Task Force on Issuing Search Warrants

State Courts Building, Phoenix [virtual meeting]

Meeting Minutes: July 23, 2021

Members attending: Hon. Christopher Browning, Christina Cabanillas, Hon. Suzanne Cohen, Chief Ken Cost by his proxy Chief Michael Soelberg, Hon. Jill Davis, Hon. Karl Eppich, Anita Escobedo, Darrell Hill, Jerry Landau, Professor Sylvia Lett, Major George Manera, Armando Nava, Sheriff David Rhodes, Professor Kevin Robinson, Primitivo Romero, Benjamin Taylor, Kent Volkmer, Hon. Melissa Zabor

Members absent: Hon. Clint Bolick, Abril Ruiz Ortega

Guests: Aaron Nash, Donna Williams, Jeff Schrade, Paul Julien, Matt Estes, Ryan Boyd, Johannah Uriri-Glover, Regina Ponder, Elise Kulik, Yaegy Park

AOC staff: Mark Meltzer, Diana Tovar, Sabrina Nash, Angela Pennington

1. Call to Order; introductory remarks; approval of meeting minutes. This is the third meeting of the Task Force on Issuing Search Warrants ("ISW"). Mark Meltzer, who serves as Task Force staff, called the meeting to order at 1:02 p.m. Mr. Meltzer advised members that Justice Bolick was unable to attend today's meeting and had requested that staff facilitate the meeting. Mr. Meltzer welcomed Michael Soelberg, who is the Chief of Police for the Town of Gilbert and president of the Arizona Association of Chiefs of Police, as proxy for Chief Cost. Guests introduced themselves. Mr. Meltzer then asked members to review draft minutes of the June 9 Task Force meeting. Members had no additions or corrections to the minutes.

Motion: A member moved to approve the June 9, 2021 meeting minutes. The motion received a second and it passed unanimously. **ISW 003**

2. Presentation by the Education Services Division. Supreme Court Administrative Order No. 2021-34, which established this Task Force, provides, "The Task Force's recommendations shall also address the training of judicial officers to ensure adequate training is provided." Jeff Schrade, the director of the Education Services Division of the Administrative Office of the Courts ("AOC"); Paul Julien, the AOC's judicial education officer; and Matt Estes, an attorney in the Education Services Division, appeared today to share information on current training and to discuss training recommendations. Their presentation was supplemented by more than 150 pages of training materials on search warrants, some of which specifically pertained to no-knock and nighttime warrants, which were included in the meeting packet.

Mr. Schrade began by noting that his division has the responsibility to train judicial officers and other court employees within the judicial branch. Judicial training is

required under the Arizona Code of Judicial Administration § 1-302. New judges upon appointment have computer-based training, which is followed by in-person new judge orientation, or "NJO" (two weeks of NJO for general jurisdiction judges, and three weeks of NJO for limited jurisdiction judges.) Mr. Schrade emphasized that judicial officer training continues after NJO. Attendance at an annual judicial conference, which includes plenary and breakout sessions, is mandatory. His division also offers programs on special topics throughout the year. On-line resources are available on-demand, including the Wendell intranet site that contains bench books on specific areas and a wealth of other reference materials.

Mr. Estes elaborated on the bench books. The bench books currently contain 110 subject-specific chapters, which are regularly updated. In the future, the criminal law bench book could include a richer discussion of search warrants, with additional citations and guides for no-knock and nighttime warrants, or the division could create a new chapter on this specialized topic. Mr. Julien noted that several members of the ISW Task Force have participated in educating new judges. Judge Cohen and Judge Davis serve as chairs for NJO programming, and Judge Eppich and Ms. Cabanillas participate as NJO faculty. Commissioner Zabor, as well as Commissioner Jane McLaughlin (who authored some of the materials in today's meeting packet), have also contributed to judicial education on search warrants. Based on recent discussions with judges, Mr. Julien has begun compiling a list of potential items that future judicial training on search warrants might address, such as:

