. (Evid. Code, § 1045; *People v. Mooc*, *supra*, at pp. 1226-1229; *City of Santa Cruz*, *supra*, at pp. 83-84.) The documents the court reviews in-camera and deems not

discoverable, as well as any in-camera oral proceedings entailed in the court's review and ruling, remain sealed and confidential. (See, e.g., *People v. Mooc*, *supra*, at pp. 1227-1230.) Hence, unlike other trial proceedings, neither the defendant nor his counsel has access to the evidentiary basis for a trial court's second-step *Pitchess* ruling. (See, e.g., *People v. Prince* (2007) 40 Cal.4th 1179, 1284-1285.)

b. State Law Entitles Defendants to Appellate Review of Second-step *Pitchess* Rulings as Part of Their First Appeal as of Right, Which Is Protected by the Due Process Clause of the Fourteenth Amendment And, in Capital Cases, the Eighth Amendment

As previously discussed, if the defendant is ultimately convicted, California provides for an appeal from the judgment which must comport with the Due Process Clause of the Fourteenth Amendment; when the defendant is sentenced to death, the appeal is automatic and must additionally comport with the Eighth Amendment's heightened demand for reliability in the verdicts. As part of the first appeal as of right, defendants have a well-settled right to appellate review of trial courts' second-step rulings on their *Pitchess* motions. (See, e.g., *People v. Mooc*, *supra*, 26 Cal.4th at pp. 1228-1230, and authorities cited therein.) Hence, the appellate process that is due under state law and protected by the federal constitution includes the right to meaningful appellate review of second-step *Pitchess* rulings.

c. The Required Record of Second-Step *Pitchess* Proceedings

In order to facilitate appellate review, there must be a record of the documents the custodians lodged and the trial court reviewed in-camera in ruling on the second step of the *Pitchess* motion. (See *People v. Mooc*,

supra, 26 Cal.4th at pp. 1228-1230.) In capital cases, the documents themselves – as well as any record of the oral proceedings held in-camera – have long been a required part of the entire record on appeal. (See §§ 190.7 (eff. Jan. 1, 1997), 190.9; , rule 8.610; see also Former § 190.6 (en. 1977); Former rule 39.5, subd. (c)(3) (eff. 1983); Former rule 39.51 (eff. March 1, 1997).)

Indeed, in capital and non-capital cases alike, this Court has recognized that state law requires that the trial court take necessary steps to ensure the availability of the reviewed documents for inclusion in the appellate record. (*People v. Mooc*, *supra*, 26 Cal.4th at pp. 1228-1231.) In *Mooc*, a non-capital case, the Court held that the trial court must either: (1) "retain[] copies of the documents it examined before ruling on the *Pitchess* motion"; or (2) if the documents are "voluminous," make a "log" or other record describing "the documents it reviewed in-camera" with sufficient specificity to allow them to be identified and ultimately included in the appellate record following conviction. (*Mooc*, *supra*, at pp. 1228-1231; see also *People v. Galland*, *supra*, 45 Cal.4th at pp. 367-369.)[4]

If the trial court erroneously fails to make the required record, the error may be remedied on remand to the trial court if it can identify the documents and reconstruct the record with actual copies thereof or, failing that, if it can obtain a reliable substitute of what information was before the trial court and withheld from the defendant, sufficient to permit meaningful appellate review of the trial court's ruling. (*People v. Mooc*, *supra*, at pp. 1228, 1231-1232; accord, *People v. Galland*, *supra*, at pp. 368-372

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[4] In capital cases, the documents are automatically part of the entire record on appeal pursuant to the long-standing law cited in the above text. (See 1SAOB 8-9, 18.)

[although trial court erred in failing to retain sealed portion of search warrant affidavit it reviewed in-camera and custodian thereafter purged the original, copy of unsigned but otherwise "identical" document was an adequate substitute to permit meaningful appellate review]; *People v. Barnard* (1982) 138 Cal.App.3d 300, 407-409 [in order to guarantee due process and meaningful appellate review of trial court's denial of discovery from DEA file after reviewing it in-camera and ruling that it contained privileged and confidential information not discoverable, appellate court "must have the file before us"; although omission was erroneous, file was reconstructed and thus adequate to permit appellate review]; *People v. Wycoff* (2008) 164 Cal.App.4th 410, 414-416 [record insufficient to conduct appellate review of second-step *Pitchess* ruling where, inter alia, documents reviewed in-camera were omitted and court failed to make adequate record for appellate court to reconstruct through augmentation; remanding for superior court to attempt reconstruction].)

d. The Continued Confidentiality of the Record and the Resulting Procedure to Which Defendants Are Entitled to Obtain Appellate Review of a Second-step *Pitchess* Ruling

Importantly, however, the confidentiality of the record of a second-step *Pitchess* proceeding continues through the appeal. (See, e.g., *People v. Prince*, *supra*, 40 Cal.4th at pp. 1284-1285, and authorities cited therein.) Hence, although the defendant is entitled to the record of confidential *Pitchess* proceedings on appeal, neither he, his trial counsel, nor his appellate counsel is entitled to *access* to that record. (*Ibid.*) Given the continuing confidentiality of that record from trial through appeal, state law makes it impossible for the defendant to affirmatively allege, in accord with the normal rules of appellate procedure, that the trial court's ruling was

erroneous. (See, e.g., *People v. Stanley*, *supra*, 10 Cal.4th at p. 793; *People v. Pinholster*, *supra*, 1 Cal.4th at pp. 922-923.) Certainly, the defendant cannot exercise his right to the assistance of counsel in raising and properly presenting a specific claim of error in the proceedings when his counsel is denied access to the record necessary to do so. (See *Evitts v. Lucey*, *supra*, at pp. 393-394, 403; *Griffin v. Illinois*, *supra*, 315 U.S. at p. 20.) In light of these realities, California has long recognized and applied an exception to the general rules of appellate procedure when, on his first appeal as of right, the defendant seeks review of a trial court's second-step *Pitchess* ruling.

Upon the defendant's request, he is entitled to the appellate court's independent review of the confidential record of second-step *Pitchess* proceedings for error. If the reviewing court finds that the trial court erroneously withheld discoverable information, it must disclose that information to appellate counsel and permit him or her to argue the impact of that error on the verdicts. (See, e.g., *People v. Mooc*, *supra*, 26 Cal.4th at pp. 1228-1230, and authorities cited therein.) This procedure comports with the due process requirements that apply to first appeals as of right. (See *People v. Kelly* (2006) 40 Cal.4th 106, 116-120 [if appointed counsel is unable to provide assistance on appeal by identifying and raising a claim of error for review, appellant is constitutionally entitled to appellate court's independent review of record for arguable error]; *Anders v. California* (1967) 386 U.S. 738, 744; *Penson v. Ohio* (1988) 488 U.S. 75, 82-83 & fn. 6; *People v. Wende*, *supra*, 25 Cal.3d at pp. 440-443.)

