INTER-OFFICE MEMORANDUM

To: Justice Bolick
From: Daniel Bowman
Re: Research Memorandum discussing no-knock and nighttime warrants
Date: March 30, 2021

RESEARCH NEEDED

I. A memorandum discussing the history and case law of no-knock and nighttime warrants in Arizona, current legislative amendments addressing these warrants, and the boundaries of the Court's rulemaking power in this area.

BACKGROUND AND FOCUS OF TASK FORCE

On March 10, 2021, the Arizona Supreme Court issued Administrative Order No. 2021-34: *The Establishment of a Task Force on Issuing Search Warrant*s. The order established a task force to review Arizona's process for issuing no-knock and nighttime warrants in order to confirm that appropriate safeguards are in place which ensure these warrants are properly authorized. The task force can make recommendations proposing 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." The recommendations shall also address "the training of judicial officers to ensure adequate training is provided."

DISCUSSION

No-knock warrants are exceptions to the common law requirement that officers serving a search warrant must knock and announce their entry prior to forcibly attempting to enter a dwelling place. This knock-and-announce requirement was a fixture of English common law and, similarly, was embraced by founding-era thinkers, state legislatures, and Fourth Amendment doctrine. *See* *Wilson v. Arkansas*, 514 U.S. 927, 931–34 (1995) (Thomas, J., majority opinion) (discussing the history of the knock-and-announce requirement and holding that it is pertinent to a Fourth Amendment "reasonableness" analysis). However, as is true of Fourth Amendment doctrine in general, this requirement is subject to exceptions. Generally, officers can forego announcing their presence before forcibly entering a residence if they believe that knocking and announcing would endanger anyone involved or would allow suspects to destroy evidence. *Id.* at 936–37 ("We simply hold that although a search or seizure of a dwelling might be constitutionally defective if police officers enter without prior announcement, law enforcement interests may also establish the reasonableness of an unannounced entry.").

In Arizona, magistrates can issue no-knock warrants and thereby preemptively authorize officers to forego the knock-and-announce requirement. A.R.S. § 13-3915 guides the issuance of all search warrants. Concerning no-knock warrants, subsection (B) states:

> 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.

Additionally, A.R.S. § 13-3916 guides the service and execution of search warrants. Subsection (B) allows a warrant-carrying officer to forcibly break into a building 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 § 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.

The key language guiding the issuance of no-knock warrants in § 13-3915 is the requirement that officers make a "reasonable showing" of why an unannounced entry is necessary. Additionally, the mandatory word "shall" seemingly limits magistrates' discretion over the issuance of no-knock warrants to deciding whether an officer has made a reasonable showing.

Turning to nighttime warrants, both common law and the U.S. Supreme Court have long recognized that it is far more intrusive to serve warrants late at night when residents are asleep.[1] Still, there are situations that necessitate the nighttime service of a

[1] While less has been written about the common law origins of the daytime-service requirement, this presumption against nighttime service is logically connected to the reasonableness of a search or seizure. *See United States v. Kelley*, 652 F.3d 915, 917 (8th Cir. 2011) ("[W]e have little doubt that in some circumstances an officer's night-time entry into a home might be unreasonable under the Fourth Amendment."); 79 C.J.S. Searches § 270 (2021) ("At early common law, the search warrant seems to have been limited to the daytime."). Nighttime warrants also functionally abridge the knock-and-announce

warrant. For instance, if an officer has reason to believe that waiting to serve a warrant until morning would enable the removal or destruction of evidence, then nighttime service of the warrant may be appropriate. The Arizona statue governing the issuance of nighttime warrants is A.R.S. § 13-3917, which states:

> 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.

The key language in this statute is the requirement that "good cause" support the issuance of a nighttime warrant.

Below, Parts I & II of this Memorandum will discuss the history and case law guiding no-knock and nighttime warrants in Arizona. Part III outlines current legislative actions seeking to curtail no-knock warrants, specifically discussing Arizona House Bill No. 2751. Finally, Part IV briefly discusses the boundaries of the Arizona Supreme Court's rulemaking power in this area.

I. No-knock warrants in Arizona.

No-knock warrants are a relatively new fixture in Arizona. Before 1974, magistrates presumably could authorize an unannounced entry if doing so was justified by "necessity." *State v. Peterson*, 20 Ariz. App. 296, 298 (1973); *see also* Brian Dolan, Note,

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requirement, simply because many residents are not awake and will not quickly respond to a police officers' request for entry late at night. The Supreme Court has repeatedly recognized that nighttime searches are, on their face, less reasonable than searches conducted during daylight. *Coolidge v. New Hampshire*, 403 U.S. 443, 477 (1971) (describing nighttime searches as an "extremely serious intrusion"); *Jones v. United States*, 357 U.S. 493, 498 (1958) ("[I]t is difficult to imagine a more severe invasion of privacy than the nighttime intrusion into a private home in this instance.").

