Task Force on Issuing Search Warrants

State Courts Building, Phoenix [virtual meeting]

Meeting Minutes: August 30, 2021

Members attending: Hon. Clint Bolick, Hon. Christopher Browning, Christina Cabanillas, Hon. Suzanne Cohen, Chief Ken Cost, Hon. Jill Davis, Hon. Karl Eppich, Darrell Hill, Jerry Landau, Professor Sylvia Lett, Major George Manera, Armando Nava by his proxy Jared Keenan, Abril Ruiz Ortega, Sheriff David Rhodes, Professor Kevin Robinson, Primitivo Romero, Benjamin Taylor, Hon. Melissa Zabor personally and by her proxy Hon. Greg Gnepper

Members absent: Anita Escobedo, Kent Volkmer

Guests: Ryan Boyd, Elise Kulik, Joe Clure, Hon. Alma Hernandez, John Thomas, Liana Garcia

AOC staff: Mark Meltzer, Angela Pennington

1. **<u>Call to Order; approval of meeting minutes.</u>** The Chair called the fourth meeting of the Task Force on Issuing Search Warrants ("ISW") to order at 1:02 p.m. He welcomed the proxy and guests. The Chair then asked members to review draft minutes of the July 23 Task Force meeting. Members had no additions or corrections to the minutes.

<u>Motion:</u> A member moved to approve the July 23, 2021 meeting minutes. The motion received a second and it passed unanimously. **ISW 004**

2. **<u>Remarks by Representative Alma Hernandez</u>**. The Chair then introduced Representative Alma Hernandez. Representative Hernandez was the primary sponsor of House Bill 2751, which Task Force members had discussed at their May 14 meeting. The Chair invited Representative Hernandez to share her insights concerning that bill and the work of this Task Force. Representative Hernandez informed members that she has a special interest in criminal justice reform, and that she had reviewed materials on the Task Force webpage prior to appearing today.

Representative Hernandez acknowledged that HB 2751 failed to pass, perhaps in part because the bill was dropped on the last day possible, which limited the time for stakeholder discussions of the bill. The bill was amended after the first round of stakeholder discussions, but the discussions had not been completed and the bill, even with bipartisan support, did not advance as anticipated. Representative Hernandez emphasized the importance of stakeholder discussions, including those with the law enforcement community. Her objective was not simply to get a bill through the Legislature, but to get the bill enacted it a way that fulfilled its initial objectives.

Representative Hernandez appreciated the opportunity to meet with the Task Force today, and she looks forward to sharing Task Force recommendations with her legislative colleagues. The Chair thanked Representative Hernandez for addressing the Task Force, as well as Mr. Landau for arranging her appearance.

3. **Prefatory remarks from the Chair regarding draft documents.** Today's meeting packet included a draft Rule 2.6, as well as a proposed statutory amendment and a draft report to the Arizona Judicial Council ("AJC"). The drafts encapsulate most of the consensus items from previous Task Force meetings. Efforts were made to assure that the members' views and recommendations were incorporated in the drafts, but if they are not adequately and accurately reflected, members should propose revisions to the draft documents.

4. **Discussion of draft Rule 2.6.** The Chair reminded members that the Court has constitutional authority to adopt procedural rules. Regardless of whether the Task Force recommends any statutory amendments, the Court has considerable latitude to prescribe court procedures for substantive statutory provisions by adopting rules. Draft Rule 2.6, which is a proposed new rule in the Rules of Criminal Procedure, was prepared by the Chair and staff with input from Mr. Landau. Members then reviewed each part of the draft rule, beginning with the title.

The proposed title as well as section (a) ("applicability") provide that the rule applies only to applications requesting an unannounced entry or nighttime service. The rule does not apply to search warrant applications that do not include these requests. The draft is tentatively numbered as Rule 2.6. Rule 2, "commencement of criminal proceedings," is the first rule in Part II ("preliminary proceedings") of the Criminal Rules. Because a search warrant occurs before or close in time to the commencement of a criminal proceeding, Rule 2.6, which is currently abrogated, appeared to be an appropriate location for this new rule. Although Rule 2.6 is not an unalterable choice for the location, no one expressed opposition to that location or any alternative number.