In short, although California's appeal right ordinarily only entitles defendants to appellate review of specific and properly raised claims of *error*, it does entitle defendants, upon request, to the appellate court's independent examination of the confidential record of a second-step

Pitchess proceeding for error. A fortiori, when that confidential record is irretrievably missing and no adequate substitute can be obtained, the defendant has been deprived of his state law right to appellate review of the trial court's ruling and, consequently, his federal constitutional rights to meaningful review.

This Court has recognized as much. Without an adequate confidential record of the documents the trial court reviewed in-camera and the information they contained, the "defendant [is] unable to obtain *meaningful appellate review* of the court's decision not to disclose [] evidence in response to his *Pitchess* motion." (*People v. Mooc*, *supra*, 26 Cal.4th at p. 1228, italics added; cf. *People v. Wende*, *supra*, 25 Cal.3d at pp. 440-443 [under special California appellate procedure requiring appellate court's independent examination of record to identify arguable errors, appellate court's failure to review the "entire record" deprived defendant of the appeal to which he was entitled under the state and federal constitutions]; *United States v. Clark* (11th Cir. 1991) 944 F.2d 803, 804 (per curium) [where trial record was incomplete, appellate court could not conduct the required independent review of the record required by the federal constitution under *Anders, supra*]; *Entsminger v. Iowa*, *supra*, 386 U.S. at pp. 749-752 [where state law entitled defendant to appellate court's plenary review based on complete record on request but appellate court decided appeal based solely on clerk's transcript and not reporter's transcript, omission of reporter's transcript deprived defendant of appeal to which he was entitled in violation of federal constitution without further showing of error].) This is just such a case.

C. The Superior Court's Erroneous Omission of the Confidential Record of Its *Pitchess* Ruling Has Deprived Mr. Townsel of his Right to Appellate Review Thereof Under State Law and the Eighth and Fourteenth Amendments of the Federal Constitution

1. The Superior Court Erred In Failing to Make the Required Record of the Confidential Second-Step *Pitchess* Proceedings and Leaving an Inadequate Record for this Court to Conduct Meaningful Appellate Review of Its *Pitchess* Ruling

It is undisputed that the trial court in this case erred in failing to make the required record of its second-step *Pitchess* review and that the contemporaneous record it did make was otherwise inadequate to permit appellate review of the court's ruling. Mr. Townsel was entitled to copies of the actual documents lodged in, and reviewed by, the trial court as part of the entire record in this capital case pursuant to the long-standing law cited in the previous section. And indeed, in December 1997, Judge Martin explicitly ordered their inclusion as part of the confidential appellate record. (7 CT 1655; 1 RC-CT 86, 88.) The parties agree that court officials erred in simply disregarding that order and omitting those documents from the appellate record. (1SARB 1; 1SAOB 1-38; 1SRB 1-14.)

Moreover, as set forth in Part A-3, *ante*, respondent itself has forcefully argued that Judge Martin's contemporaneous description of the files lodged and reviewed was an insufficient record of "what specific records" he reviewed, which is why remand to remedy that error was necessary in the first place. (1SRB 12; see *People v. Mooc*, *supra*, 26 Cal.4th at p. 1231.) A fortiori, the existing, pre-remand record is certainly inadequate for this Court to conduct appellate review of Judge Martin's ruling. (1SRB 12-13.)

In ordering remand, this Court necessarily recognized the inadequacy

of the existing record to permit meaningful appellate review of the ruling. Otherwise, remand would have been unnecessary. (Code of Civ. Proc., § 3532 "The law neither does nor requires idle acts"]; see, e.g., *People v. Mooc*, *supra*, 26 Cal.4th at p. 1232 [remand unnecessary where record before Supreme Court was otherwise sufficient to show that trial court's erroneous failure to make required record of second-step *Pitchess* ruling was harmless].)

2. The Evidence Adduced on Remand Established that the Error Resulted in the Irretrievable Loss or Destruction of the Confidential Documents And Hence that the Record Is Incapable of Reconstruction

In response to this Court's remand order, and as discussed in the procedural history in Part A-4, *ante*, Madera County Superior Court Judge Mitchell Rigby ordered the custodians of the original files, as contemporaneously described by Judge Martin, to produce them. (4/16/14 SCT 14-16.) In response, Madera County Counsel Doug Nelson produced the declarations of the custodians of records for the Madera County Departments of Corrections and Human Resources – Sergeant Chris Rodriguez and Deputy County Administrative Officer Adrienne Calip, respectively. (4/16/14 SCT 27-31; 4/16/14 SRT 53-57.)

According to Sergeant Rodriguez's declaration, he caused a search for Officer Reiland's "personnel file and report file (a file of reports prepared by Officer Frank Reilland [sic]) as those files would have existed as of April 1996 [sic]." (4/16/14 SCT 27.) His agency was unable to locate "any files that pertained to" Officer Reiland because:

> [a]ll files maintained by the Madera County Department of Corrections pertaining to former employees are routinely destroyed according to Madera County Guidelines (Madera

> County Code Chapter 2.57 CIVIL SERVICE RULES Policy 2-12(c)(1) which provides as follows: (c) Records, papers and documents on file in the personnel department may be destroyed after 2 years subject to the following conditions: [¶] (1) no record other than examination papers relating to any person employed by the county shall be destroyed until 10 years following his last employment.

(4/16/14 SCT 27-28.)

Sergeant Rodriguez attested on information and belief that Officer Reiland's last day of county employment was in November of 1992 and hence his files were routinely destroyed pursuant to county policy in November 2002. (4/16/14 SCT 28; see also 4/16/14 SRT 53-57.) Although Rule 2-12, the routine destruction policy to which Sergeant Rodriguez referred, requires that "a record shall be maintained of all items destroyed except routine correspondence" (subd. (c)(3)), Sergeant Rodriguez made no mention of that requirement or indicate whether the required record of the destroyed materials had been made.[5]

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[5] Madera County Code, Chapter 2.57 (Civil Service Rules), Rule 2-12, provides in relevant part:

> 2-12 OFFICE RECORDS.
> . . . . (c) Records, papers, and documents on file in the personnel department may be destroyed after two years subject to the following conditions:
> (1) no record other than examination papers relating to any person employed by the county shall be destroyed until ten years following his last employment,
> (2) no examination record shall be destroyed until two years following the expiration of the eligible list created by that examination,
> (3) a record shall be maintained of all items destroyed except routine correspondence,

(continued...)

