

Task Force on Issuing Search Warrants

Meeting Agenda

Monday, August 30, 2021

1:00 p.m. to 4:00 p.m.

This is a Virtual Meeting

Telephone number: **877-853-5247**, Access Code: **934 9625 4369**

<https://zoom.us/j/93496254369>

Item no. 1	Call to Order Introductory remarks	<i>Hon. Clint Bolick</i>
Item no. 2	Approval of the July 23, 2021 meeting minutes	<i>Justice Bolick</i>
Item no. 3	Comments from Representative Hernandez	<i>Hon. Alma Hernandez</i>
Item no. 4	Discussion of a draft report to the Arizona Judicial Council, including a proposed statutory amendment and a proposed criminal rule	<i>All</i>
Item no. 5	Roadmap <ul style="list-style-type: none">• Identification of items and issues for the fifth meeting• September 17, 2021: Next Task Force meeting• September 27, 2021: Anticipated date of submitting the final Task Force report for distribution to members of the Arizona Judicial Council• October 21, 2021: Chair's presentation of the Task Force report to the Arizona Judicial Council	<i>All</i> <i>Justice Bolick</i>
Item no. 6	Call to the Public Adjourn	<i>Justice Bolick</i>

The Chair may call items on this Agenda, including the Call to the Public, out of the indicated order.

Please contact Mark Meltzer at (602) 452-3242 with any questions concerning this Agenda.

Persons with a disability may request reasonable accommodations by contacting Angela Pennington at (602) 452-3547. Please make requests as early as possible to allow time to arrange accommodations.

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

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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.

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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

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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. Continuing discussion of potential consensus items regarding adequate safeguards. 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

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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

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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

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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.

1. Introduction.

Search warrants are an essential feature of law enforcement, but in some circumstances, they can lead to unfortunate and even tragic outcomes. Supreme Court Administrative Order No. 2021-34 noted that while there are few no-knock and nighttime search warrants issued in Arizona, those warrants in particular “can create a dangerous situation for both law enforcement and citizens,” and “when even one situation goes badly, it can seriously impact the public’s trust in the justice system.” The Court’s Order accordingly established a Task Force on Issuing Search Warrants. The Order directed the Task Force to review the process for issuing no-knock and nighttime search warrants in Arizona and to make recommendations to ensure that there are adequate safeguards in place for their issuance.

The Task Force held five meetings between May and September 2021. Its members represent a broad spectrum of stakeholder interests. Members include judges at all levels of Arizona courts, court clerks and a court administrator, a senior legislative consultant for the Administrative Office of the Courts (“AOC”), state and federal prosecutors, defense counsel, an attorney for the American Civil Liberties Union, professors from the University of Arizona law school and Arizona State University, and command level law enforcement representatives from a municipality, a sheriff’s office, and the Department of Public Safety.

Before their first meeting, members reviewed a variety of materials, including federal and Arizona cases and statutes, online videos, news articles, and recent legislation from other jurisdictions. At their first meeting, members heard a presentation on pertinent federal and Arizona case law and statutes concerning no-knock and nighttime search warrants. See Part 2 of this report.

Preliminary information indicated that Arizona courts maintained no data concerning search warrants. During the course of these meetings, however, members learned that Maricopa County has maintained some data for several years. See Part 3 of this report. That data informed the Task Force’s subsequent recommendations.

Members also considered House Bill 2751 at their first meeting. The bill was introduced during the 2021 regular session, but it was not enacted. This bill sought amendments to Title 13 statutes concerning the grounds for an unannounced¹ entry into

¹ A.R.S. § 13-3915 refers to an “announced entry” and an “unannounced entry.” Under A.R.S. § 13-3916, the announcement requires “notice of the officer’s authority and purpose” at the place to be searched. Arizona statutes do not use the term “no knock.” “No knock,” however, is an informal term and in the vernacular, as well as in this report, it has the equivalent meaning as an “unannounced entry.”

a dwelling and the manner of execution of no-knock warrants. See Part 4 of this report. At a subsequent meeting, a team of individuals from the AOC's Education Services Division informed members about judicial education concerning search warrants. Task Force recommendations concerning judicial education are in Part 6 of this report.

