Task Force on Issuing Search Warrants

State Courts Building, Phoenix

Meeting Minutes: May 14, 2021

Members attending: Hon. Clint Bolick (Chair), Hon. Christopher Browning by his proxy Hon. Casey McGinley, Christina Cabanillas, Hon. Suzanne Cohen, Chief Ken Cost, Hon. Jill Davis, Hon. Karl Eppich, Anita Escobedo, Darrell Hill, Jerry Landau, Professor Sylvia Lett, Major George Manera, Armando Nava, Abril Ruiz Ortega, Professor Kevin Robinson, Primitivo Romero, Benjamin Taylor, Kent Volkmer. Hon. Melissa Zabor (all members present)

Guests: John Thomas, Liana Garcia, Elise Kulik, Aaron Nash, Regina Ponder, Daniella Lertzman

AOC staff: Mark Meltzer, Angela Pennington, Theresa Barrett

1. Call to Order; welcome from the Chief Justice. The Chair called the first meeting of the Task Force on Issuing Search Warrants ("ISW") to order at 10:00 a.m.

Chief Justice Robert Brutinel gave welcoming remarks that underscored the importance of ISW's work. The Chief Justice observed that no-knock search warrants, which will be ISW's primary focus, are fraught with peril. When events go awry, outcomes can be tragic. To help assure the safety of both officers and the public, the Chief Justice requested ISW's recommendations concerning the factors magistrates should expect applications for no-knock warrants to address. Although eliminating no-knock warrants in their entirety would require substantive legislation, the Court could adopt procedural rules that would codify meaningful requirements for those warrants. An early proposal was that an application for a no-knock warrant be approved by a command level officer, and the Task Force might consider that suggestion. The Chief Justice thanked members for their service, and he looks forward to their recommendations.

2. Member introductions; administrative issues; remarks from the Chair. Following those welcoming remarks, the Chair introduced himself and asked members and guests to introduce themselves. The Chair noted that ISW meetings are recorded and are open to the public.

The Chair then reviewed Administrative Order No. 2021-34, which established the Task Force. He noted language in the Order that requires ISW to make recommendations "to assure that there are adequate safeguards" in the issuance of no-knock and nighttime warrants. The recommendations may propose amendments to court rules or statutes, including amendments that provide "new or modified criteria or standards" for the issuance of these warrants. These recommendations should also address the adequacy

of judicial officer training on these subjects. ISW must submit its report and recommendations to the Arizona Judicial Council ("AJC")—which assists the Court in developing its policies and is chaired by the Chief Justice—by October 21, 2021. If the AJC approves recommendations for Court rules, the recommendations will be followed by a petition requesting those rule amendments. The AJC's approved recommendations for statutory changes will be referred to the legislative group at the Administrative Office of the Courts ("AOC").

A packet of materials for today's meeting included a one-page document titled "Rules for Conducting Task Force Business." These rules specified the number of members needed for a quorum and incorporated the subjects of Task Force decision-making, the use of proxies, and a call to the public.

> **Motion:** A member moved to approve the Rules for Conducting Business. The motion received a second and it passed unanimously. **ISW 001**

The Chair then addressed the members. He noted that considerable work in the Arizona court system is done by committees whose members are volunteers. He expressed his gratitude to ISW members for contributing their diverse backgrounds and expertise and their service in this endeavor. He believes members probably would agree that the status quo could be improved and accordingly, they should be able to propose tangible recommendations. The Chair then reviewed the facts of a search warrant served at the Tucson residence of Jose Guerena a decade ago, during which Mr. Guerena was killed by law enforcement gunfire and that resulted in a subsequent multi-million-dollar civil settlement. The Chair asked whether additional legal requirements could have prevented Mr. Guerena's death, or whether such requirements might prevent other tragedies when warrants are issued in the future.

The Chair observed that legislative enactments create, define, and regulate the rights of citizens. Pursuant to that power, Arizona's legislature has enacted substantive criminal law, including laws regulating law enforcement officers. Arizona's Supreme Court has the authority to apply and interpret those laws. Under the Arizona Constitution, the Court also has authority to promulgate procedural rules for enforcing substantive rights and seeking redress. The Chair asked members to be mindful of the distinctions between substance and procedure during their discussions. In turn, he will monitor the members' proposals to help ensure that those requiring legislation and those that require rules adhere to their respective constitutional boundaries. He added that the content of ISW meetings will be determined by the ideas, experiences, and suggestions that members share during their discussions. He asked members to voice their needs for further research on any topic, or the desirability of inviting stakeholders to address the Task Force at a future meeting.