- Clarification of the standards for issuing a no-knock or nighttime warrant
- Justifications for forcible entry into a residence
- Avoiding "judge shopping," that is, presenting to a judge a warrant application that another judge previously denied
- The extent to which a judicial officer should counsel law enforcement officers on revisions to an application
- The desirability of having the application approved by a high-level supervisor or command officer
- The importance of safety

Mr. Schrade concluded the presentation by expressing his interest in continuing the discussion on no-knock and nighttime warrants and enlisting the subject matter expertise of ISW members and others for expanding the Education Services Division's curriculum and materials in this area. He anticipates integrating ISW's recommendations into future judicial officer training and educational materials, and possibly highlighting the recommendations at a plenary session at the next annual judicial conference. Virtual programming will also facilitate the timely and statewide dissemination of those recommendations.

A member then raised the subject of command level approval of applications, and the ensuing discussion is reported in section 4 of these minutes.

3. Maricopa forms; warrant application scenarios. Commissioner Zabor provided a screen shot, which was included in today's meeting materials, of Maricopa's electronic search warrant application template. The application template includes checkboxes for no-knock and nighttime service requests, and when checked, additional space appears where the requesting officer can provide more information. The application template is similar but not identical to the electronic template for DUI search warrants, which most counties now utilize. Commissioner Zabor added that the court assigns a unique number to each electronic warrant application upon submission and prior to judicial review of the application, which permits the system to track applications that were not approved.

Commissioner Zabor additionally provided a modified "issuance" cover sheet, which was also in the materials and that Maricopa began using earlier this month. The new form includes checkboxes for no-knock and nighttime warrants, which are useful for data collection. She noted that warrants authorizing the placement of a GPS tracking device are customarily issued as no-knock warrants and are included in the no-knock data. A law enforcement member explained that no-knock authority is requested for a GPS tracking device because although the device is affixed to a vehicle's exterior, sometimes officers will stealthily enter the curtilage of private property to attach it. The electronic warrant template does not distinguish no-knock warrants for a tracking device from no-knock warrants for entry into a residence, but Commissioner Zabor is considering adding a check box for GPS tracking warrants to the cover sheet, which would permit data collection for this specific category. She added that the electronic template can already differentiate DUI warrants that are issued for nighttime service. Members agreed that data should not be confounded by aggregating multiple categories. A member inquired if any form allows a magistrate to provide a written explanation of why a no-knock application was not approved. Commissioner Zabor advised that although there is no written explanation, in most no-knock cases the magistrate will have a conversation with the officer concerning the denial. Sometimes the conversation will result in the officer obtaining additional information and resubmitting the application.

Included in the meeting packet were two actual but redacted search warrant applications. One application concerned a drug investigation and requested no-knock and nighttime authority; the other involved a homicide and included a no-knock request. Members were not asked to second guess the magistrates' subsequent issuance of the requested warrants, but rather were asked to comment on whether the applications addressed the factors that members have proposed during their discussions, and whether officer or judicial training could have enhanced the quality of the applications. In the

drug application, a member observed that allegations concerning drug activity at the residence, people coming-and-going, and the occupants' history of violent criminal behavior, were generic rather than detailed. Another member noted that the basis for a no-knock request in the homicide case could have been better specified, although heavy redactions prevented the member from understanding some of the content. The magistrates in both instances might have orally requested and received more information that was not apparent in the written application. Including this additional information in the written submission would be a best practice, because subsequent judicial review is generally limited to what is contained in the written application. Maricopa does not utilize recorded telephonic applications, and if the magistrate has a conversation with the officer, the magistrate customarily directs the officer to add the additional information to the application and resubmit it. Pima routinely does telephonic applications; the recorded telephonic application is transcribed when the return is filed to facilitate subsequent judicial review.

