

Task Force on Issuing Search Warrants
State Courts Building, Phoenix [virtual meeting]

Meeting Minutes: June 9, 2021

Members attending: Hon. Clint Bolick (Chair), Hon. Christopher Browning, Christina Cabanillas, Hon. Suzanne Cohen by her proxy Hon. Patti Starr, Chief Ken Cost, Hon. Jill Davis, Hon. Karl Eppich, Darrell Hill, Jerry Landau, Professor Sylvia Lett, Major George Manera, Armando Nava, Abril Ruiz Ortega, Sheriff David Rhodes, Professor Kevin Robinson, Primitivo Romero, Benjamin Taylor, Kent Volkmer. Hon. Melissa Zabor

Members absent: Anita Escobedo

Guests: John Thomas, Shawn Madsen, Liana Garcia, Elise Kulik, Brandon Macken, Yaegy Park, Marie Isaacson

AOC staff: Mark Meltzer, Angela Pennington

1. **Call to Order; introductory remarks from the Chair; approval of meeting minutes.** The Chair called the second, and first virtual, meeting of the Task Force on Issuing Search Warrants (“ISW”) to order at 1:01 p.m. The Chair welcomed Judge Patti Starr, presiding criminal judge in Maricopa County, appearing as proxy for Judge Cohen. The Chair also introduced David Rhodes, the Yavapai County Sheriff, who the Chief Justice appointed to ISW on May 26, 2021 by entry of Administrative Order No. 2021-80. The Chair reviewed materials in the meeting packet that are further described in sections (2) and (3) of these minutes. A supplement to the packet contained a report from Brandon Macken, Mr. Landau’s extern, regarding a ballot measure approved by voters last month in Pittsburgh, Pennsylvania. The Pittsburgh measure, among other things, precludes unannounced entries during the execution of search warrants. The Chair then directed members to draft minutes of the first ISW meeting on May 14. Members had no additions or corrections to the minutes.

Motion: A member moved to approve the May 14, 2021 meeting minutes. The motion received a second and it passed unanimously. **ISW 002**

2. **Consideration of locally available search warrant data.** The Chair invited Professor Lett, Chief Cost, and Commissioner Zabor to present their respective materials in the meeting packet.

Professor Lett had briefly referred to the September 13, 2014 *Arizona Daily Star* article during the May 14 ISW meeting. The article, which was written by a journalist who reviewed Tucson Police Department search warrants, noted an increase in the percentage of no-knock warrants served by the T.P.D. SWAT team, from 2% of all search warrants served during 2001 through 2004, to 75% of search warrants served

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during 2012 and 2013. Professor Lett cautioned that she did not have details concerning the journalist's methodology or whether the data had been verified.

A one-page summary of anecdotal information compiled by Chief Cost identified seven incidents between 2015 and 2021 where evidence of sex-related crimes was destroyed during the execution of knock-and-announce warrants. (Chief Cost also referred to these warrants as "surround and call.") It appears that most of the destroyed evidence was in electronic form, e.g., on cell phones or computers. A member asked whether the destroyed evidence might be available on a server or in the cloud. At least with destroyed phones, however, the devices at issue are frequently disposable or "burner" phones that lack network functionality. One member opined that given the number of sex offenses, the incidence of evidence destruction appeared to be comparatively low. Another member commented that drawing bright line rules concerning destruction of evidence might be impractical because actual situations are more nuanced. Members generally agreed to preserve the option of authorizing unannounced entry to prevent evidence destruction, but they might consider appropriate, generic requirements for issuing a no-knock warrant on this basis. Chief Cost noted that he had requested information concerning evidence destruction in only the limited category of sex offenses; he intends to continue gathering information involving evidence destruction during execution of knock-and-announce warrants in other case types.

Commissioner Zabor provided several years of Maricopa search warrant data and exemplar forms. Her e-warrant summary appeared to validate the members' general discussion during the May 14 meeting. Her summary showed that about 60% of DUI warrants, and about 33% of non-DUI warrants, were issued as nighttime warrants. In addition, 1.6% of the non-DUI warrants were issued as no-knock warrants. Members agreed that a warrant that permits an unannounced entry is not always executed in that manner. An officer member advised that executing a no-knock warrant involves a "game-time" decision, that is, the decision whether to proceed with a no-knock entry is made at the scene. Officers proceed without knocking only when not knocking or announcing is actually indicated. Another officer member advised that his unit recently went to a residence to execute a no-knock warrant but upon arrival, they found that the front door was partially open. Officers then made verbal contact with the occupant through the door opening, the occupant voluntarily exited the residence, and there was no need to forcibly enter. One officer member clarified that a breach-and-hold, which involves a forcible opening of a door without officers immediately entering into the residence, is considered a no-knock entry. A public member subsequently commented that when officers execute a no-knock warrant, they typically take additional safety precautions, such having an emergency medical vehicle on-site and parking marked police units in front of the residence to heighten the occupants' awareness of a police presence.