To Knock or Not to Knock? No-Knock Warrants and Confrontational Policing, 93 St. John's L. Rev. 201, 214 (2019) (discussing how many states interpret their knock-and-announce statutes to incorporate common-law exceptions allowing magistrates to issue no-knock warrants). However, this changed in 1974 when the court of appeals held that A.R.S. § 13-3916 (then codified as § 13-1446) did not allow magistrates to authorize no-knock warrants. *State v. Eminowicz*, 21 Ariz. App. 417, 418–19 (1974) ("[T]he legislature has [] already made the determination, based on public policy, that the lives of all concerned are best protected by requiring full compliance with A.R.S. § 13-1446 in all instances."). This decision was not modified by the Arizona Supreme Court and remained good law until 2000.

In 2000, the legislature amended A.R.S. § 13-3915 & 3916 to allow for issuance of no-knock warrants. This amendment inserted both § 13-3915(B), which allows magistrates to authorize an unannounced entry upon a "reasonable showing" that knocking and announcing would endanger any person or could result in the destruction of evidence, and § 13-3916(B)(3), which allows officers to serve such warrants. The legislature also added § 13-3916(B)(4), which codifies existing Fourth Amendment exceptions to the knock-and-announce requirement by giving officers the discretion to forego the requirement if they reasonably believe that knocking and announcing would endanger anyone involved or result in the destruction of evidence.

There is little case law defining what constitutes a reasonable showing—in fact, I found only one case where the issuance of a no-knock warrant was directly challenged. There, a defendant in the District Court for the District of Arizona asserted that a

magistrate erred in authorizing an unannounced entry. *U.S. v. Wigglesworth*, No. CR 08–01376–TUC–FRZ (JM), 2009 WL 1507571 (D. Ariz. May 29, 2009). The requesting officer's reasons for no-knock exception were "the way the crack trade is conducted," "the weapons that are often involved," and "the protection of the officers serving the warrant." *Id.* at *5. The district court held that such "generalized" reasons did not constitute a reasonable showing that knocking and announcing, in this specific instance, would cause anyone to be hurt or evidence to be destroyed. *Id.* (citing *Richards v. Wisconsin*, 520 U.S. 385, 396 (1997)). However, although there was a violation of the knock-and-announce requirement, this violation did not justify suppression of the evidence obtained in the search, per U.S. Supreme Court precedent. *Hudson v. Michigan*, 547 U.S. 586 (2006); *see also State v. Roberson*, 223 Ariz. 580, 583–84 (App. 2010) (holding that neither the Fourth Amendment nor Arizona's Constitution require the suppression of evidence that is obtained in violation of the knock-and-announce requirement).[2]

[2] Writing for the court in *Roberson*, Judge Downie applied *Hudson v. Michigan* when deciding that the Fourth Amendment does not require suppression of evidence seized during an improperly announced search. 223 Ariz. at 584. However, the defendant also argued that Arizona's Constitution provides greater protection than the Fourth Amendment and, therefore, evidence seized following an unauthorized, unannounced entry should be suppressed. *Id.* at 581 (citing Ariz. Const. art. 2, § 8 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law.")). The court considered this argument and acknowledged that the Arizona Constitution does provide greater protection than the U.S. Constitution "in certain contexts." *See State v. Bolt*, 142 Ariz. 260, 264–65 (1984) (stating that this constitutional provision reaches further than the Fourth Amendment by "preserving the sanctity of homes and [] creating a right of privacy."). However, the court found that this increased level of protection is most pertinent to *warrantless* searches and seizures, at which point residents still have a presumptive right to shield their homes from the government's inspection. *Roberson*, 223 Ariz. at 583. Additionally, the court found pertinent A.R.S. § 13-3925, which provides that: "Any evidence that is seized pursuant to a search warrant shall not be suppressed as a result of a violation of this chapter except as required by the United States Constitution and the constitution of this state." *Id.* at 583–84. For both reasons, the court held that Arizona's Constitution does not require suppression of evidence seized after officers forego the knock-and-announce requirement. *Id.* at 584.

