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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL MORENO,

Defendant and Appellant.

E061848

(Super.Ct.No. FSB053258)

O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Duke D. Rouse, Judge. (Retired judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Kevin D. Sheehy, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Peter Quon, Jr. and Marilyn L. George, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

This is the third appeal by defendant and appellant Daniel Moreno following his first degree murder conviction, in June 2009, for the November 25, 2005, stabbing death of Tami Potter, a former San Bernardino County probation officer. Defendant was sentenced to 51 years to life in prison for the murder.

In the two prior appeals (*People v. Moreno* (2011) 192 Cal.App.4th 692 [E049093] (*Moreno I*) & *People v. Moreno* (May 27, 2014, E057972) [nonpub. opn.] (*Moreno II*)),¹ we conditionally reversed the judgment and remanded the matters to the trial court with directions to conduct further proceedings in connection with defendant's pretrial *Pitchess/Brady*² motion.

By his motion, defendant sought records contained in Potter's county employment personnel file indicating, among other things, that Potter had engaged in aggressive or violent altercations with people. Defendant claimed the records were material to his defense that Potter was the aggressor in the November 25, 2005, altercation with him. At trial, defendant claimed he was either not guilty of any crime because he stabbed Potter in self-defense or guilty of voluntary manslaughter based on imperfect self-defense.

¹ We have taken judicial notice of the records contained in the first and second appeals, *Moreno I* (E049093) and *Moreno II* (E057972), and have placed those records with the record on appeal in the instant matter, *Moreno III* (E061848).

² *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*); *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*).

Following our decisions in *Moreno I* and *Moreno II*, the trial court reinstated the judgment of conviction. On this appeal, defendant claims a third conditional reversal is required because the trial court erroneously denied his supplemental *Pitchess* motion, made following the second remand in *Moreno II*, in which he sought “incident reports” concerning a September 25, 1999, incident in which Potter engaged in a verbal altercation with a fellow probation officer and coworker, Deidra Ferguson.

Defendant requests that we (1) independently review the sealed reporter’s transcript of, and the records produced at, the September 5, 2014, supplemental *Pitchess* hearing; (2) order any “incident reports” of the September 25, 1999, incident produced to the defense; and (3) grant him a new trial because it is reasonably probable he would have realized a more favorable result had the incident reports been timely produced and had evidence contained in the reports been admitted at his June 2009 trial.

We find no error and affirm the judgment of conviction.

II. FACTS AND PROCEDURAL BACKGROUND

A. *The Evidence Presented at Defendant’s June 2009 Jury Trial*

The evidence presented at defendant’s June 2009 jury trial is described in detail in this court’s published 2011 opinion in *Moreno I*. On November 25, 2005, defendant and Potter were arguing in the hallway of a sober living home. (*Moreno I, supra*, 192 Cal.App.4th at p. 697.) Potter told defendant that someone had taken \$80 that belonged to her and that she was going to “handle my business,” then she pushed defendant in his chest with her hands. (*Ibid.*) Defendant “snapped” and stabbed Potter twice in the

chest and once in the back, killing her within ““a matter of minutes.”” (*Id.* at pp. 697-698.)

Potter had marijuana and methamphetamine in her system, and the pathologist testified that she had consumed the methamphetamine ““not too long before she died.”” (*Moreno I, supra*, 192 Cal.App.4th at p. 698.) Methamphetamine has a stimulant effect that can cause a person to become agitated, anxious, or potentially violent. (*Ibid.*)

A resident of the sober living home, James Walker, was awakened by the argument between defendant and Potter. (*Moreno I, supra*, 192 Cal.App.4th at p. 697.) When he heard a woman scream ““help me,”” he opened his bedroom door and saw Potter collapse onto the floor with blood squirting from her neck or shoulder area. (*Ibid.*) Defendant was standing behind Potter, holding a white cloth covered in blood that appeared to be wrapped around something. (*Ibid.*) He then ran away from Potter, yelling, ““Fuck you, bitch. That’s what you get. That’s what people like you deserve.”” (*Ibid.*, fn. omitted.) He ran to Potter’s truck and drove away. (*Ibid.*)