Ms. Calip also declared that the Madera County Human Resources Department conducted a thorough search for Officer Reiland's personnel file but was "unable to locate any files that pertained to Officer Reilland [sic]." (4/16/14 SCT 29.) Ms. Calip attested on information and belief that his files had been "destroyed." (4/16/14 SCT 30.) While she further attested on information and belief that "[m]any of the files maintained by the Human Resources Department prior to 1998 were destroyed in [a] fire," she did not attest to either any personal knowledge or any information and belief that Officer Reiland's files in particular had been destroyed by fire. (4/16/14 SCT 30.) Unlike Sergeant Rodriguez, Ms. Calip made no mention of the routine record destruction policy under Madera County Code, Chapter 2.57, Rule 2-12. The superior court granted appellate counsel's request to call Sergeant Rodriguez and Ms. Calip to testify and attempt to clarify the contents of their declarations. (4/16/14 SRT 62-68.)

Sergeant Rodriguez testified that the DOC maintains three of the four files Judge Martin contemporaneously identified as having been lodged and reviewed in ruling on Mr. Townsel's *Pitchess* motion: (1) a custodial officer's "personnel file"; (2) a "report file" of reports written by the officer; and (3) a "pre-employment background file" (4/16/14 SRT 94-96; 15 RT 3519-3520.) He also testified generally to the contents of such files (at least pursuant to policies enacted in 2001). (4/16/14 SRT 96-101, 103-107.) Consistent with his declaration, Sergeant Rodriguez testified that his agency had attempted to locate Officer Reiland's files but was unable to do

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[5](...continued)

4) no record of any type shall be destroyed without prior approval of the commission and the board of supervisors.

so because he believed that they were routinely destroyed in November 2002. (4/16/14 RT 102-103.) While that routine destruction policy does require that a log of destroyed files be made and maintained (see Madera County Code, Ch. 2.57, Rule 2-12, subd. (c)(3)) and his agency does follow that policy, no log or other record of Officer Reiland's purged files could be located, either. (4/16/14 SRT 103.)

Ms. Calip testified that of the four files Judge Martin had contemporaneously identified on the record, the Human Services Department maintained only one: the "personnel file maintained at County Personnel Offices." (4/16/14 SRT 85-86; 15 RT 3519-3520.) Like Sergeant Rodriguez, she provided a general description of the kinds of records that a personnel file contains. (4/16/14 SRT 86-89.) For purposes of *Pitchess* discovery, the personnel files her office maintains are duplicated in the more extensive files maintained by the DOC, as described by Sergeant Rodriguez. (4/16/14 SRT 86-89; compare 4/16/14 SRT 96-101, 103-107.) Consistent with her declaration, Ms. Calip testified that she could not locate Officer Reiland's personnel file in her agency's records. (4/16/14 SRT 90-91.) Ms. Calip had no knowledge or specific information or belief about why it was lost or destroyed. (4/16/14 SRT 90.) Her declaration about a court house fire was no more than speculation, one possible explanation among others that "could have" resulted in its destruction . (*Ibid.*)

Based on the foregoing evidence, the superior court concluded that the missing record was incapable of reconstruction because its contents had been irretrievably lost or destroyed. (4/16/14 SRT 181-182, 184; 4/16/14 SRT 75-76, 84-85.) While the superior court declined to resolve how the files maintained by the Human Resources Department had been destroyed,

observing only that none of the files could be produced to reconstruct the record, "having been lost or destroyed, including possibly destruction by fire, depending on which specific record is referenced," that question ultimately became irrelevant. (4/16/14 SRT 181-182.) Because the records maintained by the Human Resources Department were duplicated in the DOC's files, the evidence did establish that the contents of the lodged and reviewed files were available at the time of the trial court's December 1997 order and for five years thereafter, until the DOC destroyed them in November 2002.

As set forth in the original briefing, the court clerk's inability to locate the missing record upon this Court's 2013 request is susceptible of various explanations, including that the trial court simply never made a contemporaneous copy of the lodged and reviewed documents or that it did but the documents were later lost or destroyed from the court's own records. (See 1SAOB 15-18.) And as discussed below, Judge Martin had no notes or memory of the *Pitchess* motion at all and no recollection of what kind of record it contemporaneously made of its ruling. (4/16/14 SRT 170, 172.)

Nevertheless, as respondent puts it, it is unnecessary to resolve why or when the documents were missing from the court's files because "respondent . . . agrees with Mr. Townsel'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" as the trial court explicitly ordered in December 1997. (1SRB 12.) The evidence adduced on remand establishes that "it was possible to accomplish" at the time of the court's December 1997 order and for five years thereafter. As Mr. Townsel argued in his first supplemental opening brief and respondent tacitly conceded, even if the documents were missing from the court's files at the time of the

court's December 1997 order, the clerk nevertheless could and should have effectuated the order by obtaining the originals from their custodians. (1SAOB 18; 1SRB 12.) Indeed, the clerks' declarations submitted to this Court recognize the availability of that procedure. (2013 Declaration of Erin McKinney ["if 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"]; accord, 2013 Declaration of Doina McFarland; compare, *People v. Galland*, *supra*, 45 Cal.4th at pp. 362-363 [upon appellate court's order to superior court to augment the record with sealed document from court's files, court clerk responded with affidavit that document was not only missing from court's files but also could not be located or obtained from agency that originally produced it].) At the very least, the clerk was required to notify the court and the parties if the documents could not be located in the court's files and seek direction from the court, who presumably would have ordered the custodians to reproduce them. (1SAOB 18; 1SRB 12.) By doing nothing and simply disregarding the order, the parties agree that court officials – and thus the court itself – erred. (1SAOB 18; 1SRB 12; 1SARB 1.) And the evidence on remand establishes that the error directly resulted in the irretrievable loss or destruction of the confidential record to which Mr. Townsel was entitled.[6]

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[6] The eventual and irretrievable destruction of the record in November of 2002 also could have been avoided by Judge Martin. As set forth in the original supplemental briefing, Judge Martin erroneously refused appellate counsel's December 1997 requests to review the sealed record of the *Pitchess* materials from the court's own files and order to custodians to reproduce the original files for the court to review again and make a record of what "report" it did order disclosed from the files. (See 1SAOB 14-15, 28-29.) Absent that error, Judge Martin would have noticed

(continued...)