At virtually every meeting, Task Force members worked on developing consensus. This report contains the members' consensus recommendations on three subjects: a statutory amendment, a proposed new criminal rule, and judicial education.

Task Force members were aware of the death of Breonna Taylor during the execution of a nighttime search warrant in Louisville, Kentucky in March 2020. Closer to home was the death of Marine Corps veteran Jose Guerena at his Tucson home in 2011 during the execution of a daytime, no-knock warrant, which was captured on videotape and that members discussed in some detail.

Law enforcement officer members informed the Task Force that police tactics concerning the service of no-knock search warrants have changed over time. A team of SWAT officers forcibly breaking down a door and firing flash grenades, i.e., a "dynamic entry," may be more common in other jurisdictions², but that scenario is now an exceptionally rare occurrence in Arizona. Arizona officers now are more likely to perform a breach-and-hold, that is, a less-confrontational method of access whereby officers breach a door or window and verbally direct occupants to voluntarily exit the residence before officers enter.³ Law enforcement agencies on their own initiative have recognized that officer and civilian safety during the execution of search warrants is a paramount consideration, and execution of no-knock warrants are planned accordingly. Tragic outcomes are in no one's interest.

2. Current law on search warrants.

In addition to the United States and Arizona constitutions, Arizona Revised Statutes Title 13, Chapter 38, Article 8, provides the foundation for Arizona search warrant requirements. The starting point is that any application for a court-authorized

² A March 18, 2017 article in the [New York Times](#) reported that many Utah police departments during 2014 and 2015 "use[d] dynamic entry almost by default," and that about 40 percent of the served warrants were no-knocks, usually for drugs and usually at night. More recently, an April 15, 2021 article in the [New York Post](#) stated that 1,144 of 1,815 search warrants approved by the courts last year-- or more than 60 percent -- were no-knock.

³ A variation of this method is a "surround-and-call," which similarly seeks the voluntary exit of the occupants from the residence before officers enter the structure.

search warrant must be supported by probable cause. See A.R.S. § 13-3915, which provides:

No search warrant shall be issued except on probable cause, supported by affidavit, naming or describing the person and particularly describing the property to be seized and the place to be searched.

Other statutes govern no-knock and nighttime warrants. A.R.S. § 13-3915(B) concerns no-knock warrants:

On a reasonable showing that an announced entry to execute the warrant would endanger the safety of any person or would result in the destruction of any of the items described in the warrant, the magistrate shall authorize an unannounced entry.

A.R.S. § 13-3917 further provides for nighttime service.

Upon a showing of good cause therefor, the magistrate may, in his discretion insert a direction in the warrant that it may be served at any time of the day or night. In the absence of such a direction, the warrant may be served only in the daytime. For the purposes of this section night is defined as the period from ten p.m. to six-thirty a.m.

Historically, the law required officers serving a search warrant to knock and announce their presence before entering a residence. That principle has evolved during the past 50 years. The Task Force reviewed 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). It also reviewed a federal statute, 18 U.S.C. § 3109, Art. II, § 8 of the Arizona constitution, other pertinent Title 13 statutes, and several Arizona cases, including *State v. Cohen* (1998) and *State v. Roberson* (2010). Two U.S. Supreme Court cases are particularly notable. *Richards v. Wisconsin* excused a failure to knock if officers had a reasonable suspicion it would be dangerous to officers or others, if it would be futile to do so, or if it might result in the destruction of evidence. *Hudson v. Michigan* determined that officers' failure to comply with knock-and-announce requirements did not require suppression of the evidence obtained during the subsequent search. See further *State v. Roberson*, 223 Ariz. 580 (App. 2010), which held that neither the Fourth Amendment nor Arizona's Constitution required the suppression of evidence obtained in violation of the knock-and-announce requirement.