Later that day, defendant arrived at Debbra Garrett’s apartment with one or two duffle bags and remained inside the apartment for the next two days. (*Moreno I, supra*, 192 Cal.App.4th at p. 697.) On November 27, 2005, police saw Potter’s truck parked outside Garrett’s apartment building. (*Ibid.*) With Garrett’s consent, they searched the apartment and found defendant lying on a bed. (*Ibid.*) Defendant sat up on the bed and said, ““I can’t believe I got caught,”” and ““this was a short run.”” (*Ibid.*) On a dresser inside the bedroom the police found defendant’s wallet and a newspaper article about

Potter's murder. (*Ibid.*) Defendant's duffle bag contained a narcotics pipe with methamphetamine residue, a knife with dried blood on its blade, and a black Solo windbreaker saturated with blood. (*Id.* at pp. 697-698.) DNA tests showed that the blood on the knife, the windbreaker, and on defendant's shoes was Potter's. (*Id.* at p. 698.)

When interviewed by a police detective, defendant said he and Potter were in a "struggle" and had argued that day. (*Moreno I, supra*, 192 Cal.App.4th at p. 698.) She was, in his words, "very disrespectful" to him, called him derogatory names, said someone had taken \$80 from her and she was "about to handle" her "business" and was going to "fuck somebody up." (*Ibid.*) She then "pulled around on" defendant and pushed him in the chest. Defendant knew Potter was a former law enforcement officer who had worked in juvenile hall and knew how to "restrain" him. (*Ibid.*) He "snapped" and "defended himself." (*Ibid.*) He unsheathed his knife, stabbed Potter multiple times, then ran to Potter's truck and drove away. (*Ibid.*) He was wearing a Solo windbreaker at the time of the stabbing. (*Ibid.*)

In addition to the evidence described in *Moreno I*, the jury heard the following relevant trial evidence: Via a videotaped conditional examination, Walker testified that on three or four occasions before the stabbing, Potter had "gotten high" on crystal methamphetamine in the sober living home with someone named "Big Paul," among others. Early on Thanksgiving Day (November 24), Walker saw Potter receive a "half bag" of methamphetamine at the sober house. At that time, Potter and defendant, who

was “hyperactive,” were sitting together on a couch, getting along, and discussing how much to pay Big Paul for an “eight ball” of crystal methamphetamine.

Early on the morning on November 25, Walker saw defendant under the influence of methamphetamine with his Hispanic girlfriend, a woman other than Potter. Around 9:00 a.m. that morning, Walker saw Potter with Big Paul; Potter had been “doing” methamphetamine and arguing with Big Paul, even though she had a “girlfriend-boyfriend type thing” with defendant. Potter was “already high” and “tweaking” on methamphetamine.

On the afternoon of November 25, Walker awoke to the sounds of males and females yelling and arguing. Potter, high on methamphetamine, was “pissed off” and “being aggressive,” “[s]aying ‘F’ you to everybody,” “calling people MFs and all that stuff,” and complaining angrily that defendant had taken her truck. For more than 90 minutes, Potter was yelling and screaming at people, including Little Paul, Big Paul, Will, and “two other white guys,” about defendant having taken her truck.

The jury also heard and viewed the portions of defendant’s November 27, 2005, recorded police interview with Detective Michael Vasilis. Defendant told the detective that, on the morning of November 25, after defendant and Potter had smoked “a little dope” together at a Motel 6, Potter tried to instigate a fight in the motel parking lot between defendant and two or three Black men, one of whom claimed to be Potter’s boyfriend. “[U]pset” that Potter had “got [his] life in fuckin’ danger,” defendant dropped Potter off at the sober house, but Potter allowed defendant to drive her truck to a store.

