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IN THE SUPREME COURT

STATE OF ARIZONA

PETITION TO ADOPT RULE 2.6, ) No. R-  
ARIZONA RULES OF )  
CRIMINAL PROCEDURE )  
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Pursuant to Rule 28 of the Rules of the Supreme Court, Petitioner requests the Court to adopt a new Rule 2.6 of the Arizona Rules of Criminal Procedure. The proposed new rule, which is titled “Search Warrant Applications Requesting an Unannounced Entry or Nighttime Service,” is contained in an appendix to this petition. Rule 2.6 represents the work product of the Court’s Task Force on the Issuance of Search Warrants (“Task Force”), with certain modifications explained below.

**1. Task Force on Issuing Search Warrants.** The Task Force’s October 21, 2021 [report to the Arizona Judicial Council](#) observed that 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](#) also noted that no-knock<sup>1</sup> and nighttime search warrants “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 Administrative Order accordingly established the 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 public meetings between May and September 2021. Task Force members represented a broad spectrum of stakeholder interests, and included judges at all levels of Arizona courts, court clerks and a court administrator, a senior consultant for the Administrative Office of the Courts, 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 municipal police

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<sup>1</sup> A.R.S. § 13-3915 refers to an “announced entry” and an “unannounced entry.” Under A.R.S. § 13-3916, an announced entry 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 that in the vernacular, as well as in this petition, has the equivalent meaning as an “unannounced entry.”

department, a sheriff's office, and the Department of Public Safety. The Task Force was chaired by Justice Clint Bolick.

Members reviewed a variety of materials before their first meeting, including federal and Arizona cases and statutes, online videos, news articles, and recent legislation from other jurisdictions. Members also heard a presentation at their first meeting concerning pertinent federal and Arizona case law and statutes on no-knock and nighttime search warrants.

**2. Summary of Current Arizona Statutes on Search Warrants.** The Arizona Revised Statutes on search warrants are located in Title 13, Chapter 38, Article 8. A.R.S. § 13-3913 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.”

The common law historically required officers serving a search warrant to knock and announce their presence before entering a residence. Knocking and announcing is aimed at reducing the possibility of a violent confrontation between officers and the occupants. The requirements for entry when serving a search warrant are codified in A.R.S. §§ 13-3915(B) and 13-3916(B).

A.R.S. § 13-3915(B) allows a magistrate to issue a warrant that dispenses with the knock and announce requirement “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...”

A.R.S. § 13-3916(B) allows an officer to forcibly enter premises when (1) a judicial officer has authorized a no-knock entry in the search warrant; (2) officers arrive with a search warrant, knock and announce their presence and purpose, and forcibly enter after getting no response within a reasonable time; (3) officers arrive with a search warrant, knock and announce, and are then refused admittance; or (4) there are circumstances involving danger or exigency.

The Task Force report noted that even if a magistrate’s warrant authorizes officers to enter without knocking and announcing, officers nevertheless might execute the 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.” Execution of search warrants by their very nature is inherently dangerous, and actual situations are dynamic and varied.

An application to serve a search warrant at night requires the applicant to make a showing in addition to the probable cause required by A.R.S. § 13-3913.

A.R.S. § 13-3917 provides that a request to serve a warrant “at any time of the day or night” must show “good cause.” Absent that showing and a magistrate’s authorization, officers can serve the warrant only during the daytime. A significant percentage of nighttime search warrants do not involve the search of a residence, notably 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. These warrants are discussed in the following pages.

House Bill 2751, which Representative Alma Hernandez introduced during the 2021 legislative session, proposed amendments to the Title 13 statutes concerning search warrants. The original version of the bill would have repealed current statutory provisions that allow a magistrate to authorize an unannounced entry. A subsequent version would have reinstated those provisions and added eight factors that would permit a magistrate to authorize an unannounced entry. The bill was eventually retained by the House Committee of the Whole and no further action was taken. Representative Hernandez appeared at a Task Force meeting and shared her insights regarding this bill with Task Force members. The safety factors discussed later in this petition contain additional details concerning HB 2751.

**3. Introduction to Proposed Rule 2.6.** 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 Task Force’s primary recommendation was that the Court adopt new Criminal Rule 2.6<sup>2</sup>. Rule 2.6 is designed to provide adequate safeguards for a magistrate’s authorization of a no-knock or nighttime search warrant.