In summary, there now are multiple justifications for officers' forcible entry into a residence or other structure: (1) judicial pre-authorization of a no-knock entry in a search warrant; (2) arriving with a search warrant, knocking and announcing the presence and purpose of the officers, and forcibly entering after getting no response

within a reasonable time; (3) arriving with a search warrant, knocking and announcing, and being refused admittance; or (4) circumstances involving danger or exigency. See further A.R.S. § 13-3916(B), which codifies these scenarios as follows:

B. An officer may break into a building, premises or vehicle or any part of a building, premises or vehicle, to execute the warrant when:

1. After notice of the officer's authority and purpose, the officer receives no response within a reasonable time.
2. After notice of the officer's authority and purpose, the officer is refused admittance.
3. A magistrate has authorized an unannounced entry pursuant to section 13-3915.
4. The particular circumstances and the objective articulable facts are such that a reasonable officer would believe that giving notice of the officer's authority and purpose before entering would endanger the safety of any person or result in the destruction of evidence.

Nighttime warrants, like no-knock warrants, require a higher showing than other types of search warrants. The Arizona standard for issuing a nighttime warrant is "good cause." A significant percentage of nighttime search warrants don't involve the search of a residence, particularly warrants that request the extraction of blood evidence in a DUI investigation or the placement of a global positioning satellite ("GPS") tracking device on a vehicle.

3. Data.

Maricopa County Superior Court data for the most recent fiscal year, FY 2021, shows that 24,023 search warrants were requested electronically,⁴ by fax, or by walking in. That court issued a total of 23,009 search warrants during that fiscal year. (It declined to issue about 975 warrant requests, or about 4 percent of the total requested.)

⁴ Most search warrant applications to the Maricopa County Superior Court, and virtually all DUI warrants, are presented electronically. The process of electronic submission has the advantage of uniformity in the application template. A reviewing magistrate has the opportunity to call the requesting officer, if necessary.

The Maricopa data on electronic warrant applications was more informative than its data on faxed and walk-in applications; among other things, the electronic data distinguished warrants in DUI and non-DUI cases. Approximately 61 percent of the issued DUI warrants authorized nighttime service. About 34 percent of the non-DUI electronic warrants also authorized nighttime service. For the non-DUI electronic warrants – 40 out of 2,453, or 1.6 percent – authorized an unannounced entry. This relatively low number is consistent with anecdotal reports indicating that Arizona law enforcement agencies request comparatively few no-knock search warrants.

A police department's informal survey revealed a half dozen incidents between 2015 and 2018 involving sex-related crimes where evidence was destroyed during the service of knock-and-announce warrants. Much of the destroyed evidence was in electronic form, i.e., on a cell phone or computer. This information supported the Task Force's decision to include destruction of evidence as a viable basis for authorizing an unannounced entry.

4. House Bill 2751.

House Bill 2751 was sponsored by Representative Alma Hernandez and had several co-sponsors. It was informally referred to as the Breonna Taylor bill. The bill proposed amendments to A.R.S. Title 13, Chapter 38, Article 8 concerning search warrants. The original version of the bill would have repealed current provisions that allow a magistrate to authorize an unannounced entry⁵ 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 to House Bill 2751 would have reinstated the current statutory provision allowing an unannounced entry. The amendment added eight factors that would permit a magistrate to authorize an unannounced entry. The first seven factors included 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

⁵ There have been calls for the abolition of no-knock warrants. See, for example, [Stop the Deadly "No-Knock" Raids | StoptheDrugWar.org](#). Some states have banned these warrants, either statutorily or by court decision, including Virginia, Oregon, and Florida. Kentucky considered a statutory ban after Breonna Taylor's death. Some cities have precluded or limited the use of no-knock warrants, including Louisville, Kentucky, Columbus, Ohio, Santa Fe, New Mexico; Memphis, Tennessee; Indianapolis, Indiana; San Antonio, Texas; and Pittsburg, Pennsylvania.

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.

The proposed amendments HB 2751 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?

The most significant challenge was identifying specific factors that would justify a no-knock entry. Some stakeholders believed that magistrates should be able to use their common sense when determining if a “reasonable showing” had been made for authorizing a no-knock warrant, and that House Bill 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 this Task Force and pending stakeholder review of the Task Force recommendations.