Before he returned to the sober living house in the truck, defendant and Potter had a telephone conversation in which Potter accused defendant of “[t]aking eighty dollars and shit,” which defendant denied.

When defendant returned to the sober living house, Potter “was fuckin’ accusing [him] of all type of shit.” When asked why he killed Potter, defendant told the Detective Vasilis that “[t]here was a struggle.” Potter was being “very disrespectful,” called defendant a “fucking bitch” and said to him, “You little fuckin’ pig. You’re going to be my little bitch,” and “What’s up my little puta[?]” Defendant knew that Potter had worked at juvenile hall and knew how to restrain him. This “intimidated” defendant and made him think Potter was “capable” of attacking him.

Later on November 25, when they argued in the hallway of the sober living home, defendant asked Potter, “[W]hy [are] you accusing me of this shit” and “taking eighty dollars?” Potter responded, “I’m about to handle my business. I’m gonna fuck somebody up.” When defendant said, “[W]ait a minute,” Potter “pulled around on [him].” Potter “was coming at” him, saying “I’m gonna fuck someone up, move,” placed her hands on his chest, and pushed him. Feeling threatened and thinking Potter was going to attack him, and not knowing whether Potter was armed, a scared and “surprised” defendant “snapped,” “defended [him]self,” unsheathed his knife and, without thinking, stabbed her an unknown number of times. In defendant’s words, “[he] just blacked.” He had “never been dr[i]ven nuts like this.” “That fuckin’ woman got the best of me.”

B. Trial Court Proceedings Following *Moreno I* and the First Remand

1. *Moreno I*

In *Moreno I*, we conditionally reversed the judgment on the ground the court erroneously denied defendant's pretrial *Pitchess/Brady* motion to review, in camera, materials contained in Potter's San Bernardino County personnel file. (*Moreno I, supra*, 192 Cal.App.4th at pp. 698-703, 711.) The defense claimed the file could contain evidence of complaints by third parties that Potter had used excessive force with others, and the evidence was material and relevant to his defense because it could corroborate his claim that he acted in self-defense or in imperfect self-defense in stabbing Potter, thus justifying the homicide or reducing it to voluntary manslaughter.

We remanded the matter to the trial court with directions to review, in camera, Potter's personnel file, order the disclosure of relevant information, allow defendant an opportunity to demonstrate prejudice based on the failure to disclose the information before trial, and order a new trial if there was a reasonable possibility the outcome would have been different had the evidence been produced to the defense before the June 2009 trial. (*Moreno I, supra*, 192 Cal.App.4th at pp. 703, 711-712.) If the file contained no discoverable information, the trial court was to reinstate the judgment. (*Id.* at p. 711.)

2. The Original *Pitchess* Hearing (July 29, 2011)

Following remand in *Moreno I*, the trial court held an in camera hearing on July 29, 2011, in order to review documents produced by the County of San Bernardino in response to defendant's *Pitchess/Brady* motion. (*Moreno II, supra*, E057972 [at p. 3].)

A deputy county counsel, Carole Greene, appeared ““on behalf of the probation department,”” but no one else appeared and Greene was not placed under oath. (*Ibid.*) Further, the court did not ascertain whether Greene was the custodian of the records in Potter’s personnel file, or whether the county had withheld any responsive documents for any reason. (*Id.* [at pp. 3-4].) Nothing in the record indicated that Greene was the custodian of the records she provided to the court. Instead, it appeared that Greene merely delivered a box of documents that had been given to her along with “a ‘cover memo’ from the probation department” describing the organization of the documents. (*Id.* [at p. 3].)