Section (b) ("unannounced entry") is a provision that recites what the magistrate must find, based on the application, to authorize an unannounced entry. In subpart (1), the magistrate must find that there are specific facts that demonstrate why an announced entry would endanger a person's safety or result in the destruction of evidence. In subpart (2), if the request is based on potential destruction of evidence, the application must explain the likelihood of destruction of specifically described evidence and the magistrate must weigh that likelihood against the risk to personal safety associated with an unannounced entry. The section provides that the magistrate's findings do not need to be in writing. A discussion of section (b) ensued.

Members expressed concerns with the phrase in subpart (b)(2) requiring that the application explain "the likelihood of destruction of specifically described evidence …." Officers might have a general description of the evidence they are seeking, but they may not have a detailed description. Moreover, A.R.S. § 13-3913 already requires that a search warrant affidavit "particularly" describe the property to be seized, so the use of the word "specifically" described evidence in the draft rule is somewhat redundant. A law enforcement member noted that officers customarily attempt to describe evidence as specifically as possible. Members resolved the concern by modifying subpart (b)(2) to say, "the likelihood of destruction of that evidence."

Another concern with section (b) was that the magistrate's findings did not need to be in writing. Some members opined that memorializing the finding in writing would be useful and would not be burdensome, especially because Arizona courts issue only a limited number of no-knock warrants that would require such a finding. Members considered several options for a writing, most notably a form with checkboxes for each of the findings. On the other hand, a magistrate presented with an application in the middle of the night might not have a form available, and different venues might develop a multiplicity of forms for this purpose, which could be confusing. The Chair suggested adding language to section (b) to the effect that the magistrate's signature on the warrant is confirmation that the magistrate made one or both findings. The Chair invited members to send staff proposed language for any other alternatives. The Chair also will confer with Mr. Landau and staff to develop an alternative for the members to discuss at the next Task Force meeting.

Section (c) is titled "awareness of the request," and provides that the magistrate who is presented with a request for an unannounced entry "must consider the extent to which command level officers in the affiant's agency are aware of the request." The Chair advised that this requirement was the subject of discussions at each of the previous meetings, and this provision is intended to reflect those discussions. The requirement is mandatory ("must consider") but the provision is otherwise flexible. For example, it does not specify how far up the chain of command the request must reach. This will probably depend on multiple factors, including the size of the agency, its command structure, and the urgency of the request. A member asked whether a magistrate who believed the awareness did not go to a high enough command level could deny the application solely on that basis. The general consensus was "yes." Denial on that basis would be discretionary and include the magistrate's consideration of the multiple factors described above, such as the agency's command structure. The member who originally proposed the awareness requirement advised that section (c) met his intended purpose and criteria. That is, the magistrate needs to ask the affiant, "who within your agency is aware of the request," and "what are the command levels of those individuals?"

Section (d) ("safety factors") identifies six specific factors (criminal activity, violence, weapons, security characteristics, hostages, and occupants) and a seventh general factor that allows the magistrate to consider "any other relevant information." The Chair noted that these factors have evolved over the course of the members' discussions. For example, the factors no longer include gang association or membership; although pertinent, gang-related facts could be subsumed under one or more of the other factors. The weapons factor must be considered in connection with the Castle Doctrine, which officers reportedly do already. Task Force members, including law enforcement members, had no objections to the factors identified in section (d).

