

## CRIMINAL LAW

### ***Pitchess* Requirements for “Good Cause” are Refined**

by Nelson P. Brav, Column Editor

*Nelson Brav has practiced criminal law since 1970, beginning with Defender's Inc. of San Diego. In 1973 he entered private practice adding cases in injury and business litigation. He has been a Director and Vice President of the San Diego County Bar Association, President of the Criminal Defense Lawyer's Club and a member of the Law and Justice Agency Advisory Board for the County of San Diego. He practices with Steven Schwartz in San Diego at Brav & Schwartz, APC. Mr. Brav has been the Criminal Law Column Editor for **Trial Bar News** since 1994. He may be reached by e-mail at: [nbrav@cts.com](mailto:nbrav@cts.com).*

For the past 31 years, *Pitchess* motions for discovery of specific information and materials from police personnel files have been an important tool for criminal defense attorneys. The motions rarely go down gently and are usually vigorously opposed. Based upon *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 and Evidence Code §1043, subd. (b), “good cause” for obtaining an in-chambers review of the personnel records requires both materiality to the pending case and a reasonable belief that the law enforcement entity has the information sought. *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 84. But what type of information would qualify as sufficient for “good cause”? *Warrick v. Superior Court of Los Angeles County* (2005) 35 Cal.4th 1011 answers that question and resolves a split among state appellate courts.

Three Los Angeles police officers were patrolling a tough neighborhood known for illegal drug sales. Donald Warrick was standing near a wall and had a plastic bag in his hand which appeared to contain “off-white solids”. When the officers got out of their police car, Warrick ran, allegedly throwing away some small items which looked like rock cocaine. One officer picked up 42 pieces and the other two officers caught Warrick and arrested him. He was holding an empty baggie and had \$2.75 in his pocket along with three porcelain sparkplug chips which one of the officers testified was a tool for breaking car windows. Warrick was prosecuted for possessing cocaine base for sale (Health & Safety Code §11351.5) along with other allegations that had to do with sentencing.

His lawyer filed a *Pitchess* motion seeking disclosure of prior citizen complaints against the three officers for, among other things, making false police reports, false arrests, and planting evidence. In the supporting declaration for the motion, the defense attorney stated that his client had run out of fear of being arrested on an outstanding parole warrant. He contended that other individuals at the scene dropped the contraband. He said one of the officers told him that “You must have thrown this.” He reported that he was there to buy drugs and not sell them, and the officers' accusation that he was the one that discarded the drugs was false.

The city attorney, arguing against the motion, argued that the factual summary was nothing more than a not guilty plea and described circumstances which “might” have happened

but were not plausible. The trial judge agreed and denied the request for an in-chambers review of the personnel records and, therefore, the *Pitchess* request.

A petition for writ of mandate was filed and summarily denied in the Court of Appeal. The California Supreme Court granted review and sent the case back to the Court of Appeal directing that an order to show cause issue as to why Warrick couldn't get discovery from the police personnel files. The Court of Appeal complied with the order to show cause request, but came up with the same answer and denied relief. The Court of Appeal concluded that the factual details failed to establish to a "degree of reasonable probability" that the described events occurred and were not simply a possibility.

In a 5 - 2 decision, the California Supreme Court reversed the judgment of the Court of Appeal and directed the appellate court to issue the writ. The Supreme Court held that standard the Court of Appeal applied was stricter than the law required.

The majority opinion, authored by Justice Joyce L. Kennard, noted that the evolution of the *Pitchess* decision and the enactment of Penal Code §§832.7 and 832.8, along with Evidence Code §1043 have formed the procedural requirements for discovery of limited matters contained in police officers' personnel records. Procedurally, if the court finds that good cause has been established through declarations or affidavits, the records are reviewed in chambers to determine if information within them is relevant to the factual issues presented. *People v. Mooc* (2001) 26 Cal.4th 1216, 1226-1227. Even though a finding of relevance is made, complaints more than five years old, conclusions of officers who have investigated the citizen complaints, and matters which are remote or of no practical benefit are excluded. *City of Los Angeles* (2002) 29 Cal.4th 1, 9. Usually, only the names, addresses and phone numbers of witnesses or persons who have filed citizen complaints about police misconduct are provided and a protective order limiting use is common. See, *Haggerty v. Superior Court* (2004) 117 Cal.App.4th 1079, 1089-1090. The defense, at best, is left with a significant investigation task.

The majority in *Warrick* disagreed with the Court of Appeal on the plausibility issue. The appellate court was skeptical that Warrick was out to buy cocaine with only \$2.75 in his pocket, but the majority of the Supreme Court reasoned it could have occurred. The High Court reasoned it was not unlikely that someone else could have thrown the drugs away when police arrived. The test applied by the Court of Appeal was a reasonable probability or apparent credibility standard which would require the trial court to weigh or assess the evidence and determine whether the defendant was probably guilty or not. This is more than what is legally required.

To establish good cause, the declaration by the attorney must set forth how the discovery being sought leads to relevant evidence and how those facts can be a defense in the form of admissible evidence or impeachment. The scenario articulated can involve the denial of events described in the police report. A "specific factual scenario of officer misconduct that is plausible when read in light of the pertinent documents" is required. *Warrick v. Superior Court, supra*, 35 Cal.4th at 1025, and *Santa Cruz, supra*, 49 Cal.3d at 86.

The majority opinion in *Warrick* listed four questions that must be satisfactorily

answered for arriving at good cause to obtain an in-chambers review of the records:

1. Has the defense shown a logical connection between the charges and the proposed offense?
2. Is the defense request factually specific and tailored to support its claim of officer misconduct?
3. Will the requested discovery support the proposed defense?
4. Under what theory would the requested information be admissible at trial?

If the defense attorney's declaration is responsive to these questions and adds a reasonable belief that the law enforcement agency has the records and information, then good cause is established and the in-chambers review of the personnel records can go forward. *Warrick v. Superior Court, supra*, 35 Cal.4th 1011 at 1027.

Justice Janice Rogers Brown wrote a dissenting opinion joined in by Justice Baxter. She concluded that the defendant's factual contentions were highly unlikely and ran counter to the experience and logic that she had acquired in her many years of studying criminal reports. She's never seen a case in which a person who is about to buy drugs has his own baggie for the drugs or is able to buy them for \$1 or \$2 amounts.