At the July 29, 2011, in camera *Pitchess* hearing, the court identified two areas of discoverable material from the documents produced by Greene: (1) Potter’s 1994 arrest in Arizona for the assault of her then-boyfriend; and (2) a 1999 incident and county probation department disciplinary proceeding against Potter. (*Moreno II, supra*, E057972 [at pp. 3-4].) The court ordered the county to provide the defense with police reports regarding the 1994 incident, along with a document, apparently prepared by Potter, in which she explained the 1994 arrest in connection with her 1997 county employment application. (*Id.* [at p. 4].) Defendant was also provided with the names, addresses, and telephone numbers of five witnesses to the 1999 incident. (*Ibid.*)

3. The Second *Pitchess* Hearing (January 13, 2012)

On December 4, 2011, defendant filed a supplemental *Pitchess* motion seeking “the incident report or reports concerning the September 24, 1999 incident involving [the

five identified witnesses to the incident, namely,] witnesses Shelda Arceneaux, Kenneth Stone, Kendall Hayes, Rosa Huertas, and Diedra Fergerson.” In the motion, defendant represented that his defense investigator had been unable to contact Stone, Hayes, and Fergerson; Huertas did not recall the incident; and Arceneaux had been contacted but refused to speak to the defense investigator. Defendant claimed he was entitled to the “incident reports,” both to refresh Huertas’s recollection of the September 24, 1999, incident and also because the other four witnesses were unavailable to the defense.

At a January 13, 2012, hearing, the court denied the supplemental *Pitchess* motion on the ground it sought “[i]nformation consisting of complaints concerning conduct occurring more than five years” before the November 2005 murder and, as such, sought information outside the five-year period allowed for *Pitchess* discovery. (Evid. Code, § 1045, subd. (b)(1).) In opposition to the supplemental *Pitchess* motion and at the January 13, 2012, hearing on the motion, Greene noted that she did not raise the five-year issue at the January 29, 2011, *Pitchess* hearing when the court ordered the county to disclose the names and other indentifying information of the five witnesses to the September 1999 incident.

4. Defendant’s New Trial Motion (January 25, 2013)

Defendant filed a motion for a new trial based on the available evidence of the 1994 and the September 1999 incidents, without the benefit of any incident reports of the 1999 incident. The motion was heard on January 25, 2013. The question before the court was whether there was a reasonable probability defendant would have realized a

more favorable result at trial had the information concerning the 1994 and 1999 incidents been disclosed before trial in response to his original *Pitchess* motion.

At the hearing on the new trial motion, the defense called Fergerson as a witness. Fergerson testified that she and Potter worked together as probation correction officers at the West Valley Juvenile Detention Center in September 1999. According to Fergerson, Potter was “difficult to work with,” because she “wanted to do things her way” and “wasn’t a team player.” On September 24, 1999, Fergerson and Potter got into a verbal confrontation in which Potter used “very aggressive” language, and other staff had to get in between the two women to stop the argument. The women were “yelling” at each other, but there was no “pushing or shoving.” Fergerson explained what led to the confrontation: On the previous day, two juveniles who shared a room wanted to move into different rooms. Fergerson told Potter she had counseled the juveniles and they should remain roommates, but when Fergerson came to work the next day she discovered that Potter had moved the two juveniles into different rooms. The verbal confrontation occurred after Potter was “disrespectful” to Fergerson, and Fergerson was “not going to allow” Potter to speak to her “in that manner.”

Defense counsel argued the new trial motion should be granted based on the 1994 incident, which showed that Potter struck her former boyfriend, Martin Shuster, several times in his head for “telling lies” about her, and the evidence of Potter’s September 1999 confrontation with Fergerson. In the 1994 incident, which occurred in Mesa, Arizona, both Potter and her boyfriend were arrested for assault, but the charges against Potter

were dismissed after she attended “an anger management group . . . diversion program”

Defense counsel argued the evidence of the 1994 and 1999 incidents showed that Potter was “aggressive hostile, [and] antagonistic,” and it was reasonably probable defendant would have been convicted of the lesser offense of voluntary manslaughter based on imperfect self-defense, rather than first degree murder, had the evidence of the 1994 and 1999 incidents been disclosed before trial and presented at trial. The new evidence, counsel argued, would have corroborated defendant’s claim that Potter was the aggressor and that defendant was only trying to defend himself during the November 25, 2005, argument in the hallway of the sober living home. (Evid. Code, § 1103, subd. (a)(1) [“In a criminal action, evidence of the character or a trait of character (in the form of . . . evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence is: [¶] (1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character.”].)