In one additional case, the court of appeals indicated that issuance of a no-knock warrant was appropriate when officers, seeking a warrant for a marijuana investigation, showed there were specific "dangers associated with a firearm in this investigation." *State v. Vassell*, 238 Ariz. 281, 282 (App. 2015). The officers' concerns about this firearm were apparently well-founded because the defendant did fire two shots at the officers after they served the no-knock, nighttime warrant. *Id.* at 283. For the Task Force's purposes, the most notable part of this opinion is Judge Eckerstrom's concurrence, in which he outlines why a jury could have reasonably concluded that the defendant was firing his weapon at unknown intruders rather than at police officers serving a warrant. *See id.* at 286–88. The Judge's concurrence aptly describes the quick and disorienting nature of the officers' nighttime entry and why the defendant could easily have been confused about the officers' identity when awakened from his slumber. *Id.*

Beyond these few cases, I was unable to find any cases that even tangentially discuss the reasonable showing standard. Additionally, there are no existing Arizona Supreme Court rules or trainings that define what constitutes a reasonable showing. It is possible (though unlikely) that some counties have created rules to provide this guidance. This lack of guidance is one thing that Arizona House Bill No. 2751 seeks to ameliorate, as will be discussed in Part III.

II. Nighttime warrants in Arizona.

Dissimilarly from no-knock warrants, nighttime warrants have been statutorily authorized in Arizona since 1901. *State v. Jackson*, 177 Ariz. 120 (1977) (discussing the history of A.R.S. § 13-1447 (recoded in 1977 as § 13-3917) and the historic "aversion to

nighttime searches"). The statute was substantially rewritten in 1970, at which point the legislature also added the "good cause" standard which controls the issuance of nighttime warrants. The statute's most recent substantive amendment was in 1971 when the legislature defined "night" as anytime between 10 p.m. and 6:30 a.m.

Because judges have applied the good cause standard since 1970, there are several cases that help define its contours. As an initial matter, a magistrate's determination of whether good cause exists for nighttime service of a warrant is not coterminous with a finding of probable cause for the warrant. *Jackson*, 177 Ariz. at 122 (clarifying that "good cause" is not a higher or lower evidentiary standard than probable cause; rather, "all that is required for a nighttime search is that it is reasonable."). The reasons given by officers in support of their request for a nighttime warrant must show that, in each specific case, the "interests of justice are best served by the authorization of nighttime service." *State v. Foncette*, 238 Ariz. 42, 47 (App. 2015). Additionally, when officers improperly serve a daytime warrant at night, evidence seized in the ensuing search should not be suppressed because this is a statutory, rather than constitutional, violation. *Id.* (citing A.R.S. § 13-3925(A), which precludes suppression of evidence that was improperly obtained unless it was obtained through a constitutional violation).

Good cause exists when police have witnessed nighttime drug sales occur at the premises to be searched—it is reasonable that sought-after narcotics may not still be at the premises in the morning. *State v. Eichorn*, 143 Ariz. 609, 614 (App. 1984). Additionally, the type of criminal activity that a warrant is premised upon can affect whether nighttime service is reasonable. *Id.* at 613 ("The factors to be considered regarding the "good cause"

for a nighttime search in a murder case . . . are much different than the ones to be considered in a case concerning possession and sale of marijuana."); *State v. Adamson*, 136 Ariz. 250, 259 (1983) (holding that good cause for a nighttime search correlates to the seriousness of the crime involved). Finally, good cause does not exist if the reasons given for a nighttime search are generalized. *State v. Rypkema*, 144 Ariz. 585, 589 (App. 1985) (holding that a request based upon "the nature of the contraband" and allegations that "drug sales often occur at night" did not sufficiently establish good cause).

In summary, while "good cause" is a low bar that only requires nighttime service to be reasonable, it still requires officers to have an actual, non-generalized reason for a nighttime exception. Currently, the Arizona legislature has not proposed any amendments to A.R.S. § 13-3917. However, the combination of no-knock authorizations with nighttime service authorizations has received consistent criticism because the combination of both warrant exceptions can lead to dangerous situations for residents and police officers alike.[3] This criticism has swelled since Breonna Taylor's death in March 2020, when she was killed by police officers who were executing a no-knock, nighttime warrant in order to search for narcotics in her boyfriend's apartment.

