Focus

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Motions to See Files on Police Have to Meet Specific Criteria

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On a showing of good cause, a criminal defendant is entitled to discovery of relevant information, located in otherwise confidential personnel records, of past misconduct by a police officer accused of misconduct against the defendant. Such discovery is sought through what is usually called a *Pitchess* motion. Evid. Code § 1043 *et seq.*; *Pitchess v. Superior Court*, 11 Cal.3d 531 (1974).

Warrick v. Superior Court, 35 Cal.4th 1011 (2005) is the latest in a line of cases that have struggled to define good cause. *Warrick* does two things. It makes one element of the existing good cause definition easier to establish. It also clarifies what showing is necessary when the alleged misconduct is the writing of a false police report.

A risk in post-*Warrick* hearings is that busy courtrooms may rely on a simplified view of *Warrick* without giving proper consideration to all the criteria necessary to show good cause, especially when false police reporting is alleged.

Police agency counsel should therefore actively remind judges precisely what *Warrick* says and does not say. To this end, a review of the following criteria, all of which a defendant must satisfy to show good cause, should be helpful.

First, defense counsel must allege in a declaration that the officer in question did something wrong. In *People v. Hill*, 131 Cal.App.4th 1089 (2005), which interprets *Warrick*, a *Pitchess* motion was deemed inadequate "on its face" as to a sergeant because it did not describe him as having done anything wrong. No allegation of misconduct means no entitlement to discovery.

Second, the alleged misconduct must be described with specificity. *Warrick* notes that in *City of Santa Cruz v. Municipal Court*, 49 Cal.3d 74 (1989), allegations that a defendant charged with resisting arrest had been handcuffed, grabbed by the hair, thrown to the ground, and stepped on by the officers, were specific enough to support a claim of excessive force.

What specificity is required when alleging that officers lied in a police report?

In *Warrick*, the defendant was charged with possession of cocaine for sale. The officers claimed that the defendant discarded the cocaine when he ran away from them. Defense counsel's declaration stated that the defendant was at the scene to buy cocaine and that, while fleeing at the sight of the officers because he feared arrest for an outstanding arrest warrant, he ran past the actual seller who had discarded the cocaine.

In *Hill*, the defendant was charged with assault with a firearm. Defense counsel claimed that the defendant did not possess a gun, did not fire a weapon, and was walking to a liquor store when he heard the shots.

Both descriptions are specific version of events countering the charges. Is this alone sufficient to satisfy the specificity criterion? No. An officer must be alleged to have done something wrong.

In *Warrick*, defense counsel claimed that the arresting officers falsely accused the defendant either because they did not know who had discarded the cocaine or knew somebody else had done so. Defense counsel explained precisely how the officers were alleged to have lied.

In *Hill*, defense counsel's claim that there was insufficient evidence of identification of the defendant was, however, irrelevant to the *Pitchess* motion. Identification was made not by the officers, but by other witnesses, and there were no allegations that the officers had interviewed these witnesses or falsified their statements, or that the shooting had not occurred.

Regardless of whether the witnesses' statements were "self-serving" as defense counsel claimed, *Hill* concludes that defense counsel did not specifically describe any alleged misconduct by the officers.

Thus, a factual dispute alone does not justify disclosure of personnel information related to past dishonesty. Defense counsel must precisely allege what facts reported by the arresting officers constitute lies.

The third criterion of good cause is that defense counsel's version of events must be "plausible." This is where *Warrick* reduces the burden on defendants.

The appellate court, using the standard in effect prior to *Warrick*, found defense counsel's story not "objectively" plausible, that is, plausible to a "reasonable person." It reasoned that the defendant possessing only $2.75 when arrested, and holding an empty baggie, was materially inconsistent with a claim he was attempting to buy cocaine.

The Supreme Court opined that it is not the task of a court to weigh the evidence in a *Pitchess* proceeding. Rejecting the "objectively" plausible standard, *Warrick* defines a plausible scenario of officer misconduct as one that "might or could have occurred."

What does this mean? To begin with, *Warrick* makes clear that the new standard does not lessen the specificity criterion described above.

A threshold inquiry would seem to be whether the version of events is, to borrow from the dissent, "technically feasible." For example, neither officers nor defendants may be described as clairvoyant or in two places at once or violating some other law of physics.