The prosecutor countered that the evidence of the 1994 and 1999 incidents would not have changed the result at trial because the jury heard ample evidence that Potter was being “confrontational and angry and disrespectful to the defendant” at the time defendant stabbed and killed her. Specifically, the jury heard that Potter and defendant had been in a relationship for several months. On November 24, 2005, the day before the homicide, defendant and Potter “got together and arranged to purchase

methamphetamine,” then spent the night together at a Motel 6. The following morning, they got into a series of arguments. Defendant drove Potter back to the sober living home in Potter’s truck, then drove away in the truck. Potter became “incensed” that defendant had driven off in her truck, and, at one point, called him and accused him of stealing her truck. After arguing with Potter on the telephone, defendant brought a “Rambo-style” knife, wrapped in a sheath, to the sober living home. Other witnesses overheard Potter “being loud,” but defendant did not claim he actually believed that Potter was threatening him with bodily injury. The trial court denied the new trial motion after finding there was no reasonable probability the outcome would have been different had the evidence of the 1994 and 1999 incidents been previously disclosed and presented to the jury.

C. Trial Court Proceedings Following Moreno II and the Second Remand

1. Moreno II

In his second appeal in *Moreno II*, defendant claimed the court erroneously failed to grant his supplemental *Pitchess* motion and his new trial motion. (*Moreno II, supra*, E057972 [at pp. 4-5].) In *Moreno II*, we again conditionally reversed the judgment based on the trial court’s failure to administer an oath to a custodian of records at the July 31, 2011, *Pitchess* hearing. (*Id.* [at p. 6].) We remanded the matter to the trial court with directions to hold a new in camera *Pitchess* hearing in accordance with the procedures outlined in *People v. Mooc* (2001) 26 Cal.4th 1216 (*Mooc*), its progeny, and our opinion in *Moreno II* (*Moreno II, supra*, E057972 [at pp. 6, 12-13]).

In *Moreno II*, we criticized the trial court for making an inadequate record of the documents it examined at the July 29, 2011, hearing, and for failing to ascertain whether the county had withheld any documents potentially responsive to defendant’s motion and, if so, why. (*Moreno II, supra*, E057972 [at p. 10].) We also criticized the manner in which the documents that were apparently produced at the July 29, 2011, hearing—and at a March 25, 2014, hearing to settle the record on appeal in *Moreno II*—were provided to this court. (*Id.* [at pp. 11-12, fn. 6].) The documents arrived at this court in a vaguely marked box, and it was unclear whether the documents in the box were the same documents that the county produced and the court reviewed at the July 29, 2011, and March 25, 2014, hearings.

2. The Third *Pitchess* Hearing (September 5, 2014)

On August 22, 2014, following *Moreno II*, defendant filed a second supplemental *Pitchess* motion, again seeking “the incident report or reports concerning the September 24, 1999 incident,” between Potter and Ferguson. The August 22, 2014, motion and supporting declaration of defendant’s trial counsel, James Crawford, were *identical* to defendant’s December 4, 2011, supplemental *Pitchess* motion and supporting declaration, except that the August 22, 2014, motion mentioned that, in *Moreno II*, this court concluded that the trial court failed to conduct an adequate in camera review of Potter’s personnel file. Oddly, defense counsel continued to represent that the defense investigator had been unable to contact Ferguson, even though Ferguson testified at the January 25, 2013, hearing on defendant’s new trial motion.