[3] *See generally* G. Todd Butler, *Recipe for Disaster: Analyzing the Interplay Between the Castle Doctrine and the Knock-And-Announce Rule After Hudson v. Michigan*, 27 Miss. C.L. Rev. 435 (2008). Kevin Sack, *Door-Busting Drug Raids Leave a Trail of Blood*, N.Y. Times (Mar. 18, 2017) (detailing the commonality of no-knock warrants across the country and the heavy losses that can ensue). Of note is the cited New York Times article, which highlights many instances where unannounced entries by SWAT teams resulted in death or injuries to officers and residents. Specifically, it includes a 2011 video of a SWAT team serving a no-knock warrant on Jose Guerena's residence in Tucson in order to search for marijuana. This incident ultimately left Mr. Guerena dead after he was shot more than 20 times by the officers. *See* Joe Ferguson, $3.4M Settlement in Deadly 2011 SWAT Raid Near Tucson, Tucson.com (Sep. 20, 2013).

III. Recent legislative proposals and reforms curtailing the issuance of no-knock warrants.

Over the last year, there has been an influx of legislation seeking to curtail or eliminate the use of no-knock warrants on federal, state, and local levels. *See* Caroline Kelly, *Rand Paul Introduces Bill To End the Type of Warrant Involved in Breonna Taylor's Death*, CNN (June 11, 2020); Tessa Duvall & Darcy Costello, *In Cities and States Across the US, Breonna's Law Is Targeting Deadly No-Knock Warrants*, Louisville Courier J. (Mar. 17, 2021) (claiming that there are 84 active proposals in 33 different states which would curtail or ban the use of no-knock warrants). Cities across the country—such as Columbus, Louisville, Santa Fe, Memphis, Indianapolis, San Antonio, and Long Beach—have either eliminated or severely limited their police force's ability to obtain no-knock warrants.

On the state level, Virginia recently banned the use of no-knock warrants. Daniella Cheslow, *Virginia Gov. Northam Signs 'Breonna's Law' Banning No-Knock Warrants*, NPR (Dec. 8, 2020). Additionally, no-knock warrants have long been prohibited by state law in both Florida and Oregon, and Utah legislatively curtailed its use of no-knock warrants in 2015 by prohibiting their issuance for drug-related crimes. *State v. Bamber*, 630 So. 2d 1048 (Fla. 1994); Or. Rev. Stat § 133.575 (2009); Utah Code Ann. 77-23-210 (2018).

It is against this backdrop that Arizona House Bill No. 2751 was introduced on February 2, 2021, by Representative Alma Hernandez (D-Tucson). This bill, in its current form, would amend AR.S. § 13-3915 by changing the statute's mandatory language to permissive ("shall" becomes "may"), which would presumably give a magistrate discretion over the issuance of a no-knock warrant even when an officer has made a reasonable showing in support of the warrant. The amendment would also insert eight

factors into A.R.S. § 13-3915(B) to guide magistrates' consideration of the reasonable showing standard.[4] This amendment has 21 co-sponsors but has not had a change of status since February 24. I am sure that the Task Force is much better equipped than I to predict the Amendment's chances of being enacted.

Something that frustrates attempts to understand whether the use of no-knock or nighttime warrants in Arizona is systemically problematic is the dearth of data showing how commonly they are issued. On a national level, there is significant disparity amongst estimates of how many no-knock warrants are issued annually.[5] Closer to home, I have been unable to find actual data detailing how frequently no-knock warrants are issued by Arizona magistrates. There are claims that no-knock warrants are rarely issued in Arizona—that they are proverbial needles in a haystack of warrants—but I have not found any data backing this up.[6] This empirical scarcity obstructs consideration of whether, or to what extent, no-knock and nighttime warrants should be curtailed in Arizona.

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[4] These factors are:

1) Underlying Charges,
2) Weapons Information,
3) Gang Activity,
4) Fortification of Structure,
5) Documented Violence Potential of the Suspect and other Associates or Occupants Related to the Address,
6) Calls for Service Related Related to the Address Itself,
7) Firsthand Knowledge by the Detective of the Suspects and Target Location,
8) Any Other Factor Which a Magistrate May Consider Relevant.

[5] *Compare* Dara Lind, *Cops Do 20,000 No-Knock Raids A Year. Civilians Often Pay the Price When They Go Wrong.*, VOX (May 15, 2015) *with* Candice Norwood, *The War on Drugs Gave Rise to 'No-Knock' Warrants. Breonna Taylor's Death Could End Them*, PBS News Hour (June 12, 2020) (stating that criminologist Peter Kraska estimated that police officers serve 60–70 thousand no-knock warrants per year).