The drug application expressly requested authority for a breach-and-hold, and a member asked whether a breach-and-hold is implicitly included in a no-knock request? Several law enforcement officer members responded. They advised that dynamic, forcible entries by officers without first announcing their presence are now rare because they are inherently dangerous. Dynamic entries usually occur only in situations involving hostages or an active shooter. Instead, the current best practice is that officers attempt to communicate with occupants through a breached door or open window, and then announce their presence and direct the occupants to voluntarily exit the structure. After the occupants have exited, officers will slowly and methodically enter the structure, repeatedly announcing their presence as they progress through the interior. This process enhances everyone's safety. One officer noted that the drug warrant application discussed above included information that the residence under investigation had exterior video cameras. The officer explained that those security cameras were a significant tactical factor—referred to as "countersurveillance"—because the occupants could see the officers approaching and the cameras reduced the advantage of surprise. On another matter, members observed that small, rural departments do not usually request or execute no-knock warrants. Among other reasons, a small department would not have a specialized tactical unit. Instead, those departments typically enlist the assistance of a sheriff's office or the DPS.

4. <u>Continuing discussion of potential consensus items regarding adequate safeguards.</u> Today's meeting packet included redlined and clean versions of the consensus items discussed at the June 9 meeting, which were thereafter modified by the Chair and staff to reflect the members' discussions at that meeting. Each consensus item now has a subject heading. Some items, such as the item on discretion, were moved or consolidated with other items. The content of several items was revised. The item

regarding firearms now refers to the number and type of weapons, and whether an occupant used or threatened the use of a weapon during criminal activity. Membership or affiliation with a gang was revised to refer to activity by a "criminal street gang," a term defined in A.R.S. § 13-105(8). Characteristics of the structure now includes references to guard dogs, security screens or window bars, and security cameras or other security devices.

The discussion earlier in today's meeting during the Education Services' presentation concerned what is now consensus item 10, "approval." The item provides in part that an application for a no-knock entry or nighttime service "has been approved by a command level officer or the highest-level supervisor who is available." An officer member emphasized that when presented with a no-knock application, the magistrate should ask the applicant, "who within the agency is aware of the request?" Reports concerning the Breonna Taylor warrant indicated that the highest-level individual with awareness of the no-knock request was a sergeant, and in a department of that size, it should have been a higher-level officer.

Other officer members believed that the application should focus on probable cause to issue the warrant and, if requested, the grounds for a no-knock entry or nighttime service. The officers indicated that most Arizona agencies already ensure command-level awareness of a no-knock request, and therefore it's not a piece of information that should be mandated for inclusion in the application. The officers, however, did not oppose the magistrate's inquiry to confirm that awareness. The officer who initiated this suggestion agreed that command-level approval did not need to be expressly stated in the application. Rather, the critical element is awareness. The level of the desired awareness would depend on the size of the agency. Awareness would establish that a no-knock request had gone to the appropriate level in the organization's chain of command and that higher levels in the organization understood the necessity of the no-knock request. Put simply, awareness would establish that the organization as a whole "knows what it's doing." A magistrate's inquiry about organizational awareness of a no-knock request could be a best practice and the subject of judicial training.

Members had concerns with consensus item 2 ("safety"), which requires that a magistrate's primary consideration for issuing a no-knock or nighttime warrant be the protection of officer and civilian safety. Many nighttime warrants are issued in DUI cases, and item 9 ("exceptions") provides that "nighttime service of a warrant for the extraction of blood alcohol evidence, or to place a tracking device, is presumptively permitted …." Members discussed modifying item 2 to exempt DUI warrants; however, officer safety is implicated in a request to place a GPS tracking device, which usually includes a no-knock request. Proposed item 2 connects nighttime warrants and officer safety, but officer safety is usually not an issue with nighttime warrants. Nighttime DUI

warrants are particularly important for promptly obtaining perishable evidence. Members concluded that consensus items regarding no-knock requests and those regarding nighttime warrants should be separated and not overlap.