3. The Evidence Adduced on Remand Established That An Adequate Substitute for the Missing Record Cannot be Obtained Despite Reasonable Efforts to Do So

The evidence presented on remand likewise established that an adequate substitute for the missing record could not be obtained despite reasonable efforts to do so. (See *People v. Galland*, *supra*, 45 Cal.4th at pp. 370-372; *Griffin v. Illinois*, *supra*, 351 U.S. at p. 20.) Under California procedure, "a settled statement may provide an adequate substitute." (*People v. Holloway* (1990) 50 Cal.3d 1098, 1116, disapproved on another ground in *People v. Sainsbury* (1995) 9 Cal.4th 824, 830, fn. 1; see also *Marks v. Superior Court*, *supra*, 27 Cal.4th at pp. 194-197 [generally describing settlement process]; *People v. Mooc*, *supra*, 26 Cal.4th at pp. 1221, 1232 [missing *Pitchess* materials proper subject of record settlement]; *People v. Galland*, *supra*, 45 Cal.4th at pp. 370-372 [missing search warrant affidavits reviewed in-camera].)

In this regard, although this Court's remand order did not explicitly direct settlement proceedings in the event that the missing record could not be reconstructed, the superior court interpreted the remand order broadly to encompass such proceedings (4/16/14 SRT 109-114) – settlement proceedings respondent urged both before the superior court and before this Court (4/16/14 SRT 111-114, 142; SRB I at pp. 8-12). To that end, the superior court took evidence from the only people privy to the contents of the lost confidential record – County Counsel Doug Nelson, who produced

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[6](...continued)
if the *Pitchess* materials were missing from the court's files and presumably reconstructed that record with the still-available materials in the custody of the Department of Corrections so as to effectuate its own order.

and lodged Officer Reiland's personnel files with the trial judge and Judge Martin, who reviewed them – that they could not recall the materials at all, much less with sufficient specificity to recreate a substitute for them. (4/16/14 SRT 109, 114, 140-146, 150-151, 158-172, 194-198; 4/16/14 SCT 75-76, 84-86, 98-107, 120-121; see, e.g., *Marks v. Superior Court, supra*, 27 Cal.4th at pp. 196-197 [in attempting to settle contents of missing record, court must consult "'trial judge's own memory and those of the other participants'"]; *People v. Cervantes* (2007) 150 Cal.App.4th 1117, 1121-1123.) Indeed, Judge Martin stated that he did not remember the motion itself. (4/16/14 SRT 140.)

Judge Martin did have a significant amount of personal notes from the trial in the court file. (4/16/14 SRT 76-77, 114, 122, 138, 140, 169-170; see, e.g., *In re Steven B.*, *supra*, 25 Cal.3d at p. 9 [presence or absence of detailed notes of proceedings for which the record has been lost or destroyed is an important factor to consider in determining whether an adequate substitute can be obtained through settlement]; *People v. Cervantes*, *supra*, 150 Cal.App.4th at p. 1 [same].) Therefore, the superior court conducted an in-camera hearing with Judge Martin and Mr. Nelson to review those notes, as well as the relevant existing record relating to Mr. Townsel's *Pitchess* motion, and determine if they refreshed his recollection of the documents he reviewed. (4/16/14 140-142, 157, 169-170.)[7]

After the in-camera proceeding, Judge Martin stated in open court that he "found no notes specifically with respect to the *Pitchess* motion."

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[7] The hearing was held in-camera over appellate counsel's objection. (4/16/14 SRT 114-131, 141-151, 157, 169.) The reporter's transcript thereof, as well as Judge Martin's notes, are included in the sealed confidential record. (See 4/16/14 SRT 157, 169-170.)

(4/16/14 SRT 172; see, e.g., *People v. Bradford, supra*, 154 Cal.App.4th at pp. 1418-1420 [absence of notes of unreported proceedings one factor that precluded ability to obtain adequate substitute through settlement]; accord, *In re Steven B., supra*, 25 Cal.3d at p. 9.) His review of his notes and the existing record "did not help my memory at all as far as specific documents. It did not refresh my recollection in any way. It's too old." (4/16/14 SRT 170.) Furthermore, he did not know and could not recall whether a court reporter was present to record the confidential proceedings in which he reviewed the files. (4/16/14 SCT 172.) At respondent's request, the court reporter searched his records but found no indication that the trial court held any oral proceedings in-camera relating to the *Pitchess* motion (4/16/14 SRT 180-181; 4/16/14 SCT 85-89), just as the original record gave no such indication (see 1SARB 4, fn. 3).

Mr. Nelson was present throughout all of the proceedings on remand – including the in-camera hearing with Judge Martin – had attempted to reconstruct the files by obtaining them from their custodians, and had reviewed all of the pleadings and documentary evidence submitted on remand, as well as the existing record relating to the *Pitchess* motion. Nevertheless, like Judge Martin, Mr. Nelson swore that he had no memory of the files he produced in April 1991 and had been unable to refresh his recollection. (4/16/14 SCT 120-121; 4/16/14 SRT 196-198.)

Furthermore, as previously discussed, Sergeant Rodriguez testified that, contrary to the routine county policy under which Officer Reiland's files had been destroyed, his agency had not maintained any log or record of the destroyed files. (4/16/14 SRT 103; 4/16/14 SCT 27-28; Madera County Code, Ch. 2.57, Rule 2-12, subd. (c)(3).) Therefore, no substitute for the files could reasonably be obtained from the custodian, either.

As to the identity of the one "report written" by Officer Reiland that Judge Martin did disclose to the parties from the reviewed materials (15 RT 3519), the superior court also received oral and documentary evidence from the trial prosecutor and defense attorneys to whom that report was disclosed. (4/16/14 SCT 55-63.) Consistent with the representations of respondent's counsel during the original record completion and settlement proceedings before the trial judge – as detailed in the original supplemental briefing filed in this Court (1SAOB 24-38; 1SRB 8-9) – respondent presented the sworn affidavit of the trial prosecutor (and current superior court judge), Ernest Licalsi, that the disclosed report was the June 28, 1990 "incident report" Officer Reiland wrote alleging the battery by Mr. Townsel to which he testified at the penalty phase. (4/15/14 SCT 62-61 see also 15 RT 3547-3553.) Mr. Townsel offered to stipulate to the accuracy of respondent's evidence in this regard, but the deputy attorney general representing respondent on appeal and in the proceedings on remand declined that stipulation, preferring instead to present all available evidence to the court consistent with traditional settlement procedures. (4/16/14 SRT 111-113.) Hence, in addition to Mr. Licalsi's affidavit, respondent presented the sworn affidavit of trial defense counsel Linda Thompson that her best recollection was that the incident report was "probably" the report Judge Martin disclosed. (4/16/14 SCT 62.) Finally, trial defense counsel Roger Litman testified that although he did not have an independent recollection, after reviewing the public transcript and the incident report, "it seems pretty obvious to me that the document that the judge was talking about was the Reiland incident report." (4/16/14 SRT 154-157.)