5. Building Task Force Consensus.

Task Force members began discussing issues and solutions at their first meeting. Those initial discussions resulted in a 3-page list of potential consensus items, which members considered at their second meeting. The list proposed criteria for no-knock and nighttime warrants and included several of the factors enumerated in the amendments to House Bill 2751. The safety factors in the consensus list were revised as a result of the members’ additional input and suggestions and presented again at the third meeting.

A few of the proposed safety factors generated considerable discussion. A proposed factor that a magistrate should consider “weapons that the requesting agency reasonably believes are at the place to be searched” received considerable criticism. Many Arizonans, and probably a majority of households, have a weapon, and Arizona is a “Castle Doctrine” state in which the use of weapons to defend a home is authorized in certain situations. Some Arizonans lawfully own multiple and varied weapons. Members considered distinguishing the type of weapons, e.g., pistols versus automatic

rifles. Such a distinction would not be dispositive, however, because even a single pistol can be used for a shootout, hostage taking, or to evade capture. Members were similarly critical of a factor concerning “gang or group affiliations of the occupants.” Although some members concluded that gang activity was frequently violent, others believed that “gang affiliation” was nebulous, and that gang membership could be a pretext for unannounced entries. Members considered qualifying this factor by referring to the activity of a “criminal street gang,” which is described in A.R.S. § 13-105(8), but ultimately, they agreed to delete a specific reference to gangs. Another broader factor, which the members retained, requires the magistrate to consider the nature of the criminal activity, and that factor would presumably include consideration of criminal activity by a criminal street gang.

Another factor requiring considerable discussion would require a warrant application requesting a no-knock or nighttime entry to indicate 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.” Members generally agreed that nighttime warrants pose a lower possibility of risk to safety, and that this “approval” factor should apply only to no-knock warrant applications. Another initial comment questioned whether “attorney advisor” meant a prosecutor or an attorney within a law enforcement agency. Regardless, there was virtually no support for attorney approval because although attorneys can provide legal guidance when officers apply for warrants, attorneys are not trained in police tactics, and it’s the officer on the ground rather than the attorney in the office who is responsible if the manner of execution goes wrong.

Even if the factor applied only to officers, some members disfavored this factor because an officer in a remote assignment might have difficulty reaching a supervisor who, in a state as large as Arizona, could be a considerable distance away. Others believed that “command level officer or the highest-level supervisor who is available” was vague. The issue was further refined when the member who initiated the suggestion clarified that command level approval did not need to be expressly recited in the application. Everyone agreed that an application should include probable cause for the warrant and, if requested, a reasonable basis for an unannounced entry. But the essence of this suggestion, the member explained, was that the magistrate orally verify that a no-knock request had gone to an appropriate level in the organization’s chain of command, and that the higher level understood the necessity of the no-knock request. (Reports concerning the Breonna Taylor warrant indicated that the highest-level individual within the Louisville police department of the no-knock request in that case was a sergeant, and in a department of that size, it should have been a higher-level officer.) Put simply, “awareness” would establish that the organization as a whole “knows what is happening.”

All agreed that safety of officers, inhabitants, and bystanders is the paramount consideration, and a few of the proposed safety factors were uncontroversial. Members agreed that a magistrate who is presented with a no-knock warrant application should consider security characteristics of the place to be searched, i.e., “particular characteristics of the exterior or interior of the place to be searched, such as the presence of gates, locks, alarms, guard dogs, security screens or window bars, security cameras or other security devices, explosives, fortifications, booby traps, or other dangerous conditions.” Security cameras are of special note, because those cameras allow the occupants to conduct countersurveillance on approaching officers and reduce the officers’ element of surprise. Another uncontroversial factor would require the application to identify “the known occupants of the place to be searched, and the number of occupants, the presence of children, the elderly, persons with disabilities, and pets, and whether any occupant of the place to be searched is experiencing a mental health crisis.” The uncontroversial factors also included “the presence at the place to be searched of any persons held against their will.”