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The Maricopa forms included a request for expedited review and a cover sheet. The request for expedited review is completed by the requesting agency; the issuing magistrate completes the cover sheet. Commissioner Zabor observed that although a warrant application does not require a supervisor's signature, the expedited review form, which allows a request to go to the front of the court's queue, does require that signature. There is no checkbox on the expedited review form for a no-knock warrant, but members discussed the possibility of adding one. An alternative cover sheet displays a potential modification that would facilitate tracking of nighttime and no-knock data by adding checkboxes for these elements in the lower left margin of the form. A drawback of the Maricopa form is that it's utilized only in Maricopa County. A member observed that while A.R.S. § 13-3915(C) includes a warrant form, A.R.S. § 13-3918, which governs the return, does not prescribe a form. The member suggested that it might be advantageous to create a statewide form for a return, possibly adopted by an administrative order. The statewide return form could include checkboxes that would indicate whether the warrant was served at night or was served without knocking and announcing. Some warrants are issued yet not served, and those warrants don't generate a return, but that would not affect the ability to track data for warrants that are served. Commissioner Zabor and Judge Starr will follow up on potential form changes that could facilitate data collection.

3. **Discussion of potential consensus items.** Members then considered a list of proposed consensus items drafted by the Chair and staff. The 3-page list identifies potential features for requesting and issuing no-knock and nighttime search warrants. The list incorporates concepts that members discussed at the May 14 meeting; some but not all of the factors enumerated in HB 2751; and the recent Maryland legislation, which was included in the May 14 meeting packet. The Chair advised that items on which members have consensus will help determine whether ISW should recommend statutory amendments, rule amendments, or modifications to court policies or practices.

The draft consensus list contains five major headings: "generally" (items 1 through 4), "unannounced ('no-knock') entry" (items 5 through 9), "nighttime service" (items 10 and 11), "approval" (item 12), and "data" (item 13). Item 1 emphasizes the primary consideration of safety. Under item 2, a magistrate must weigh an application for a no-knock warrant to prevent destruction of evidence against safety considerations. Item 3 specifies that a magistrate has discretion to issue a no-knock or nighttime warrant, and would clarify that issuance is not mandatory. Item 4 requires the application to include "reliable, fact-specific information."

In the no-knock section, item 5 would require the application to include an explanation of the agency's investigative activities and "information the agency has gathered that specifically support[s] the request for a no-knock entry." Item 6 would require the application to address the identity and characteristics of the occupants of the place to be searched. The list of twelve factors in item 7 ("an application for a no-knock

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search warrant should address applicable safety factors”) is not exclusive. Item 8 expressly contains the “non-exclusive” qualification and says that “the magistrate’s decision to issue a no-knock warrant should be based on an overall showing of good and sufficient reasons.” This item would not require a magistrate to make factual findings about whether particular factors exist. Current Arizona statutes governing search warrants do not identify factors that merit the issuance of a no-knock warrant, and these factors would be useful for the issuing magistrate.

Item 9 provides that an application for a no-knock warrant based on destruction of evidence “should describe such evidence and explain why imminent destruction of the evidence is possible or likely absent an unannounced entry.” Item 10 would require an application for nighttime service to explain why daytime service would not be reasonable or feasible; item 11 proposes exempting DUI warrants from that requirement. Supervisor or command level approval of the application for a no-knock or nighttime warrant would be required under item 12. Item 13 would modify search warrant application forms to allow the tracking of data for no-knock and nighttime warrants. In light of the earlier discussion at today’s meeting, this item could include a reference to using search warrant returns for tracking the data.

A discussion ensued on individual items. Item 1 specifies that a magistrate’s primary consideration in issuing a no-knock or nighttime warrant is whether issuance “will enhance the safety of officers and civilians.” A member suggested that the word “enhance” was inapt, and after discussion, members changed it to “protect.” Item 1 and other items refer to a “no-knock” warrant. Members observed that the term “no-knock” is not used in Arizona statutes. (A.R.S. § 13-3915 refers to an “announced entry” and an “unannounced entry.” A.R.S. § 13-3916 requires “notice of the officer’s authority and purpose” at the place to be searched.) “No-knock,” however, is an informal term and in the vernacular, it means an “unannounced entry.” If ISW proposes statutory amendments, they should consider using the more formal term, but for ISW discussions, “no-knock” and “unannounced entry” have equivalent meanings.

A few of the proposed safety factors that a no-knock application should address (item 7) generated considerable discussion. The first such factor was 7(b): “weapons that the requesting agency reasonably believes are at the place to be searched.” On the one hand, when an occupant possesses a weapon, it creates a potential danger to officers and other occupants. On the other hand, because many Arizonans own guns, some members believed that the presence of a weapon should not be a per se safety factor. One member noted that Jose Guerena, a former Marine whose death during the execution of a no-knock warrant was described in the ISW resource materials and at the May 14 meeting, was presumably a law-abiding citizen, notwithstanding his ownership of a firearm. Members discussed whether qualifying this factor by including information concerning

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the number of weapons would be appropriate, but some believed that a homeowner who had multiple weapon could own them for legitimate reasons and that this alone should not implicate a safety concern. They also considered distinguishing the type of weapon, e.g., a pistol versus an automatic weapon, but members generally agreed that that distinction would not be dispositive. Even a single pistol can be used for a shootout, hostage taking, or to evade capture. A judge member proposed that whether the presence of firearms was a safety concern could be addressed by the officer who is applying for the warrant, and the magistrate would determine the weight given to the factor.