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4. The Irretrievable Loss or Destruction of the Confidential Record of the Trial Court's Second-Step *Pitchess* Ruling Has Deprived Mr. Townsel of his Right to Appellate Review of that Ruling and, Consequently, his Eighth and Fourteenth Amendment Rights

Based on the foregoing evidence, Judge Rigby did find that the contents of the missing record had been irretrievably lost or destroyed. (4/16/14 SRT 181-182, 184; 4/16/14 SCT 75-76, 84-85.) Hence, the missing confidential record is incapable of reconstruction.

In addition, all relevant and available evidence having been presented on the question of whether an adequate substitute for the record could be obtained through settlement, Mr. Townsel moved the superior court to make factual findings pursuant to this Court's directive in *Marks v. Superior Court*, *supra,* by: (a) finding that no adequate substitute for the confidential record could be obtained through settlement despite reasonable efforts to do so based on the undisputed and unconflicting evidence demonstrating as much; and (b) resolving any conflicts in the evidence regarding the identity of the disclosed report. (4/16/14 SRT 177-178, 182-184.)

Judge Rigby denied the request, though not on the ground that such findings were unsupported by the evidence. Instead, he ruled that in the absence of an explicit directive from this Court to make factual findings, he would not make any. (4/16/14 SRT 185.) Instead, he would simply present all of the evidence gathered to this Court for it to make any factual findings it deemed appropriate. (4/16/14 SRT 184-185, 194-198; 4/16/14 SCT 75-76, 84-86, 120-121.)

Of course, this was error. Once Judge Rigby embarked on settlement

proceedings despite the absence of any explicit directive from this Court to hold them, then he was required to follow the law that applies to such proceedings despite the absence of any explicit directive to do so in this case. In this regard, this Court has unequivocally held that a court presiding over settlement proceedings is obligated to make factual findings – whether to resolve conflicts in the evidence to settle a record or to find that the record is incapable of settlement. (*Marks v. Superior Court*, *supra*, 27 Cal.4th at pp. 196-197.) Nevertheless, the ruling was harmless.

The evidence on remand, as detailed above, unquestionably established that the confidential record was incapable of settlement. Respondent never disputed as much below. Furthermore, as to the disclosed report, Mr. Townsel agrees that respondent's evidence – presented during the original postjudgment record correction and completion proceedings and corroborated by the evidence respondent presented on remand – was sufficient to establish its identity as the June 28, 1990 incident report that formed the basis of Officer Reiland's penalty phase testimony. Of course, as a written statement of a testifying witness, the incident report was automatically discoverable under section 1054.1, subdivision (f) and not protected by the confidentiality provisions that apply to peace officers' personnel files at all. Therefore, it is clear that the trial court's second-step *Pitchess* ruling amounted to a complete denial of *Pitchess* discovery.

However, because the confidential record that formed the basis of the trial court's second-step *Pitchess* ruling was erroneously omitted, its contents irretrievably lost or destroyed and incapable of reconstruction or substitution, Mr. Townsel has been deprived of his long standing and well-settled state law right to appellate review of that ruling pursuant to the

authorities set forth in Part B, *ante*. Consequently, Mr. Townsel has also been deprived of his rights to meaningful appellate review of that penalty phase ruling under the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment. (Part B, *ante*).

D. Respondent Cannot Prove the Violation of Mr. Townsel's Federal Constitutional Rights to Meaningful Appellate Review of the Trial Court's Second-Step *Pitchess* Ruling Harmless Beyond a Reasonable Doubt

Violations of the federal constitution are presumptively prejudicial and require reversal unless the beneficiary can prove them harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; see also AOB 228-229.) Given the heightened demand for reliable death judgments, the state bears the same burden under the state law test that apples to errors affecting the penalty phase of a capital trial. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 961 [harmless error analysis applicable to violations of state law that affect the penalty phase is the "same in substance and effect" as *Chapman* standard]; *People v. Ashmus* (1991) 54 Cal.3d 932, 990; see also AOB 228-229.)

Applying that standard here, respondent's burden of proving that the deprivation of Mr. Townsel's right to appellate review of Judge Martin's penalty phase *Pitchess* ruling is harmless beyond a reasonable doubt entails a two-part inquiry. First, respondent must prove beyond a reasonable doubt that appellate review of the confidential record would have revealed that it did not contain discoverable information that would have led to the impeachment of Officer Reiland and hence would have resulted in affirming the trial court's order denying *Pitchess* discovery. Of course, without the confidential record, respondent cannot satisfy its burden. Therefore, it must be presumed that appellate review of the confidential

record would have revealed the existence of such evidence and a finding that the trial court's ruling was erroneous. This conclusion is consistent with other decisions holding that the deprivation of the right to appellate review of a particular claim, which in itself incorporates a prejudice component, is necessarily prejudicial. (See, e.g., *People v. Bradford, supra*, 154 Cal.App.4th at pp. 1417-1421 [deprivation of record of trial judge's ex-parte communications with jurors]; *People v. Apalatequi, supra*, 82 Cal.App.3d at pp. 971-974 [irretrievable loss of reporter's notes of closing arguments and no substitute available to review claim of prosecutorial misconduct]; *In re Steven B., supra*, 25 Cal.3d at pp. 7-9 [deprivation of record adequate to conduct appellate review of appellant's challenge to insufficiency of the evidence to sustain verdict].) It is equally consistent with this Court's treatment of similar due process violations. (See *People v. Zamora* (1980) 28 Cal.3d 88, 98-104 [where custodians negligently destroyed peace officers' personnel files and thus deprived defendant of opportunity to avail himself of *Pitchess* discovery procedure in violation of due process, appropriate remedy was to presume that destroyed files contained the sought-after impeachment information]; cf. *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684 [applying *Chapman* standard to unconstitutional limitation on cross-examination to impeach witness, reviewing court must "assum[e] that the damaging potential of the cross-examination were fully realized"].)