The Chair concluded with preliminary questions that members might consider during their discussions later today. A.R.S. § 13-3915(B) provides in part that a magistrate "shall authorize an unannounced entry" if the application makes a "reasonable showing" that an announced entry would endanger any person's safety or would result in the destruction of items described in the warrant. Does "reasonable showing" have a distinct legal meaning? And if the application makes a reasonable showing, does the word "shall" mean that the magistrate has no discretion to decline the no-knock request? In comparison, A.R.S. § 13-3917 explicitly provides that a magistrate "may, in his discretion" issue a nighttime warrant "upon a showing of good cause." Are "reasonable showing" and "good cause" synonymous? Would magistrates benefit from clarification of these terms?

The Chair then asked Ms. Cabanillas, who is an experienced instructor on the subject of search and seizure, to review applicable law and practical considerations concerning no-knock and nighttime search warrants.

3. <u>Presentation by Ms. Cabanillas on the law of no-knock and nighttime search warrants.</u> Historically, the law required officers serving a search warrant to knock and announce their presence prior to entering a residence. Ms. Cabanillas reviewed the evolution of that principle during the past 50 years. She explained the holdings in several United States Supreme Court cases, including *Wilson v. Arkansas (*1995), *Richards v. Wisconsin* (1997), *United States v. Banks* (2003), and *Hudson v. Michigan* (2006). She also reviewed a federal statute, 18 U.S.C. § 3109, Art. II, § 8 of the Arizona constitution and pertinent Title 13 statutes, and several Arizona cases, including *State v. Cohen* (1998) and *State v. Roberson* (2010). In summary, there now are multiple justifications for a forcible entry: judicial pre-authorization of a no-knock entry; knocking and forcibly entering after getting no response within a reasonable time; knocking and being refused admittance; or circumstances involving danger or exigency. See further A.R.S. § 13-3916(B), which codifies these scenarios.

Nighttime warrants, like no-knock warrants, are intended to mitigate confrontations; both require a higher showing than other types of search warrants. The Arizona standard for issuing a nighttime warrant is "good cause." There is limited authority on what that means, other than how the standard is applied in individual cases. Older Arizona case law approved nighttime warrants, for example, when drugs were being sold "at all hours of the day and night" but not based on an allegation that "drug sales often occur at night" without a specific showing of a nighttime sale. Some nighttime warrants concern searches of persons or vehicles and don't involve a residence. She further noted that federal authority defining "daytime" is in a court rule, whereas in Arizona "night" is defined by statute. See further section 5 of these minutes, at page 8.

Although the lynchpin of forcible entry is whether it is reasonable, Ms. Cabanillas concluded that statutes and rules can only go so far in establishing what is reasonable. Case law can be significant in ascertaining reasonableness. The standards in this area are general and vague for good reasons, including the application of those standards to a broad range of circumstances and the associated need for flexibility, and to meet the practical needs of law enforcement officers.

The Chair thanked Ms. Cabanillas for her presentation. He observed that ISW cannot rewrite the Fourth Amendment, but it can propose rules or statutory amendments that are more specific or limiting, provided those enactments do not fall below the requirements of federal law. With that, he invited Mr. Landau, the AOC's senior consultant for legislative affairs, and Mr. Volkmer, the Pinal County Attorney, to discuss a bill introduced during the 2021 Arizona legislative session concerning no knock warrants.

4. <u>Presentation by Mr. Landau and Mr. Volkmer on HB 2751.</u> Mr. Landau explained that HB 2751 was sponsored by Representative Alma Hernandez and had several co-sponsors. The bill proposed amendments to A.R.S. Title 13, Chapter 38, Article 8 concerning search warrants. The original bill would have repealed current provisions that allow a magistrate to authorize an unannounced entry and replaced them with provisions requiring a uniformed officer to provide audible notice of the officer's authority and purpose before entry. A subsequent amendment reinstated the current provision allowing an unannounced entry and added eight factors that would permit a magistrate to authorize an unannounced entry. (The first seven factors were the underlying charges, weapons information, gang activity, fortification of the structure, documented violence potential of the suspect or occupants, documented violence potential or calls for service at the address, and a detective's first-hand knowledge of the suspects or target location. The eighth factor was a catchall: "any other factor which a magistrate may consider relevant.") The amended bill also would have required a no-knock warrant, if authorized, to be executed by a special weapons and tactics team ("SWAT"), if practicable. The bill was retained by the Committee of the Whole, and no further action was taken, i.e., the bill died.