More importantly, to be plausible, the version of events must be, the majority explains, "internally consistent." Although weighing evidence is not allowed, *Warrick* still requires reference to the police report and any witness statements in determining whether allegations of police misconduct are sufficiently plausible.

The problem with the lower court's plausibility determination, *Warrick* states, is that it was based on assumptions lacking any factual basis or relied on inferences that went beyond the facts as described in the police report and defense counsel's declaration.

Reacting to the lower court's reasoning that the defendant having little money and an empty baggie was materially inconsistent with the claim that he was looking to buy cocaine, *Warrick* notes that the police report made no reference to the street price of cocaine and that one

could also ask why a drug seller would have so little cash with which to make change for his clients.

Warrick also notes that defense counsel's scenario conflicts with the police report only in denying that the defendant possessed any cocaine and that he was the one who discarded the cocaine found on the ground.

This analysis suggests that assumptions and inferences may be made if properly grounded in the facts as described in the police report and defense counsel's declaration, and that facts described in the police report, especially if uncontested, may be used to challenge whether exonerating facts described in defense counsel's declaration "might or could have occurred."

For example, if the police report in *Warrick* had documented the price of cocaine as quadruple what the defendant had in his pocket, it appears that such fact could have allowed the court to properly conclude that the allegation that the defendant was looking to buy cocaine was not a scenario that "might or could have occurred" because the money he possessed was not even remotely sufficient to buy the drug.

In opposing a *Pitchess* motion, counsel must therefore hew as closely as possible to the police report and defense counsel's declaration and determine whether uncontested facts or valid inferences make defense counsel's version of events practically impossible.

The fourth criterion is that the discovery sought must support a theory of defense that is logically related to the pending charges. In other words, even if defense counsel's allegation of misconduct is specific and plausible, unless that type of misconduct is relevant to the charges or to an available theory of defense, evidence of past misconduct of this type will not be discoverable.

For example, *Warrick* cites *People v. Hustead*, 74 Cal.App.4th 410 (1999), for the proposition that prior complaints of excessive force by the arresting officer were irrelevant after the charge of resisting arrest was dropped and the remaining charge was evasion of arrest in an automobile.

Similarly, if a defendant attempts to justify battery against an officer by claiming unlawful arrest, prior complaints of excessive force by the arresting officers should be irrelevant because there is no right to use force to resist an unlawful detention. *Evans v. City of Bakersfield*, 22 Cal.App.4th 321 (1994).

Fifth and lastly, if defense counsel's version of events and allegations of misconduct by an officer are specific and plausible, and the alleged misconduct is relevant to the charges or to an available theory of defense, then the defendant entitled to seek discovery of past misconduct by that officer, but only that which is similar to the misconduct described in the motion.

It should therefore be easy to prune boilerplate discovery requests of, for example, information of past discrimination, when the *Pitchess* motion fails to describe any misconduct of this type. But even if defense counsel describes particular officer misconduct, this does not justify discovery of every type of misconduct that falls within a broad category.

For example, *Warrick* found good cause for the discovery of information relating to false arrests, planted evidence, perjury, and falsified police reports, but not to false or misleading officer statements in overtime, medical, or other internal personnel records. And as *People v. Jackson*, 13 Cal.4th 1164 (1996), states, "when a defendant asserts that his confession was coerced, a discovery request that seeks all excessive force complaints against the arresting officer is overly broad."

If all five criteria noted above are satisfied with respect to an officer named in a *Pitchess* motion, then good cause is shown and the motion should be granted as to that officer. The police custodian of records must then bring all "potentially relevant" records to court for an *in camera* review as described in *People v. Mooc*, 26 Cal.4th 1216 (2001). The court then determines whether any records contain information of misconduct similar to the specific misconduct described in the *Pitchess* motion and for which good cause has been shown.

The Evidence Code also prohibits the disclosure of information more than five years old, the conclusions of any investigator, facts so remote as to make disclosure of little or no practical value, or records of an officer who was not present during the arrest. Evid. Code § 1043 *et seq.*

But first things first. Police agency counsel should remind courts presented with *Pitchess* motions that behind the pithy phrase "might or could have occurred" lie meaningful steps mandated by *Warrick* in the determination of the plausibility of alleged officer misconduct and the finding of good cause for discovery of police personnel information.