Nevertheless, if respondent could prove that even if appellate review of the trial court's *Pitchess* ruling did reveal the existence of discoverable information that would have led to the impeachment evidence Mr. Townsel sought, such evidence would not have affected the jurors' verdict based on the record as a whole, it would seem that this Court could find the violation

harmless beyond a reasonable doubt to the outcome of this appeal. Again, this Court has endorsed this analysis for similar due process violations. (*People v. Zamora, supra*, 28 Cal.3d at pp. 103-104 & fn. 11 [after holding that custodians' destruction of peace officer's files violated due process and therefore required trial court to instruct jury to presume that files contained sought-after impeachment information, Court analyzed prejudice from omission of instruction based on record as a whole under *Chapman*]; cf. *Delaware v. Van Arsdall, supra*, 475 U.S. at p. 684 [applying *Chapman* standard to unconstitutional limitation on cross-examination to impeach witness, "the correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt"].) However, respondent cannot satisfy that burden here.

As a preliminary matter, Mr. Townsel incorporates by this reference his discussions of the weight of the evidence of his mental retardation and other mitigating evidence, the room for lingering doubt that he premeditated and deliberated the killings or harbored the essential mental state elements of the special circumstances, and the closeness of the prosecution's case for death. (See AOB 228-243, 254-256; ARB 314-316; see also AOB 223-228; ARB 155-185.) As set forth therein, given the closeness of the penalty phase case, this Court cannot be confident beyond a reasonable doubt that any error tending to strengthen the prosecution's case for death or weaken Mr. Townsel's case for life did not contribute to the unanimous death verdict. This is certainly true of Officer Reiland's unimpeached testimony.

According to Officer Reiland, he worked as a custodial officer at the jail where Mr. Townsel was in custody awaiting trial in this case. (15 RT 3547-3548.) On the morning of June 28, 1990, Mr. Townsel was in his

locked cell and apparently agitated, since Officer Reiland testified that he opened Mr. Townsel's cell door to "try to calm [him] down[.]" (15 RT 3550; *id.* 3548.)[8] Mr. Townsel's cell was one of eight contained in a secured module or "day room" in which three other officers were present at that time. (15 RT 3550-3551.) When Reiland entered the cell, Mr. Townsel either attempted to "walk[]" (15 RT 3550) or "push[]" (15 RT 3549) past him, out of the cell and into the secure day room (15 RT 3550-3551). Reiland "pushed him back." (15 RT 3549-3550.) In response, Mr. Townsel yelled obscenities at Reiland, kicked his knee, and tried to punch him, grazing his temple. (15 RT 3549.)

The logical and inevitable inference from this unimpeached testimony was that Mr. Townsel posed a demonstrable danger of great bodily injury or even death to custodial officers or other prison officials if the jurors voted for life imprisonment over death; a death sentence was the only way to protect those future victims. (See, e.g., *Kelly v. South Carolina* (2002) 534 U.S. 246, 253-254 [jury hearing evidence of defendant's possession of shank in custody and escape attempts inevitably will infer that he presents a threat of future danger, "whether locked up or free,"

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[8] Reiland's testimony that he opened the door to "try to calm [Mr. Townsel] down" clearly indicated that he was agitated, although Reiland never expressly testified as much. (See 15 RT 3546-3553.) According to the prosecutor's offer of proof prior to the *Pitchess* motion, Mr. Townsel was "banging" and "hollering" when Reiland opened his cell door and entered. (15 RT 3504-3505.) The trial court granted defense counsel's motion to exclude that evidence unless the defense opened the door by suggesting that Reiland entered his cell for an improper purpose, outside of the scope of his duties. (15 RT 3505-3506.) Mr. Townsel's subsequent *Pitchess* motion for discovery to support such a theory having been denied, defense counsel did not pursue it at trial.

notwithstanding whether prosecutor explicitly argues the point]; *People v. Milwee* (1998) 18 Cal.4th 96, 153 [evidence of other violent crimes admitted under a statutory aggravating factor can give rise to logical inference of "future dangerousness as a life prisoner"].) Hence, the inference of future dangerousness "works as a powerful advocate on the side of death." (Garvey, *As The Gentle Rain From Heaven: Mercy in Capital Sentencing* (1996) 89 Cornell L.Rev. 989, 1030-1031 & fn. 166 [citing results of studies showing that concern over future dangerousness figures most prominently in jurors' penalty phase deliberation]; Danalynn Recer et. al., *Representing Foreign National Capital Defendants* (2012) 42 U.Mem.L.Rev. 965, 1020 (2012) [same, citing data from Capital Jury Project]; cf. *People v. Murtishaw* (1981) 29 Cal.3d 733, 773, superceded by statute on another point as stated in *People v. Boyd* (1985) 38 Cal.3d 762, 772-773 [expert testimony regarding future dangerousness will "implant in the mind of each juror the message that the death penalty, promptly carried into effect, is the only way to protect society and the only way to forestall another instance in which defendant responds to frustration with deadly violence"].) Indeed, in *Skipper v. South Carolina*, the United States Supreme Court held that the spectre of future dangerousness in prison weighs so heavily on death's side of the scale that the exclusion of evidence to rebut it – even though it was cumulative of other but less credible rebuttal evidence – was prejudicial "under any standard" and demanded reversal of the resulting death judgment. (*Skipper v. South Carolina* (1986) 476 U.S. 1, 3-9 & fn. 1.)

Reiland's testimony was significant in another respect. As set forth in the original briefing, correctional officer Rebecca Davis testified that she was assigned to Mr. Townsel's jail unit when a similar incident occurred.

(15 RT 3542.) On May 31, 1990, Mr. Townsel was sitting on a plastic chair just outside the open door to his cell (which, according to Reiland's description of the unit, would be in the secured day room). (15 RT 3542-3544.) Although Mr. Townsel was not violating any rules, Davis ordered him to "lock down," meaning go into his cell and shut the door. (15 RT 3543, 3545.) When he did not respond and Davis ordered him to lock down a third time, Mr. Townsel stood up and threw his lightweight plastic chair at her from a distance of about two to three feet. (15 RT 3543-3545.) Davis avoided being struck by stepping aside then pushing Mr. Townsel into his cell and closing the door. (15 RT 3544-3545.)

However, Davis was impeached with testimony from her supervisor that he had investigated her complaint and determined that Mr. Townsel had not – contrary to Davis's trial testimony and complaint – thrown the chair at her. (16 RT 3619-3621, 3623.) Indeed, Davis admitted as much when her supervisor interviewed her. (16 RT 3621, 3623.) Instead, Mr. Townsel had simply slammed the chair down on the floor and it bounced back up. (15 RT 3621.) While Mr. Townsel was disciplined for slamming the chair on the floor, he was not disciplined or charged with assault because he had not intended or attempted to hit Davis. (16 RT 3621.)