Mr. Volkmer further explained that the HB 2751 was informally referred to as the Breonna Taylor bill. The proposed amendments were the result of stakeholder input, but further stakeholder discussion of those amendments led to additional issues such as the following:

- What constitutes a uniformed police officer? Is a SWAT officer dressed in black or camouflage, albeit with police lettering, in a uniform?
- How would these provisions apply in a rural jurisdiction that has a small police force and no SWAT team?

- The proposed amendment that said, "shall be executed by" a SWAT member was ambiguous. Did it mean that the application should be signed by that member, or that the warrant should be served by that member?

Mr. Volkmer noted the challenge of identifying specific factors that would justify a no-knock entry, and that a checklist format, or assigning point values for each factor, would likely be unworkable. Some stakeholders believed that magistrates should be able to use their common sense when determining if a rational basis exists for authorizing a no-knock warrant, and that HB 2751 would lead to increased litigation. Stakeholders anticipated doing further work on this bill during the summer months, but that work was deferred upon learning of the establishment of ISW and pending stakeholder review of ISW's recommendations.

During the ensuing discussion, members observed that although A.R.S § 13-3915 authorizes a no-knock entry to prevent the destruction of evidence, in practice that often is not a basis for the request. Rather, an exception to the no-knock requirement is usually requested for the safety of officers and civilians. Because safety is of prime importance, the requesting officer frequently attempts to gather intelligence about who might be occupying the premises where the search will occur. The intelligence inquiry might consider the presence of children, elderly and incapacitated persons, any occupant who might be on probation, and even pets. If, for example, there are concerns with child occupants, officers might attempt service of the warrant during school hours, when the children are more likely to be out of the home. In some circumstances, officers upon entry provide occupants an opportunity to immediately exit the residence (a "breach and hold"), which could avoid the necessity of a dynamic and confrontational intrusion. One officer member emphasized that his unit customarily evaluates alternative ways it can execute a warrant, and then determines which way would best mitigate dangers to officers and civilians.

Mr. Landau and Mr. Volkmer were asked about the recently enacted Maryland legislation that was included in the meeting materials. The Maryland act is lengthy and prescriptive, and they conjectured that in some respects, it might unduly hinder the process of requesting and executing a no-knock warrant. Mr. Landau added that a list of factors in a statute is rarely exhaustive, and when a statute does contain a list, the list frequently includes the phrase, "including but not limited to …" This language avoids the dilemma of omitting a factor that might be reasonable and appropriate in some situations.

5. <u>Further discussion of the members' experiences, concerns, and ideas.</u> The afternoon session of the meeting included a discussion of issues and suggestions for improving the status quo. The Chair began the discussion by asking for comments on these issues:

- Notwithstanding the word "shall" in A.R.S § 13-3915, should a magistrate have discretion to issue a no-knock warrant when the application makes a "reasonable showing?"
- Are "reasonable showing" and "good cause" appropriate standards? Are they equivalent?
- Are the eight factors enumerated in the HB 2751 amendments useful?
- Should a no-knock request require the approval of a command level officer or a prosecutor?

On that last item, members were generally opposed to a requirement that a prosecutor sign a no-knock request. Prosecutors occasionally review warrant requests and provide guidance to the requesting officer, but they don't sign the applications. A member from a rural county was concerned that a prosecutor might be a considerable distance away, which might impede the process of obtaining a warrant. Another member expressed concern that the requirement could complicate the prosecutor's ability to argue the validity of the warrant. The member, however, supported the concept of approval by a law enforcement supervisor.

A judicial officer member from Maricopa County reported that the local superior court receives about 24,000 search warrant applications annually. These applications cover a range of searches and seizures, including the taking of blood or DNA samples, or searches of cell phones and computers. Most applications are presented to that court electronically, and a magistrate has the opportunity to call the requesting officer, if necessary. The process of electronic submission has the advantage of uniformity in the application template. Emergency warrant requests go to the top of the court's queue. The member advised that the court only tracks a limited amount of data concerning these thousands of requests. It does not track whether applications request no-knock or nighttime exemptions. Mr. Landau's informal survey found few no-knock requests. Research by Professor Robinson, a former assistant police chief, indicated that fewer than a dozen no-knock warrants were served by the Phoenix Police Department over a period of several years. However, another member located an article in a 2013 issue of the *Arizona Daily Star* that found an increasing number of no-knock requests in Tucson during specified years. An officer member opined that the dearth of up-to-date and reliable no-knock data in Arizona might reflect the current rarity of those warrants.

