

Task Force on Issuing Search Warrants

Meeting Agenda

Friday, September 17, 2021

1:00 p.m. to 3:00 p.m.

State Courts Building * 1501 West Washington * Phoenix, AZ

This is a Virtual Meeting

Telephone number: **877-853-5247** Access Code: **963 3150 5300**

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

Item no. 1	Call to Order Introductory remarks	<i>Hon. Clint Bolick</i>
Item no. 2	Approval of the August 30, 2021 meeting minutes	<i>Justice Bolick</i>
Item no. 3	Further discussion of a draft report to the Arizona Judicial Council, including a proposed statutory amendment and a proposed Criminal Rule 2.6	<i>All</i>
Item no. 4	Roadmap <ul style="list-style-type: none">• 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. 5	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: August 30, 2021

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

Members absent: Anita Escobedo, Kent Volkmer

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

AOC staff: Mark Meltzer, Angela Pennington

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

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

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

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

Task Force on Issuing Search Warrants
Draft minutes: 08.30.2021

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

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

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

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

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

Task Force on Issuing Search Warrants
Draft minutes: 08.30.2021

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

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

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

Task Force on Issuing Search Warrants
Draft minutes: 08.30.2021

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

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

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

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

Task Force on Issuing Search Warrants
Draft minutes: 08.30.2021

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

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

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

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

Task Force on Issuing Search Warrants
Draft minutes: 08.30.2021

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

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

The meeting adjourned at 2:51 p.m.

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 of 1,815 search warrants approved by the courts last year, 1,144 – 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 fiscal year 2021. (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 robust 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 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. [Representative Hernandez appeared at a Task Force meeting and shared with Task Force members her insights regarding this bill and her broader concerns with no-knock search warrants.](#) [House Bill 2751](#) 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

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.

violence potential or calls for service at the address, and a detective's first-hand knowledge of the suspects or target location. The eighth factor was a catchall: "any other factor which a magistrate may consider relevant." The amended bill also would have required a no-knock warrant, if authorized, to be executed by a special weapons and tactics team ("SWAT"), if practicable. The bill was retained by the Committee of the Whole, and no further action was taken, i.e., the bill died.

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 of 2021, 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 generating 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 then clarified that command level approval ~~did~~ might 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.”

After reconsideration and further discussion, members made additional changes to their draft provision. Members agreed that unless the application confirmed command-level awareness, it would not be documented anywhere. Accordingly, the application should recite that approval. They also agreed that the issue wasn’t whether a commander was “aware” of the request, because a commander could have awareness yet not expressly approve the request. The lack of approval, however, should not automatically invalidate the application. Accordingly, the section (c) of the proposed rule was revised to provide,

When considering an application for an unannounced entry, a magistrate must ascertain whether a command level officer in the affiant’s agency has approved the request. Approval by a command level officer is a consideration, but not a requirement for the magistrate to grant the application.

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.~~ Members also distinguished 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.

As noted above, serving nighttime warrants usually involves considerably less risk to officers and civilians when compared to service of no-knock warrants, which are high risk. That does not mean, however, that warrants served at night are free of risk. Some warrants served at night involve entry into a structure, and those warrants are generally associated with the highest risk of nighttime service. Many of the warrants served at night – particularly a large volume of warrants for the extraction of blood for evidence of alcohol or drug use during a driving under the influence investigation, which might be served at a police station – entail considerably less risk. The rule proposed by the Task Force recognizes these risk gradients.

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

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 Guereña](#) against several government entities in Pima County settled in 2013 for \$3.4 million.

(a) **Statutory amendment.** **[Staff note: consider deleting the request for 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 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

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.

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 approval~~ 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.”~~ whether a command level officer has approved the request, but as noted above, the lack of approval is not by itself a sufficient factor for withholding issuance of a no-knock warrant. 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. [Staff note: section (e) provision requires further discussion.]

Section (f) of the proposed rule (“return”) requires the return of the warrant, which is filed with the court that issued the warrant, to indicate whether the warrant was served by an unannounced entry or during the night. This simple information will be useful for collecting data under section (g) and might help to account for circumstances where issued warrants are not served, and warrant authorizing an unannounced entry that subsequently served by knocking and announcing.) Proposed section (~~g~~) 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 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 ~~their practice of having available options when a no-knock request does not include a commander's approval. 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 pursuant to A.R.S. § 13-3915(B), 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 that evidence, and the magistrate has weighed that likelihood against the risk to personal safety associated with an unannounced entry.

The magistrate's signature on the warrants confirms that the magistrate made one or both findings.

(c) ~~Awareness~~ Approval of the Request. When considering an application for an unannounced entry, a magistrate must ~~consider the extent to which ascertain whether a~~ command level officers in the affiant's agency ~~are aware of~~ has approved the request. Approval by a command level officer is a consideration, but not a requirement for the magistrate to grant the application.

(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~~ Service Involving Entry into a Structure.

~~(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:~~

~~(A) for obtaining blood evidence of alcohol or drug use in a driving under the influence investigation;~~

~~(B) requesting the placement of a global positioning satellite (“GPS”) tracking device on a vehicle; or~~

~~(C) that do not require entry into a residence, building, or vehicle.~~

An application requesting service at any time of the day or night pursuant to A.R.S. § 13-3917, and which requires entry into a structure that is the subject of the warrant, must contain specific facts that provide good cause why service only during the day would not be reasonable or feasible.

(f) **Return**. A warrant returned to a magistrate must be accompanied by a statement of the affiant or an officer returning the warrant indicating whether the warrant was served by an unannounced entry or during the night.

(f g) **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 that are requested and that are granted for

(1) unannounced entry, or nighttime

(2) service day or night that require entry into a structure, excluding warrants that are excepted under subpart (e)(2).

(h) Definitions. For purposes of this rule:

(1) “Night” means the period from 10 p.m. to 6:30 a.m.

(2) “Structure” means any building or place with sides, a door, and a floor, which is used for lodging or a business [or a vehicle?].