Nevertheless, the prosecutor relied on the "assault upon Sergeant Davis" as another crime involving force or violence in aggravation under factor (b). (16 RT 3690; 4 CT 908, 910-911.) However, he struggled over the effect of the evidence impeaching her testimony. On the one hand, in both his opening and rebuttal arguments, the prosecutor argued that Davis's supervisor was "mistaken in his recollection of what happened" (16 RT 3690), but on the other seemingly recognized the room for doubt over the truth of her testimony that appellant had committed an assault by arguing

"[e]ven if you found this to be true beyond a reasonable doubt, it's the People's position this assault . . . should not be given as much weight as the other [more violent] criminal acts which we presented" (16 RT 3691). (See also 16 RT 3736-3337 [rebuttal argument to same effect].)

Given the evidence impeaching Davis and the prosecutor's own summation, it is highly likely that the jurors had reasonable doubt over the truth of her testimony when viewed in isolation. However, Reiland's unimpeached testimony lent Davis's account an aura of plausibility given the similarities between the two incidents. And their testimony together only reinforced the aggravating weight of the inference that Mr. Townsel posed a future danger of harming other custodial officers and prison officials if his life were spared. Hence, it is surely possible that Reiland's unimpeached testimony influenced the jurors to accept Davis's testimony, and that the combined weight of their testimony contributed to the verdict obtained, when otherwise the jurors would have disregarded it.

Certainly, the prosecution relied on Officer Reiland's testimony as an important part of its case for death. As set forth in the opening brief, apart from the circumstances of the crime, the prosecution's aggravating evidence consisted of four incidents of violent criminal conduct under section 190.3, subdivision (b): (1) the prior battery on the victim in this case, which was also a circumstance of the charged crimes; (2) a prior battery on Mr. Townsel's former girlfriend, Beatrice Cruz, when he was 18 years old; (3) the battery on a custodial officer to which Officer Reiland testified; and (4) the alleged assault on correctional officer Davis. (AOB 238-240; see also 16 RT 3689-3691 [prosecutor's argument detailing aggravating factors].)

But the prosecutor's first words to the jurors in his opening penalty

phase statement emphasized the battery on Officer Reiland before any of the other incidents. (15 RT 3525-3526.) After hearing Reiland's testimony, the jurors were instructed that, in the absence of reasonable doubt that Mr. Townsel had committed a battery on Officer Reiland in violation of section 243.1 (battery on peace officer, or custodial officer, in performance of his or her duties), they were to consider that evidence in aggravation under section 190.3, subdivision (b). (4 CT 908, 915-916, 918-920; see *People v. Robertson* (1982) 33 Cal. 3d 21, 53-56 [factor (b) evidence must be proved beyond reasonable doubt].)

In his summation, the prosecutor again emphasized Reiland's unimpeached testimony that Mr. Townsel "kicked him and then took a swing at his head and grazed his forehead." (16 RT 3690.) The prosecutor anticipated that the defense might argue that the incident was not entitled to much weight because it did not result in any actual injury to Reiland. (*Ibid.*) Even if that were true of such a battery on someone else, the prosecutor argued, this battery was "significant" due to Officer Reiland's status as a "*correctional officer*" who was performing his duties at the jail when Mr. Townsel attacked him. (*Ibid.*, italics added .)

Reiland's testimony was likewise an important part of the prosecutor's rebuttal argument. The prosecutor referred to defense counsel's own closing arguments as an attempt to minimize the seriousness of Mr. Townsel's prior violence by characterizing it as "a mere problem with ending a relationship" with his girlfriends. (16 RT 3736.) However, the prosecutor argued that Reiland's testimony proved that was untrue: while in custody awaiting trial in this case, Mr. Townsel had also committed a violent battery upon a correctional officer in the performance of his duties. (16 RT 3736.) In his final words to the jurors before they

retired to deliberate, the prosecutor argued that when they considered Mr. Townsel's "other criminal activity, you can see that this is not an aberrant behavior on the part of the defendant. This is not just a temper tantrum or an inability to conclude a relationship. . . . The People would ask you to look at everything and return a verdict imposing the death penalty." (15 RT 3739.)

Thus, the prosecutor's first words to the jurors in the penalty phase and his final words to them before they retired to deliberate emphasized Reiland's testimony. And those final words clearly gave rise to the inference that unlike an "aberrant" episode of violence or "a mere problem with ending a relationship" with girlfriends, which would pose no future danger in an all-male prison setting, Mr. Townsel had a demonstrated history of violence even against correctional offices in a custodial setting, which did pose an acute danger to others within the prison walls for the remainder of Mr. Townsel's natural life if the jurors were to spare it. (See *Kelly v. South Carolina, supra,* 536 U.S. at pp. 253-253.) Officer Reiland's unimpeached testimony was obviously an important part of the prosecution's case for death and "[t]here is no reason why [this Court] should treat this evidence as any less crucial than the prosecutor – and so presumably the jury – treated it." (*People v. Powell* (1967) 67 Cal.2d 32, 56-57, internal quotation marks omitted; accord, e.g., *Johnson v. Mississippi* (1978) 486 U.S. 578, 586; *People v. Hernandez* (2003) 30 Cal.4th 835, 877.) On this record, respondent cannot prove beyond a reasonable doubt that Reiland *un*impeached testimoy "did not contribute to the verdict obtained." (*Chapman v. California, supra,* 386 U.S. at p. 24.)

Presuming, as this Court must, that appellate review of the confidential *Pitchess* record would have revealed that the trial court erred in

failing to disclose discoverable information that would have led to the impeachment evidence Mr. Townsel sought (see *People v. Zamora*, supra, 28 Cal.3d at pp. 98-104), it is indisputably possible that the jurors would have discredited Reiland's testimony and thus a significant component of the case for death absent the error (cf. *Delaware v. Van Arsdall, supra,* 475 U.S. at p. 684). Had Officer Reiland been impeached with evidence that he had harassed, used excessive force, and made false reports against other inmates, the jurors could have inferred that he had acted in conformity with that habit during his altercation with Mr. Townsel. (See *People v. Memro* (1985) 38 Cal.3d 658, 681; Evid. Code, § 1105.) If Mr. Townsel were, as Officer Reiland testified, agitated while locked safely in his cell, Reiland's decision to open his door and enter his cell was certainly curious. While Reiland claimed that he simply intended to "calm" Mr. Townsel down, in the face of evidence of misconduct against other inmates, the jurors may well have closely examined just how Reiland intended to calm him and why it was necessary to enter his cell in order to do so. The jurors could have inferred that it was reasonably possible that Reiland, in a fit of the impatience or irritation to which he was otherwise prone, entered the cell intending to use unnecessary physical force to shut Mr. Townsel up. (See *People v. Memro, supra,* at p. 681; see also, e.g., *People v. Bean* (1988) 46 Cal.3d 919, 932-933 [where circumstantial evidence supports more than one rational inference, proof beyond a reasonable doubt standard requires jurors to accept the one consistent with the defendant's innocence].) They could similarly have inferred that Mr. Townsel's attempt to leave the cell when Reiland entered was consistent with the innocent explanation that Mr. Townsel was frightened and simply wanted to get away from Reiland and into the relative safety of the secured day room where others officers were