A member then reiterated that no-knock warrants were primarily requested for safety reasons, including, for example, hostage situations or searches related to homicides or significant injuries to officers or others. The member believed that no-knock requests to prevent evidence destruction typically arose in the context of a violent or other serious crime, including child pornography cases or major narcotics investigations. Another

member would be interested in the relative number of no-knock requests based on safety issues versus destruction of evidence; the member believes that a significant number of warrants currently issued in drug cases are no-knock due to concerns about evidence being destroyed. One member suggested that in drug cases, a request based on destruction of the evidence should require fact-specific rather than generic allegations. The Chair observed that the Maryland legislation requires data concerning no-knock requests and thought that tracking similar data in Arizona might be a meaningful ISW recommendation. He also posed whether applications in drug cases should have different requirements than applications for non-drug offenses.

Members considered requirements for judicial training specified in the Arizona Code of Judicial Administration § 1-302(I). A member reiterated the idea of the magistrate asking questions of an officer requesting a no-knock or nighttime warrant; if it isn't already, the member proposed that this topic be included in judicial training. A further discussion ensued about the content of a warrant application; isn't the legal sufficiency of an application determined by what's contained in its "four corners?" Members generally believed that necessary information in support of a no-knock exception should appear within the four corners of the application rather than information the officer supplies to a magistrate during a conversation. (The Maryland legislation requires the application to include, among other items, "an explanation of the investigative activities that have been undertaken and the information that has been gathered to support the request for a no-knock search warrant" and "an explanation of why the affiant is unable to … search the premises using other, less invasive methods.")

Regarding the use of the word "shall" in A.R.S § 13-3915, several members expressed a preference for replacing it with "may." That is, even if an application made a "reasonable showing," the magistrate should still have discretion to decline a no-knock request. Members also discussed the "any other factor" phrase in the amendments to HB 2751. Those who favored the phrase believed that it would allow an officer to include in the application any information the officer thought the magistrate should know, regardless of whether it was pertinent to the specified factors, and that the first seven enumerated factors were not exclusive. Others thought this eighth catchall factor was too broad. One member believed that the eighth factor could open the door for a magistrate filling in gaps in the officer's application rather than evaluating what the application expressly says. Another member thought the process of issuing a no-knock warrant should not involve determining whether specific factors exist, which could become a hyper technical exercise, but rather whether the request is reasonable based on the facts presented.

On the subject of nighttime warrants, a member observed that these warrants don't necessarily involve the danger element that's inherent in a no-knock warrant.

Nevertheless, and similar to the discussion regarding no-knock, a member suggested that a request for a nighttime warrant should provide a reason why it would be safer to execute the warrant at night than during daytime, or that it provide another factually specific rationale for nighttime service. A.R.S § 13-3917 defines "night" as 10 p.m. to 6:30 a.m. Rule 41 of the Federal Rules of Criminal Procedure defines "daytime" as 6 a.m. to 10 p.m. The Maryland act requires execution of a no-knock warrant, absent exigent circumstances, between 8 a.m. and 7 p.m.

6. **Roadmap.** Members expressed interest in reviewing Arizona data concerning search warrants. (A public member also inquired about demographic data in these cases.) A couple members volunteered to look for data within their respective organizations, although they anticipated that the number of data elements might be limited, and that demographic data was probably unavailable.

The Chair proposed dates for the second Task Force meeting. Following discussion, the Chair set the next meeting for the afternoon of Wednesday, June 9, 2021. The second meeting will be virtual. The third and fourth meetings are tentatively set for the afternoons of Friday, July 16 and Friday, August 13.

7. **Call to the Public; Adjourn.** The Chair made a call to the public. Mr. John Thomas, on behalf of the Arizona Association of Chiefs of Police, and Ms. Regina Ponder, on behalf of the National Coalition of 100 Black Women, Phoenix Chapter, responded to the call and addressed the members.

The meeting adjourned at 1:56 p.m.