On September 5, 2014, the trial court conducted a third in camera *Pitchess* hearing in response to this court's decision in *Moreno II*, and concluded that Potter's personnel file contained no additional documents responsive to defendant's motions. The in camera hearing was held in the presence of Greene and the custodian of records for the county probation department, Ms. Benton, who was placed under oath.

In open court following the second in camera *Pitchess* hearing, the trial court considered defendant's August 22, 2014, *Pitchess* motion, seeking the incident reports of the September 24, 1999, verbal altercation between Potter and Ferguson. Defense counsel argued that the reports might help him locate and interview the witnesses he had been unable to locate, and a recent appellate court decision concluded that a defendant's *Brady* rights to the disclosure of potentially exculpatory information "trumps" Evidence Code section 1043 and "any strict statutory requirements," including the five-year limitation period on discoverable information. (Evid. Code, § 1043, subd. (b)(1).) The trial court ruled it had "not found any additional information to be disclosed," and reinstated the judgment of conviction and sentence.

III. DISCUSSION

A. *The Trial Court Conducted a Proper Pitchess Hearing Following Moreno II*

Defendant asks that we independently review the sealed transcript and records produced at the September 5, 2014, supplemental *Pitchess* hearing, and determine whether the trial court complied with our instructions in *Moreno II*. We have reviewed the sealed reporter's transcript of the September 5, 2014, hearing, and the records

produced at that hearing, and conclude that the court fully complied with our instructions in *Moreno II*. The court placed a qualified custodian of records for the probation department, Ms. Benton, under oath; ascertained that all potentially relevant documents were produced at the hearing; and made an adequate record, sufficient to facilitate appellate review, of the documents the court examined at the hearing. (*Mooc, supra*, 26 Cal.4th at pp. 1228-1229.)

B. *The Trial Court Properly Refused to Disclose the “Incident Reports” Concerning the September 24, 1999, Verbal Altercation Between Potter and Ferguson*

1. Relevant Legal Principles

Pitchess motions are governed by Evidence Code sections 1043 through 1047 and Penal Code sections 832.5, 832.7 and 832.8. (*Mooc, supra*, 26 Cal.4th at p. 1226.) The moving party must make a threshold showing that the information sought is “material” to the subject matter involved in the pending litigation and a “reasonable belief” that the agency has the type of information sought. (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1016; Evid. Code, § 1043, subd. (b)(3).) “Traditionally, *Pitchess* motions seek information about past complaints by third parties of excessive force [or] violence [on the part of the officer]” (*Rezek v. Superior Court* (2012) 206 Cal.App.4th 633, 640.)

The statutory *Pitchess* process includes limitations on the information the trial court is required to disclose in response to a *Pitchess* motion. (Evid Code, § 1045, subd. (b).) As pertinent, Evidence Code section 1045, subdivision (b)(1) provides that the trial court “shall exclude from disclosure: [¶] (1) Information consisting of complaints

concerning conduct occurring more than five years before the event or transaction that is the subject of the litigation in aid of which discovery or disclosure is sought. . . .” (*Mooc, supra*, 26 Cal.4th at pp. 1226-1227, italics added.)

The statutory five-year limitation on *Pitchess* disclosure is not absolute, however; it does not apply when the information sought is discoverable under *Brady*. “[T]he “*Pitchess* process” operates in parallel with *Brady* and does not prohibit the disclosure of *Brady* information.” (*City of Los Angeles v. Superior Court* (2002) 29 Cal.4th 1, 14 (*City of Los Angeles*)). As *Mooc* explained: “[T]he *Pitchess* ‘procedural mechanism for criminal defense discovery . . . must be viewed against the larger background of the prosecution’s constitutional obligation [under *Brady*] to disclose to a defendant material exculpatory evidence so as not to infringe the defendant’s right to a fair trial.’” (*City of Los Angeles, supra*, at p. 14, citing *Mooc, supra*, 26 Cal.4th at p. 1225; see also *People v. Superior Court (Johnson)* (2015) 61 Cal.4th 696, 714, 716 [prosecutors and defendants must comply with the *Pitchess* procedures if they seek information from an officer’s confidential personnel records, and the prosecution fulfills its *Brady* obligation if it shares with the defendant any information it has regarding whether an officer’s personnel file might contain *Brady* material, then lets the defense decide for itself whether to file a *Pitchess* motion].)