present and could protect him. Reiland apparently made no verbal command to Mr. Townsel to remain in his cell but rather immediately resorted to physical force by "push[ing] him back." (15 RT 3549-3550.) Had the jurors heard evidence that Reiland used excessive and unjustified force in the past, they may have had doubt that Reiland used a reasonable and lawful amount of force and not unreasonable or excessive force. Such doubts alone would have compelled a finding that Reiland was not acting in the "lawful performance of his . . . duties" within the meaning of Penal Code section 243.1 when Mr. Townsel responded by kicking and trying to punch him. (See, e.g., *People v. Jenkins* (2000) 22 Cal.4th 900, 1020; *People v. Gutierrez* (2009) 174 Cal.App.4th 515, 518-519, 521-522, 524-526.) Such a finding, in turn, would have diminished any concern that Mr. Townsel posed a future danger to prison custodial officers or other officials, who presumably perform their duties in a lawful manner. Indeed, the jurors may well have had reasonable doubt that Mr. Townsel committed an unlawful battery at all. The possibility of such doubts are even more reasonable given the prosecution's failure to present the testimony of percipient witnesses to corroborate Reiland's account.

According to Reiland, three other officers were present when the altercation occurred. (15 RT 3550-3551.) According to the prosecutor's offer of proof, made before Mr. Townsel's *Pitchess* motion, correctional officers Shannon Dunn and Andrade would testify to corroborate his account. (15 RT 3504-3505.) While defense counsel objected to their proposed testimony as cumulative, the trial court ruled it was not cumulative to present corroborating evidence given the prosecutor's burden of proof beyond a reasonable doubt. (15 RT 3506-3507.) Nevertheless, no such corroborating testimony was offered. The prosecutor apparently

decided not to present any such testimony even before the evidentiary phase of penalty trial: in his opening penalty phase statement, the prosecutor identified all of the witnesses who would testify in aggravation but omitted mention of any of the officers who were present and might have corroborated Reiland's account. (15 RT 3526-3528.) The jurors could have inferred from the absence of their testimony that the officers would not corroborate Officer Reiland's account. (See, e.g., *People v. Ford* (1988) 45 Cal.3d 431, 442-443 [where party has power to call logical witness or present material evidence and fails to do so, it is reasonable to infer that the evidence would be adverse to that party].)

Had that adverse inference accompanied the impeachment evidence Mr. Townsel sought through his *Pitchess* motion – the existence of which the Court must presume in the absence of proof to the contrary beyond a reasonable doubt – this Court cannot be confident that the jurors would not have discredited Reiland's testimony. Likewise, given the importance of his unimpeached testimony to the prosecution's case for death, as discussed above, the Court cannot be confident that it did not contribute to the jurors' unanimous death verdict. (See, *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.) Thus, for these and all of the other reasons set forth in Mr. Townsel's opening and reply briefs, the Court cannot find beyond a reasonable doubt that the omission of the confidential record of the trial court's *Pitchess* ruling and corresponding violation of Mr. Townsel's state and federal constitutional rights to appellate review thereof is harmless because the jurors' death verdict must be affirmed on appeal regardless of what that review would have revealed.

Finally, even if the violation of Mr. Townsel's rights to a complete and meaningful appeal were harmless when viewed alone, its combined

effect with any or all of the other guilt and penalty phase errors raised in Mr. Townsel's opening and reply briefs is not. (See AOB 223, 228-244, 254-257; ARB 305-316.) As set forth therein and incorporated herein by this reference, the guilt and penalty phase errors substantially weakened Mr. Townsel's mitigating case for life and strengthened the prosecution's aggravating case for death in what was otherwise a close case. (*Ibid.*) Given the cumulative effect of the violation here together with any or all of those errors, this Court simply cannot have the degree of confidence in the reliability of the death judgment that is demanded by the Eighth and Fourteenth Amendments, as well as state law. (See AOB 228-244, and authorities cited therein; *Johnson v. Mississippi*, *supra*, 486 U.S. at pp. 584-590; *People v. Gonzalez*, *supra*, 38 Cal.4th 932, 961; *People v. Brown* (1986) 46 Cal.3d 432, 438.) The death judgment must be reversed.

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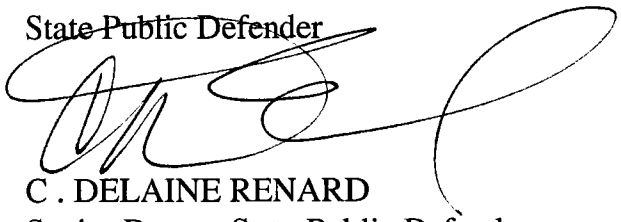
CONCLUSION

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

DATE: December 1, 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. On November 6, 2014, this Court granted my application for leave to file the accompanying supplemental opening brief in excess of 2,800 words. (Calif. Rules of Court, Rules 8.630, subdivisions (b)(5) & (d) and 8.520, subdivision (d).) I have conducted a word count of this supplemental brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 13,556 words.

Date: December 1, 2014

Respectfully submitted,

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

DECLARATION OF SERVICE

Re: *People v. Anthony Letrice Townsel*

Superior Court No. 8926
Supreme Court No. S022998

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

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

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

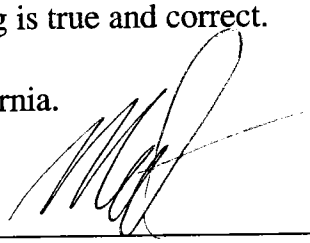
Mr. Anthony Letrice Townsel, H-10300
CSP-SQ
3-EB-22
San Quentin, CA 94974

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

Each said envelope was then, on December 1, 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.

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

Executed on December 1, 2014, at Oakland, California.



DECLARANT