Section (e) ("nighttime execution"), subpart (1), contains the well-established requirement of showing "good cause why service between 6:30 a.m. and 10:00 p.m. would not be reasonable or feasible." Meanwhile, subpart (2) exempts from that requirement "applications for obtaining blood evidence of alcohol or drug use in a driving under the influence investigation, or to place a global positioning satellite ('GPS') tracking device on a vehicle." A member suggested that a warrant for obtaining DNA evidence be added to the exceptions. After discussion, members proposed modifying the exceptions to include any nighttime warrant application where officers do not require entry into a residence. Members then considered whether "residence" would include other structures, including commercial structures, or vehicles such as a recreational vehicle or camper. See further A.R.S. § 13-3916(B), which authorizes officers to break into "a building, premises or vehicle or any part of a building, premises or vehicle" to execute a warrant. The Chair will modify subpart (e)(2) for further consideration at the next meeting.

Section (f) ("data") is the final section of the draft rule. The draft requires any court where applications for search warrants are presented to "maintain and annually forward to the Administrative Office of the Courts the total number of court-issued warrants for unannounced entry or nighttime service," but "excluding warrants that pertain to a GPS tracking device and to blood alcohol or drug evidence in a driving under the influence investigation." Rather than the draft verbiage concerning exclusions, members agreed that the provision could simply refer to the exceptions contained in subpart (e)(2), and section (f) will be modified accordingly.

Other members asked whether section (f) required collection of adequate data, and suggested including data that would allow a community-by-community assessment of disproportionate impacts of no-knock and nighttime warrants. Although such information would provide a foundation for in-depth research, there were concerns that this would impose additional work on court clerks and could become an unfunded mandate. A member also reported that even tracking the number of no-knock and nighttime warrants, as proposed by section (f), is a potential cost because Arizona's

current trial court case management system does not provide input for these two fields. Another concern was that data for determining disproportionate impacts would probably require a complete review of individual applications and deriving data elements from the applications might involve subjectivity and interpretation of factual issues. A judge member also proposed that the data should include applications that were denied. The judge's proposal raised another subset of issues. First, are denied applications matters of public record? Second, how many of those applications are resubmitted and eventually issued? Maricopa treats a resubmitted application as a new one, but other jurisdictions might not follow a similar practice. (Maricopa also advised that during the month of July, it authorized unannounced entries for five search warrants.)

Absent additional legislative funding or funding from another source, members concluded today's discussion by limiting the data requirement in section (f) to two elements: the total number of court-issued warrants for unannounced entry, and the total number for nighttime service.

5. Proposed amendment to A.R.S. § 13-3916(B). Members then discussed a proposed amendment to A.R.S. § 13-3916(B). The one-word amendment would change the word "shall" to "may," i.e., if the application makes a reasonable showing that an unannounced entry would endanger any person's safety or result in the destruction of evidence, "the magistrate ~~shall~~ may authorize an unannounced entry." The Chair asked if the amendment was desirable, or whether it would be necessary if the Court adopted Rule 2.6. Law enforcement members opposed the amendment. They noted that subjectivity, i.e., discretion, is already inherent in the statute's use of the words "reasonable showing." They also believe that once a law enforcement officer has made a reasonable showing, due process requirements have been satisfied and the officer should rightfully expect the magistrate to authorize the no-knock request. Law enforcement organizations would probably oppose this statutory amendment. If the Task Force report recommends the proposed statutory amendment, it also should note the officers' viewpoint.

6. Draft Task Force report. The Chair advised that the draft report in today's packet will be revised to reflect today's discussions, including agreed-upon and pending modifications to the draft rules. The Chair inquired if members had any other suggestions or comments concerning the draft report. A member responded that an officer who is authorized to serve a warrant at night must still knock and announce, unless the officer has separate authorization for an unannounced entry. The member noted that this comment did not require any change to the report, but it was provided as a potential item for judicial education.

7. **Roadmap.** The next Task Force meeting is scheduled for Friday, September 17, 2021. The Chair advised that the September 17 meeting will be conducted on Zoom and it will begin at 1:00 p.m. The meeting will follow up on various issues raised during today's meeting, and it will include the members' consideration of revised documents for submission to the AJC. The AJC will consider the Task Force report at its meeting on October 21, 2021.

8. **Call to the Public; Adjourn.** Mr. Joe Clure responded to a call to the public and addressed the members.

The meeting adjourned at 2:51 p.m.