Task Force members began defining issues and solutions concerning search warrants at their first meeting. Those initial discussions resulted in a 3-page list of potential items, which members considered at their second meeting. That list proposed criteria for no-knock and nighttime warrants and included several of the factors enumerated in the amendments to HB 2751. The safety factors in the list were revised as a result of the members’ additional input and suggestions and were presented again at the third meeting. These factors became the foundation for proposed Rule 2.6, which was introduced at the fourth meeting and further revised at the fifth and final meeting. The proposed rule represents a unanimous view of Task Force members in most aspects but a majority view in some respects, particularly subpart (b)(1) concerning supervisor approval.

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<sup>2</sup> Criminal Rule 2 is titled “commencement of criminal proceedings.” The Task Force believed that Rule 2 would be a sensible location for the new search warrant rule because search warrants are generally served near the inception of a criminal proceeding. Rule 2.6 was abrogated in 2017 and the number is currently an available placeholder. Another Task Force recommendation, as further detailed in the Task Force report to the Arizona Judicial Council, concerned judicial education on Rule 2.6.

4. **Section-by-Section Description of Rule 2.6.** What follows is a section-by-section explanation of the seven sections of Rule 2.6.

**Section (a): Applicability.** Section (a) expressly provides that this rule applies only to search warrant applications requesting an unannounced entry or nighttime service. Rule 2.6 does not apply to search warrant applications that request neither no-knock nor nighttime service authorization.<sup>3</sup>

**Section (b): Unannounced Entry.** Section (b) applies to applications for no-knock authorization. Section (b) says, “A magistrate cannot authorize an unannounced entry into a structure pursuant to A.R.S. § 13-3915(B)” unless the magistrate has made at least the first two findings, and if applicable the third finding, shown below. These findings are mandatory, not discretionary. Note that section (b) applies only to applications for an unannounced entry into a “structure,” a term that is defined in section (g). Virtually every unannounced entry involves a structure; but it is entry into a structure, particularly a residence, that involves the highest risk, so the emphasis on “structure” is appropriate.

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<sup>3</sup> Maricopa County data indicated that a significant number of nighttime search warrants arise from nighttime driving under the influence investigations and officers’ requests for judicial authorization to draw blood samples for drug or alcohol testing. By comparison, applications for no-knock warrants are relatively infrequent and represented less than two percent of the applications in Maricopa County.

The three section (b) findings<sup>4</sup> are:

- (1) the search warrant application has been approved by a supervising law enforcement officer in the affiant's agency;
- (2) there are specific facts and safety factors discussed in the application 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; and
- (3) if the application requests an unannounced entry based on the potential destruction of evidence, 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 first finding was the subject of considerable discussion by Task Force members, and if any portion of this proposed rule might be controversial, it is this provision. The purpose of this finding is to ensure that the applicant's no-knock request was presented to an appropriate higher-level officer in the law enforcement agency's chain of command, and that the higher-level officer was aware of the no-knock request and concurred in the need for an unannounced entry. Individual agencies can determine, based on their size, organizational structure, and chain of command, what higher level would be appropriate. A majority of Task Force

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<sup>4</sup> The version of Rule 2.6(b) presented to the Arizona Judicial Council had two subsequent modifications. First, the supervisory approval provision was previously a separate section (c). The substance of that section has been relocated to subpart (b)(1). Second, the words "and safety factors" were added to subpart (b)(2) to emphasize that the safety factors specified in Rule 2.6(c) should be included in the application's discussion of the need for a no-knock warrant. Adding those three words to subpart (b)(2) provides a textual connection between proposed sections (b) and (c).

members believe that this provision would help to assure the agency's accountability. A dissenting view believed that most agencies already adhere to this approval process as a best practice, and that its inclusion in the proposed rule is inappropriate because it adds a requirement for issuance of a warrant that is not specified in the governing Arizona statutes.

The second finding required by section (b) is that the application must demonstrate why an announced entry would endanger the safety of any person—which includes the safety of both civilians and officers—or would result in the destruction of evidence. This finding is based on A.R.S. § 13-3915(B). However, the rule provision introduces the concept of “safety factors,” and requires that the application specify why a no-knock warrant is necessary after considering the safety factors that apply to the circumstances of the case. The safety factors are specified in section (c).

The third finding applies when the application requests an unannounced entry based on the potential destruction of evidence. It requires the magistrate to weigh the likelihood of evidence destruction against the inherent risk to personal safety of the officers and occupants associated with an unannounced entry.