Factor 7(c) is “gang or group affiliations of the occupants.” One member contended that neither gang membership nor affiliation with a gang should, by themselves, serve as justification for an unannounced entry, and that “group affiliations” in particular was a nebulous term. Another member thought gang affiliation was a reasonable factor because gang activity is often violent. A member suggested that if factor 7(c) implied a connection between gangs and violence, then other factors—such as factor 7(d), “any history of violence of any occupant” — were sufficient. Some members, however, opined that factor 7(d) — a “history of violence” — was also vague. Like the discussion concerning firearms, members observed that the application of these factors would be specific to the occupants and would vary based on the individuals and the circumstances involved in an actual situation.

Members discussed item 8, quoted above, which provides that the factors are not exhaustive and that issuing a no-knock warrant should be based on “good and sufficient reasons.” One member characterized the factors as “guidance,” and cautioned against using the factors as a checklist. A judge member agreed with this comment and added that the factors should not be used as a “scorecard.” The judge member thought the factors were useful, that no factor was dispositive, and that a magistrate should review the totality of circumstances and exercise discretion when presented with a no-knock warrant application. A member asked that ISW consider the safety factors in conjunction with the “castle doctrine” (see, e.g., A.R.S. § 13-404 on justification.) An officer member responded that officers who execute these warrants are indeed mindful of the castle doctrine, and they presume that every household has a firearm. The member observed that officers take care to avoid any occupants being shot as a result of being startled by the officers’ presence. Moreover, officers are selective in applying for no-knock entries, and some agencies already have lists similar to the consensus list presented today. Another officer noted that the initial version of HB 2751, in addition to being introduced without prefatory law enforcement input, would have prohibited no-knock warrants in any situation, and that prohibition would have deprived law enforcement of a necessary albeit infrequently used tool.

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Item 9 concerned destruction of evidence. As noted earlier, a large percentage of DUI warrants require nighttime service, as do warrants requesting DNA samples or to affix a GPS tracking device. An application for nighttime service might be combined with a no-knock request, but usually it is not combined, and members should consider nighttime search warrant applications as an independent issue.

Members also discussed item 12, which would require an application for a no-knock entry or nighttime service to show that the application “has been approved by an attorney advisor, a command level officer, or the highest-level officer supervisor who is available, or indicate why such approval was not requested or obtained.” One member asked whether “attorney advisor” meant a prosecutor or an attorney advisor within a law enforcement agency. An officer member observed that execution of a search warrant is a dynamic police event, and although attorneys can provide legal guidance when officers apply for warrants, attorneys are not trained in police tactics. Search warrant execution tactics are the responsibility of the requesting officer. The officer member reminded members that it is the officer, rather than the attorney, who is responsible for the outcome if execution goes wrong, and therefore the officer believed that the attorney’s approval would be inappropriate and unnecessary.

Law enforcement members also disfavored this item because they considered it restrictive. An officer in a remote assignment might have difficulty reaching a supervisor, who can be a considerable distance away. This item, however, would permit the requesting officer to note circumstances of remoteness and distance in the application. Another member observed that magistrates would need training on which circumstances would excuse the supervisor approval requirement. Regardless, some members considered the requirement of a supervisor’s signature to be an artificial roadblock that lacked substantive significance. One member also suggested that “command level officer or the highest-level supervisor who is available” was vague. Another member proposed an alternative that would permit the magistrate to consider the absence of a supervisor’s signature in deciding whether to grant the request, although that alternative lacked support. The Chair requested that members be prepared to offer other phrasing options for this item at the next meeting.

4. **Roadmap.** The Chair anticipates presenting a revised list of consensus items at the next meeting that reflects today’s discussion. He also invited the members to submit additions or revisions to the list and agreed that modifications to the initial list are warranted. He would like to review any additional data that might be available at the next meeting. He also requested a presentation from the AOC Education Services Division on judicial training regarding search warrants, including training that’s offered at new judge orientation and during subsequent educational events. He noted that

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judicial training is essential inasmuch as current statutes provide only minimal guidance regarding the circumstances that merit issuance of no-knock and nighttime warrants.

The Chair set the next meeting for Friday, July 23, 2021, from 1:00 p.m. to 3:00 p.m. The next meeting will be virtual.

5. **Call to the Public; Adjourn.** The Chair made a call to the public. Mr. Shawn Madsen on behalf of the Fraternal Order of Police responded to the call and addressed the members.

The meeting adjourned at 3:01 p.m.