In contrast to *Pitchess*, which broadly requires the disclosure of information “material” to the subject matter involved in the pending litigation (Evid. Code, § 1043, subd. (b)(3)), *Brady* requires the disclosure of evidence that is both “favorable” to the

defendant and “material” on the issue of the defendant’s guilt (*City of Los Angeles, supra*, 29 Cal.4th at p. 10; *Brady, supra*, 373 U.S. at p. 87). For *Brady* purposes, evidence is “favorable if it helps the defense or hurts the prosecution,” and is “material if there is a reasonable probability its disclosure would have altered the trial result. [Citation.] Materiality [for *Brady* purposes] includes consideration of the effect of the nondisclosure on defense investigations and trial strategies. [Citations.] Because a constitutional violation occurs only if the suppressed evidence was material by these standards, a finding that *Brady* was not satisfied is reversible without need for further harmless-error review. [Citation.]” (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1132-1133.)

2. Analysis

Defendant claims the trial court violated his rights under both *Pitchess* and *Brady* in refusing to disclose the probation department’s “incident report or reports” concerning the September 24, 1999, incident between Potter and Ferguson, in response to his August 22, 2014, supplemental *Pitchess/Brady* motion, after the trial court conducted a further in camera review of Potter’s personnel records on September 5, 2014.

The records produced at the September 5, 2014, supplemental *Pitchess* hearing contain a single report, titled, “Disciplinary Investigative Report” (the report) concerning the September 24, 1999, incident between Potter and Ferguson. The report includes a statement from Potter, along with statements from the five previously-identified

witnesses to the 1999 incident: Arceneaux, Hayes, Stone, Huertas, and Ferguson. We conclude the report was not discoverable under *Pitchess* or *Brady*.³

First, the report was not discoverable under *Pitchess*. The September 24, 1999, incident occurred more than six years before the November 25, 2005, stabbing death of Potter. The report thus fell squarely within the five-year limitations period on discoverable peace officer personnel records. (Evid. Code, § 1045, subd. (b)(1).) As noted, the trial court is required to “exclude from disclosure” “[i]nformation consisting of complaints concerning conduct occurring more than five years before the event or transaction that is the subject of the litigation in aid of which discovery or disclosure is sought.” (Evid. Code, § 1045, subd. (b)(1); *City of Los Angeles, supra*, 29 Cal.4th at pp. 11, 13.) It is of no moment that, following the original *Pitchess* hearing on January 31, 2011, the trial court disclosed the names and other identifying information of the five witnesses to the 1999 incident, including Ferguson. As noted, county counsel did not assert the five-year limitations period at the original *Pitchess* hearing.⁴

³ Other than the report, the records produced at the September 5, 2014, hearing contain no other documents concerning the 1999 incident, including psychological or other mental health-related records.

⁴ Any conclusions of the officer or officers conducting the investigation of the 1999 incident are also not discoverable under *Pitchess*. (Evid. Code, § 1045, subd. (b)(2); *People v. Memro* (1985) 38 Cal.3d 658, 687, overruled on another ground in *People v. Gaines* (2009) 46 Cal.4th 172, 181, fn. 2.) And, because the information contained in the report was not discoverable (Evid. Code, § 1045, subd. (b)(1)), the names of the officer or officers conducting the investigation of the 1999 incident are not discoverable.