The Task Force discussed whether the magistrate's findings should be in writing. The Task Force concluded that there are a variety of circumstances in which a no-knock warrant could be issued, such as a warrant issued at a magistrate's

residence in the middle of the night or over the telephone, which would make written findings impractical.<sup>5</sup> Instead, the Task Force added to section (b) a concluding sentence that says, “The magistrate’s signature on a search warrant confirms that the magistrate has made the required findings.”

**Section (c): Safety Factors.**<sup>6</sup> HB 2751 contemplated that a magistrate would consider eight factors in an application for a no-knock warrant. 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 factor which a magistrate may consider relevant.”

Task Force members were critical of certain factors in HB 2751. For example, although some members concluded that gang activity was frequently violent, others believed that “gang affiliation” was nebulous, and that gang membership could be used as a pretext for unannounced entries. Members did not include this factor in their proposed rule, nor did they include previous calls for service at the address,

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<sup>5</sup> A.R.S. § 13-3914(C) allows the magistrate, in lieu of a written application, to consider a statement given “by telephone, radio or other means of electronic communication.”

<sup>6</sup> The version of the section (c) safety factors that was appended to the Task Force report to the Arizona Judicial Council has been stylistically modified.

which could be unrelated or immaterial to the situation at hand. Information concerning weapons also received considerable attention. Many Arizonans 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. The presence of weapons, however, remains in the proposed rule as a factor for the magistrate’s consideration.

After extensive discussion, the rule proposed by the Task Force specifies these seven safety factors:

- (1) ***Criminal activity***, i.e., the nature of the criminal activity that forms the basis for the search.
- (2) ***Violence***, including any history of violence or the violence potential of persons known to live at, or who occupy, the place to be searched.
- (3) ***Weapons*** that the affiant reasonably believes to be at the place to be searched, including the number and type of weapons and whether any occupant previously used a weapon during criminal activity.

- (4) *Security characteristics* of the place to be searched, including such things as guard dogs, security cameras, fortifications, booby traps, or other dangerous conditions.
- (5) *Hostages*, i.e., the presence at the place to be searched of anyone held against their will.
- (6) *Occupants*, including the number of occupants and, if known, their identity; the presence of children, the elderly, or persons with disabilities; and whether any occupant is experiencing a mental health crisis.
- (7) *Other information*, i.e., any other relevant information.

Several of these proposed factors are already used by Arizona law enforcement agencies as part of their best practices.

**Section (d): Nighttime Service.** 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, which are generally associated with a greater risk. Unless the magistrate has approved an unannounced entry, however, a nighttime warrant involving entry into a structure must be served by knocking and announcing. Additionally, many 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, or for placing a GPS tracking device on a vehicle that is parked in a public place – do not involve entry into a structure and entail considerably less risk.

Accordingly, section (d) mirrors the statutory requirement of “good cause” for service of a warrant “at any time of the day or night.” Section (d) also requires that the application “contain specific facts that provide good cause.” Although members considered exempting routine DUI and GPS search warrant applications from the requirement, “good cause” is mandated by A.R.S. § 13-3917, and the requirement therefore applies even to routine applications that request service of the warrant between 10 p.m. and 6:30 a.m.

**Section (e): Statement with the Return, and Section (f): Court Data.**

Although the Maricopa County Superior Court already collects certain data concerning search warrants, the Task Force believes that data should be gathered statewide, and uniformly.

The Task Force report to the Arizona Judicial Council proposed two sections in Rule 2.6 that required data collection. One section mandated that officers filing a return of a warrant must indicate whether the warrant was served by an unannounced entry or during the night. Another section of the previous draft of Rule 2.6 specified two metrics that would be collected by the court: the number of issued warrants that

authorized unannounced entry into a structure, and the number of warrants authorizing nighttime service that required entry into a structure.

After further consideration subsequent to the Arizona Judicial Council meeting, Petitioner is proposing modifications to these fields, as shown in sections (e) and (f) of proposed Rule 2.6 in the Appendix. These modifications are consistent with the provisions previously proposed by the Task Force, but they are somewhat broader and should yield more meaningful data. The manner of collecting and submitting data under these sections would be subject to further direction by the Administrative Office of the Courts.

**Section (g): Definitions.** This section includes the definitions of two terms.

“Night” is derived from A.R.S. § 13-3917 and means the period from 10 p.m. to 6:30 a.m.