Members agreed that these safety factors should differentiate no-knock and nighttime warrant applications. As noted above, the majority of nighttime warrants involve considerably less risk to officers and civilians than service of no-knock warrants, which are high risk. The safety factors also distinguish unannounced entries for the purpose of mitigating the risk of injury, and unannounced entries that had as their primary purpose preventing the destruction of evidence. Most evidence cannot be quickly destroyed, although some exceptions exist. Therefore, an application for an unannounced entry based in whole or in part on evidence destruction should describe with particularity why such entry is necessary to preserve evidence. Further, the magistrate should weigh the possibility of evidence destruction against the risk of personal injury that’s inherent in any unannounced entry.

6. Recommendations. This report emphasizes that the following recommendations concern only court involvement in the search warrant process. The other and perhaps greater portion of the search warrant process is within the realm of law enforcement. This is particularly so with regard to execution of a no-knock warrant. This report makes no recommendations concerning a required number of officers for serving a no-knock warrant, the kinds of vehicles they should arrive in or what uniforms they should wear, the types of weapons or devices they should, or should not, use while executing the warrant, the deployment of body cameras, or other items that are exclusively matters of police tactics and public policy.

Officers might execute a warrant that is issued as a no-knock warrant by knocking on a door and announcing their presence. Conversely, officers are authorized under A.R.S. § 13-3916(B) to forcibly enter a residence, even if not expressly authorized to do so

by the magistrate's warrant, upon receiving no response or being denied admission, or if an announcement "would endanger the safety of any person or result in the destruction of evidence." These are what one officer member characterized as "game-time decisions" and they transcend these recommendations. The execution of search warrants by their very nature is inherently dangerous, and actual situations are dynamic and varied.⁶

(a) Statutory amendment. This report recommends a single statutory amendment. As noted in Part 2 of this report, A.R.S. § 13-3917 provides, "Upon a showing of good cause therefor, the magistrate may, in his discretion insert a direction in the warrant that it may be served at any time of the day or night." Thus, the issuance of a nighttime warrant is expressly discretionary. By comparison, the statute concerning an unannounced entry, A.R.S. § 13-3915(B), says, "On a reasonable showing that an announced entry to execute the warrant would endanger the safety of any person or would result in the destruction of any of the items described in the warrant, the magistrate shall authorize an unannounced entry." Under this statute, the magistrate has no discretion to decline a request for an unannounced entry once the application makes the requisite showing. Members believe that, like the discretion afforded by A.R.S. § 13-3917 for issuing nighttime warrants, the magistrate should have discretion to deny a request for an unannounced entry. Accordingly, the Task Force recommends changing a single word of A.R.S. § 13-3915(B) as follows:

On a reasonable showing that an announced entry to execute the warrant would endanger the safety of any person or would result in the destruction of any of the items described in the warrant, the magistrate ~~shall~~ may authorize an unannounced entry.

Admittedly, a magistrate under the existing provision could exercise discretion and deny a request for an unannounced entry by determining that the application did not make a "reasonable showing." The proposed amendment, however, would explicitly provide that discretion. On the other hand, the proposed new rule, which is detailed in

⁶ Notwithstanding laudable improvements in police training and tactics, there are occasional civil lawsuits in Arizona arising from the execution of search warrants. [Richard Brubaker](#) made a claim, which is still pending, concerning a forcible entry into his home in 2010, which included deployment of a "flashbang" stun grenade. A complaint filed by [Bret Frimmel](#) against the Maricopa County Sheriff's Office involved a 2013 search warrant and also is still pending. A lawsuit filed by the family of [Jose Guerena](#) against several government entities in Pima County settled in 2013 for \$3.4 million.

the next section of this report, would also allow magistrates to exercise that discretion. If the Court adopts the proposed rule, a statutory change might be unnecessary.

(b) New rule. Article 6 of the Arizona Constitution concerns the Judicial Department. Article 6, Section 5 expressly provides, “The supreme court shall have: ... power to make rules relative to all procedural matters in any court.” The issuance of a search warrant by an Arizona magistrate is a “procedural matter.” In recognition of that power, the centerpiece Task Force recommendation is a new Rule 2.6⁷ in the Arizona Rules of Criminal Procedure titled “unannounced entry and nighttime search warrant applications.” The proposed rule, which is attached to this report, encapsulates much of the members’ consensus.