Second, the report was not discoverable under *Brady*. The report was not “material” for purposes of *Brady* because it is not reasonably probable that its disclosure would have altered the result at trial. (*People v. Zambrano, supra*, 41 Cal.4th at p. 1132.) At the hearing on defendant’s new trial motion, Ferguson testified that she and Potter got into a verbal altercation, on September 24, 1999, over whether Potter should have allowed two juvenile detainees to stop sharing the same room. According to Ferguson, Potter used “very aggressive” language in the altercation, and staff had to separate the two women, but there was no “pushing or shoving” and no physical violence. Ostensibly, Ferguson had no reason to minimize Potter’s behavior during the 1999 incident. Further, nothing in the probation department’s report of the 1999 incident contradicts Ferguson’s testimony. The statements of the witnesses to the incident, contained in the report, are entirely consistent with Ferguson’s testimony: the 1999 altercation between Potter and Ferguson was verbal and involved no physical violence.

In contrast to Ferguson’s testimony and the statements of the other witnesses to the 1999 incident, contained in the report, the evidence at trial painted a far more violent picture of Potter than any evidence of the 1999 incident could have. The evidence at trial showed that Potter had been using methamphetamine and verbally assaulting people, including defendant, for at least two or three days before defendant finally “snapped” and stabbed her to death in the hallway of the sober living home. Walker overheard Potter swearing at and verbally assaulting several people, other than defendant, on the morning of November 25, shortly before he overheard defendant and Potter arguing and defendant

stabbed Potter. And, in his interview statements to Detective Vasilis, defendant claimed he understood that Potter was threatening to physically restrain or attack him at the time he stabbed her. In sum, nothing about the 1999 incident between Potter and Ferguson would have *materially* assisted defendant's claim that Potter threatened him with *physical violence* before he stabbed and killed her. To the contrary, it is more likely that evidence of the 1999 incident would have undermined the defense theory that Potter threatened defendant with physical violence.

C. The Motion for New Trial Was Properly Denied

Lastly, defendant claims his motion for a new trial, based on the newly-discovered evidence of the 1999 incident in which Potter got into a verbal altercation with Ferguson, and the 1994 incident in which Potter hit her then-boyfriend several times in the head, was erroneously denied. (Pen. Code, § 1181, cl. 8.) We disagree.

An order denying a motion for a new trial based on newly discovered evidence is reviewed on appeal for an abuse of discretion. (*People v. Ochoa* (1998) 19 Cal.4th 353, 473.) A new trial may not be ordered based on newly discovered evidence unless it is reasonably probable the defendant would realize a more favorable result in a retrial. (*Ibid.*) Here, and as the trial court found, there was no reasonable probability that defendant would have realized a more favorable result in a retrial, based on the newly discovered evidence of the 1994 and 1999 incidents.

In the 1994 incident in Mesa, Arizona, Potter was charged with assault for hitting her then-boyfriend several times in his head following an argument, but the charge was

dismissed after Potter completed an anger management program. And, in the 1999 incident, Potter got into a verbal altercation with her coworker, Ferguson, but the 1999 incident involved no physical violence.

Both incidents were remote in time to the November 25, 2005, homicide. And, at defendant's June 2009 trial, the jury heard ample evidence—both from defendant's police interview statements and Walker's interview statements, that Potter was being both verbally aggressive and physically threatening toward defendant and others shortly before and at the time defendant stabbed and killed her.

Given the evidence of Potter's threatening and hostile demeanor toward defendant and others in the hours and shortly before defendant stabbed and killed her, it is not reasonably probable that defendant would have realized a more favorable result in a retrial based on the newly discovered evidence of the 1994 and 1999 incidents. At best, the evidence of the 1994 and 1999 incidents was of marginal probative value on the issue of whether Potter threatened defendant with physical violence immediately before he stabbed and killed her. Thus, it is not reasonably probable that, in a retrial, defendant would have either been acquitted of the first degree murder charge based on reasonable self-defense or found guilty of the lesser offense of voluntary manslaughter based on imperfect self-defense.

IV. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

KING
J.

We concur:

HOLLENHORST
Acting P. J.

MILLER
J.