[6] *See, e.g.*, Brittni Thomason, No-Knock Warrants Are Legal in Arizona, But Rare, AZfamily.com (Sep. 23, 2020) (providing absolutely no basis for the title's claim that no-knock warrants are "rare" in Arizona).

IV. The extent of the Arizona Supreme Court's rulemaking power in this area.

The Court does not currently have any rules or orders guiding magistrates' issuance of no-knock or nighttime warrants, nor have I found any such rules that were issued in the past. Accordingly, whether or not the Court could promulgate such rules—to perhaps define the "good cause" and "reasonable showing" standards—is something of an open question.

Article 6, § 5 of Arizona's Constitution bestows upon the Supreme Court the "[p]ower to make rules relative to all procedural matters in any court." This broad authority conceivably would allow the Court to make rules guiding magistrates' consideration of nighttime or no-knock warrant requests. Whether such rules would be proper depends, entirely, upon if they are considered procedural or substantive in nature. And this consideration, somewhat circularly, would come before the Supreme Court because the thorny question of whether a rule is procedural or substantive "is one of law." *See Seisinger v. Siebel*, 220 Ariz. 85, 92 ¶¶ 26–29 (2009) ("Although the basic constitutional principle of separation of powers is easily stated, the precise dividing line between substance and procedure has proven elusive.") (internal quotation marks omitted).

At a basic level, substantive law "creates, defines and regulates rights" while procedural law "prescribes the method of enforcing the right or obtaining redress for its invasion." *State v. Birmingham*, 96 Ariz. 109, 110 (1964). The distinction between procedural and substantive laws does not hinge upon the effect that the law has—procedural rules will sometimes have "important or substantial" effects. *State v. Reed*,

248 Ariz. 72, 76 ¶ 13 (2020). Instead, "the ultimate question" is whether a rule or statute works to effectively create, define, and regulate rights. *Seisinger*, 220 Ariz. at 93 ¶ 29.

Here, if the Court were to promulgate rules defining how the "good cause" and "reasonable showing" standards should be evaluated, this seemingly would not create, define, or regulate a right. Although it is debatable what type of "rights" are created by A.R.S. § 13-3915 & § 13-3917,[7] they foundationally seem to provide police officers with a right to abridge common-law restraints upon the service of a warrant. If this is the right, then surely a Court rule clarifying how to apply the ambiguous standards that gatekeep this right would simply "prescribe[] the method of enforcing the right." *Birmingham*, 96 Ariz. at 110. Accordingly, at this basic level—which is perhaps as far as this analysis can go until an actual rule is suggested—such a rule would be procedural and, therefore, would be within the Court's rulemaking power.

One additional question is whether Arizona House Bill No. 2751's proposed eight-factor test, which would guide magistrates' reasonable-showing determination, would override a Court rule that also attempts to provide such guidance. Of course, as a practical matter, the Court may not want to actually promulgate such a rule if it would be duplicative of the legislature's efforts. However, it is not inconceivable that the Court might choose to promulgate such a rule even if the amendment is passed. For instance, the Court could decide that the legislature's eight-factor analysis is overbroad and thus unhelpful, or that it is not something magistrates can deploy effectively. In such a

[7] For instance, do these statutes give a magistrate a right to issue certain types of warrants, police officers a right to seek necessary warrant exceptions, or the public an enhanced right to more effective law enforcement?

situation, a conflicting Court rule would likely prevail over the legislature's statute—assuming, of course, that the rule was classified as procedural rather than substantive. *State v. Forde*, 233 Ariz. 543, 575 ¶ 145 (2014) ("It is more accurate to say that the legislature and this Court both have rulemaking power, but that in the event of irreconcilable conflict between a procedural statute and a rule, the rule prevails." (quoting *Siebel*, 220 Ariz. at 89 ¶ 8)).

Ultimately, the Arizona Constitution does vest the Supreme Court with the power to promulgate procedural rules, and it is likely that rules guiding how magistrates should analyze the good-cause and reasonable-showing standards would qualify as procedural. Whether the Court *should* exercise this power is, of course, another question entirely.

CONCLUSION

The issuance of no-knock and nighttime warrants in Arizona are guided by open-ended, fact-dependent standards that provide issuing magistrates with much discretion. Arizona lawmakers, following a movement occurring throughout the Union, have proposed an amendment which seeks to help guide magistrates' issuance of no-knock warrants. However, the ball is not solely in the legislature's court; the Arizona Supreme Court also could create rules guiding the magistrates' application of these somewhat amorphous statutory standards.