“Structure” is significant in the context of certain sections of Rule 2.6, especially section (b) on an unannounced entry, which applies only to applications requesting a no-knock entry into a structure. The definition of “structure” is derived in part from definitions used in Title 13 burglary and arson statutes. The definition of “structure” in Rule 2.6, however, is tailored to the particular context of Rule 2.6. “Structure” as defined in section (g) means “any building, place, or vehicle with sides, a door, and a floor, which a reasonable person would believe is used for permanent or temporary lodging or for a business.” In addition to a residence, a

“structure” therefore would include locations such as a recreational vehicle, an automobile used as a residence by a homeless person, a part-time office, or a hotel room.

**5. Pre-filing Vetting.** The Task Force report to the Arizona Judicial Council, including proposed Rule 2.6, was presented at a meeting of the Presiding Judges and at a Court Leadership Conference, both of which were held in October 2021.

The Presiding Judges made a notable comment, which was reiterated at the October 21, 2021 meeting of the Arizona Judicial Council. The comment concerned a supervisor’s approval of an application for a no-knock warrant. The initial draft of Rule 2.6 provided that the absence of a supervisor’s approval was not dispositive. Rather, it was merely a factor for the magistrate’s consideration, who could authorize an unannounced entry even without a supervisor’s approval of the application. In addition, a comment to the draft rule explained that the magistrate could issue a no-knock warrant in the absence of a supervisor’s approval if the lack of approval was justified by the underlying circumstances. The Presiding Judges and members of the Arizona Judicial Council believed a supervisor’s approval should be available in virtually any situation, and approval should be obtainable within the time the affiant

needs to prepare the application. They accordingly requested that supervisor approval of a no-knock application be a requirement of the proposed rule.<sup>7</sup>

Petitioner revised the draft rule based on those comments and the consensus of the Presiding Judges and Arizona Judicial Council. Section (b) of the rule proposed by this petition makes a supervisor's approval of a no-knock application mandatory and a prerequisite to a magistrate's issuance of a no-knock warrant. In addition, and as requested at those meetings, the draft comment was deleted from the proposed rule.

**6. Conclusion.** Petitioner requests that the Court open this petition for public comment and that the Court consider the petition and comments in the regular course provided by Supreme Court Rule 28.

RESPECTFULLY SUBMITTED this 4<sup>th</sup> day of January 2022.

/s/  
David K. Byers, Administrative Director  
Administrative Office of the Courts

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<sup>7</sup> Moreover, in an actual exigent circumstance, the officers could proceed with an unannounced entry even without a magistrate's approval. See A.R.S. § 13-3916(B)(4), which permits an unannounced entry if "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."

## Appendix: Proposed Criminal Rule 2.6

The entirety of the rule shown below is new.

### **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.** A magistrate cannot authorize an unannounced entry into a structure pursuant to A.R.S. § 13-3915(B) unless the magistrate finds that:

- (1) the search warrant application has been approved by a supervising law enforcement officer in the affiant's agency;
- (2) there are specific facts and safety factors discussed in the application 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; and
- (3) if the application requests an unannounced entry based on the potential destruction of evidence, 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 a search warrant confirms that the magistrate has made the required findings.

**(c) Safety Factors.** An application for an unannounced entry must discuss safety factors that 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 or other animals that might pose a risk to officers, 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 number of occupants at the place to be searched and the identity of known occupants; the presence of children, the elderly, and persons with disabilities; and whether any occupant of the place to be searched is experiencing a mental health crisis.
- (7) *Other information.* Any other relevant information.

**(d) Nighttime Service.** An application requesting service at any time of the day or night pursuant to A.R.S. § 13-3917, must contain specific facts that provide good cause why service only during the day would not be reasonable or feasible.

**(e) Statement with the Return.** The return on a warrant must be accompanied by a statement of the affiant or the officer returning the warrant. The statement must be in a format promulgated by the Director of the Administrative Office of the Courts. The statement must indicate whether service of the warrant required entry into a structure. If service of the search warrant required entry into a structure, the statement must indicate whether the warrant:

- (1) authorized an unannounced entry;
- (2) was executed by an unannounced entry;
- (3) authorized nighttime service; and
- (4) was executed at night.

**(f) Court Data.** Each court must collect and maintain the following data:

- (1) the total number of search warrants the court authorized during the reporting period, and
- (2) the total number of warrants for each of the categories identified in the statements submitted to the court under section (e).

Courts must submit this data as directed by the Director of the Administrative Office of the Courts.

**(g) 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, place, or vehicle with sides, a door, and a floor, which a reasonable person would believe is used for permanent or temporary lodging or for a business.