Another member disfavored the term "good and sufficient reasons" in item 1 ("discretion"). That term has not been previously articulated as a standard by either statute or case law. (Pertinent Title 13 statutes refer to "probable cause" for issuing a warrant [A.R.S. § 13-3913]; a "reasonable showing" for authorizing an unannounced entry [A.R.S. § 13-3915]; and "good cause" for nighttime service [A.R.S. § 13-3917]. See further A.R.S. § 13-3916(B)(4), which refers to the belief of a "reasonable officer" that announcing would endanger safety or result in the destruction of evidence.) The phrase "good and sufficient reasons" was used in the draft to provide identical standards for issuing a no-knock warrant or authorizing nighttime service. However, several members believed "good and sufficient reasons" was vague and subject to interpretation, and that magistrates would apply the standard inconsistently. Another member contended that the standards should be different, and that nighttime service, which is primarily used for preserving evidence, is a lesser standard. Commissioner Zabor noted that Maricopa issued 135 nighttime warrants last week in DUI cases, and because these are rather routine requests, she suggested that a requirement of supervisor awareness might be unnecessary. These are additional reasons why the next version of the consensus items should separate no-knock and nighttime requests.

Item 6 ("safety factors"), subpart (b) concerns the presence of weapons. A member proposed adding the term "prohibited possessor" to this subpart. Another member suggested adding the word "known" in this subpart so the phrase would be "any known occupant." Members also discussed item 3 ("facts"), which would require a no-knock or nighttime application to include "reliable, fact-specific information," and the magistrate to "give more weight to detailed facts, including reliable hearsay, than to general, conclusory allegations." Some conclusory allegations, however, might be appropriate and useful. A member noted the absence in items 1 and 3 of a reference to the magistrate being "satisfied" when presented with the application. (See A.R.S. § 13-3915(A).) There was also concern that allegations in an application would be taken at face value, e.g., if the application alleged that an occupant was a prohibited possessor, should the magistrate automatically issue a no-knock warrant? There was a similar concern regarding factor 6(c) regarding gangs. The revised factor focuses on the nature of street gang activity rather than the actors, but some members continued to find the factor problematic.

The discussion concluded with the following question. If dynamic no-knock entries are used only in hostage or active shooter scenarios, aren't those both exigent circumstances that would justify a forcible entry without a warrant? Put differently, why

is there any need for no-knock warrants? Officer members agreed that circumstances meriting a no-knock entry were exceptional, but those circumstances continue to occur, and it would not be prudent to eliminate a judge's ability to issue no-knock warrants. No-knock authorizations also allow officers the option of using less confrontational methods of entry, such as breach-and-hold or surround-and-announce.

There are two collateral matters. First, a member noted the desirability of proposing an amendment to A.R.S. § 13-3915(B). The current verbiage requires a magistrate to issue a no-knock or nighttime warrant ("on a reasonable showing…, the magistrate shall authorize an announced entry") and removes the magistrate's ability to exercise discretion. The member suggested that ISW consider at its next meeting an amendment to the statute that replaces "shall" with "may." Second, a judge member noted that the warrants discussed in the application scenarios (item 3 of these minutes) contain what appears to be standard language permitting an extensive search of electronic devices. The member asked whether these blanket authorizations were appropriate, or if they should be limited in scope in the absence of a specific rationale for an expansive search. Members deferred a discussion of this question.

5. Roadmap. The ISW's discussions lay the foundation for responding to a directive in Administrative Order No. 2021-34, that the Task Force "may propose amendments to Arizona court rules and statutes …, including amendments that provide new or modified criteria or standards for the issuance of no-knock or nighttime warrants." Based on these discussions, the Chair and staff will prepare draft rules and proposed statutory amendments for the members' consideration at the next meeting. The final versions of those documents will inform the Task Force's report, which the Arizona Judicial Council will consider at its October 21, 2021 meeting. Accordingly, the Task Force report should be finalized and submitted no later than September 27. Three additional meetings are contemplated, and the following meeting dates were proposed:

Meeting #4: **Tuesday, August 17**
Meeting #5: **Monday, August 30**
Meeting #6: **Friday, September 17**

Upon inquiry, it appeared that a quorum of members would be available for each of these meetings, and members should add these dates to their calendars. Members are encouraged to send a proxy if they cannot attend a meeting. The Chair will determine the time of day for these meetings, and whether the meetings will be virtual, in-person, or hybrid.

6. Call to the Public; Adjourn. There was no response to a call to the public. The meeting adjourned at 2:56 p.m.