Section (a) of the proposed rule (“applicability”) advises that it applies only to search warrant applications that request an announced entry or nighttime service. Section (b) (“unannounced entry”) generally enumerates what a magistrate must find before authorizing an unannounced entry. Section (c) (“awareness of the request”) requires the magistrate to consider “the extent to which command level officers in the affiant’s agency are aware of the request.” Section (d) (“safety factors”) includes six specific items that a magistrate must consider in an application for an unannounced entry: criminal activity, violence, weapons, security characteristics, hostages, and occupants. A seventh factor requires the magistrate to consider “any other relevant information.” Section (e) (“nighttime execution”) mirrors the statutory requirement of “good cause” for nighttime service of a warrant. However, this section provides an express exception to that requirement for applications to obtain blood alcohol or drug evidence in a driving under the influence investigation, or to place a GPS tracking device on a vehicle.

Proposed section (f) of this rule concerns “data.” Maricopa County already maintains considerable data, and as a result of discussions at initial Task Force meetings, that court has recently amended one of its forms to capture additional data for no-knock or nighttime warrants on faxed or walk-in applications. (Those applications represent about sixty percent of the total number of applications; the remainder are electronic applications.) Moreover, Maricopa County might be the exceptional Arizona court that keeps statistical information concerning search warrants. The data should be gathered statewide, and uniformly. The Task Force rule proposes a limited number of fields, making the data requirement straightforward and simple. **[Note:** We should specify

⁷ Criminal Rule 2 is titled “commencement of criminal proceedings.” Rule 2.6 was abrogated in 2017. Rule 2 is a sensible location for the new search warrant rule because search warrants are generally served near the inception of a criminal proceeding. However, there might be other alternative locations for the new rule.

what courts should do with the data, e.g., send it to the AOC? Should we propose a cover sheet for capturing this information? Also, we should have a process for tracking returns showing the manner in which warrants were executed (or not executed) and the number of total warrants issued and rejected.]

(c) ***Judicial education.*** Judicial education concerning the recommendations contained in this report is essential. If the recommended statutory amendment is enacted, the training should emphasize magistrates' use of discretion in issuing no-knock warrants. Similarly, if Court adopts the proposed rule, training should inform magistrates of the rule's new requirements and considerations, with particular emphasis on the safety factors. It also should instruct magistrates regarding the practice of having a colloquy with the affiant concerning the law enforcement agency's awareness of a no-knock request. Court clerks should receive direction on the new data requirements.

The Education Services team expressed great interest in continuing the discussion of no-knock and nighttime warrants with Task Force members and other subject matter experts to assist in implementing these recommendations. and to enhance the content and delivery of judicial education on these topics. If the recommendations are implemented, Education Services anticipates integrating them into future judicial officer training and educational materials, and possibly highlighting them at a plenary session of an upcoming annual Judicial Conference. The exact manner and scope of future judicial education depends on the outcome of the Task Force recommendations.

7. Conclusion.

The Task Force requests approval from the Arizona Judicial Council to

- (1) submit to the AOC's legislative liaison a request for an amendment to A.R.S. § 13-3915(B), and
- (2) file a rule petition proposing the adoption of Rule 2.6.

Task Force members express their appreciation to the Chief Justice for the opportunity to serve on this project and to recommend these improvements to the criminal justice system.

Draft Criminal Rule

Rule 2.6. Search Warrant Applications Requesting an Unannounced Entry or Nighttime Service

(a) Applicability. This rule applies to search warrant applications requesting an unannounced entry or nighttime service.

(b) Unannounced Entry. In authorizing an unannounced entry, a magistrate based upon the application must find the following:

(1) there are specific facts that demonstrate why an announced entry would endanger the safety of any person or would result in the destruction of evidence sought by the warrant.

(2) if the application requests an unannounced entry based on the potential destruction of evidence, that the application explains the likelihood of destruction of specifically described evidence, and the magistrate has weighed that likelihood against the risk to personal safety associated with an unannounced entry.

The findings do not need to be in writing.

(c) Awareness of the Request. When considering an application for an unannounced entry, a magistrate must consider the extent to which command level officers in the affiant's agency are aware of the request.

(d) Safety Factors. An application for an unannounced entry must discuss safety factors. A magistrate must consider the safety factors described in an application for an unannounced entry as those factors apply to the circumstances of the case. Safety factors include but are not limited to the following:

(1) *Criminal Activity.* The nature of the criminal activity that forms the basis for the search;

(2) *Violence.* Any history of violence, or the violence potential, of persons known to live at or occupy the place to be searched;

(3) *Weapons.* Weapons that the affiant reasonably believes are at the place to be searched, including the number and type of weapons and whether any occupant has previously used or threatened to use a weapon during criminal activity;

(4) *Security Characteristics.* Particular characteristics of the exterior or interior of the place to be searched, such as the presence of gates, locks, alarms, guard dogs, security screens or window bars, security cameras or other security devices, explosives, fortifications, booby traps, or other dangerous conditions;

(5) *Hostages.* The presence at the place to be searched of any persons held against their will;

(6) *Occupants.* The identity of the known occupants of the place to be searched, and the number of occupants, the presence of children, the elderly, persons with disabilities, and pets, and whether any occupant of the place to be searched is experiencing a mental health crisis; and

(7) *Other information.* Any other relevant information.

(e) Nighttime Execution.

(1) *Basis.* An application requesting service at any time of the day or night must contain specific facts that provide good cause why service between 6:30 a.m. and 10:00 p.m. would not be reasonable or feasible.

(2) *Exceptions.* Subpart (e)(1) does not apply to 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.

(f) Data. Any court where applications for search warrants are presented must maintain and annually forward to the Administrative Office of the Courts the total number of court-issued warrants for unannounced entry or nighttime service, excluding warrants that pertain to a GPS tracking device and to blood alcohol or drug evidence in a driving under the influence investigation.

Search warrant; unannounced entry

1 13-3915. Issuance; form of warrant; duplicate original warrant; telefacsimile

2 A. If the magistrate is satisfied that probable cause for the issuance of the warrant
3 exists, the magistrate shall issue a search warrant commanding a search by any peace
4 officer of the person or place specified, for the items described.

5 B. On a reasonable showing that an announced entry to execute the warrant would
6 endanger the safety of any person or would result in the destruction of any of the
7 items described in the warrant, the magistrate ~~shall~~ MAY authorize an unannounced
8 entry.

9 C. The warrant shall be in substantially the following form:

10 County of _____, state of Arizona.

11 To any peace officer in the state of Arizona:

12 Proof by affidavit having been this day made before me by (naming every person
13 whose affidavit has been taken) there is probable cause for believing that (stating the
14 grounds of the application) according to section 13-3912, you are therefore
15 commanded in the daytime (or in the night, as the case may be, according to section
16 13-3917) to make a search of (naming persons, buildings, premises or vehicles,
17 describing each with reasonable particularity) for the following property, persons or
18 things: (describing such with reasonable particularity), and if you find such or any
19 part thereof, to retain such in your custody subject to section 13-3920.

20 Given under my hand or direction and dated _____ (judge, justice of the
21 peace or magistrate.)

22 D. The magistrate may orally authorize a peace officer to sign the magistrate's name
23 on a search warrant if the peace officer applying for the warrant is not in the actual
24 physical presence of the magistrate. This warrant shall be called a duplicate original
25 search warrant and shall be deemed a search warrant for the purposes of this chapter.

26 In such cases, the magistrate shall cause to be made an original warrant and shall

1 enter the exact time of issuance of the duplicate original warrant on the face of the
2 original warrant. Upon the return of the duplicate original warrant, the magistrate
3 shall file the original warrant and the duplicate original warrant as provided in
4 section 13-3923.

5 E. A magistrate may affix the magistrate's signature on a telefacsimile of an original
6 warrant. The telefacsimile of the original warrant is deemed to be a search warrant
7 for the purposes of this chapter. On return of the telefacsimile of the original warrant,
8 the magistrate shall file the original warrant and the telefacsimile of the original
9 warrant as provided in section 13-3923.

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