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ARIZONA SUPREME COURT

In the Matter of: PETITION TO ADOPT RULE 2.6, RULES OF CRIMINAL PROCEDURE	Supreme Court No. R-22-0002 **Comment by the Directors of Maricopa County Indigent Defense Agencies**

We are the directors of the indigent defender agencies that handle most indigent felony cases filed in Maricopa County. We submit this comment in support of the proposal to adopt Rule 2.6, Ariz. R. Crim. P. We believe that enacting additional procedural safeguards requiring law enforcement to prove the necessity of a "no knock" warrant to a neutral magistrate will promote the safety of our clients, law enforcement, and the community at large.

I. **"No knock" warrants are inherently dangerous and should be limited to situations in which an announced entry endangers individual safety or situations in which evidence will likely be destroyed.**

Search warrants are an essential tool for law enforcement investigations. Search warrants also vindicate an individual's rights against unreasonable search and seizure under U.S. Constitution amend. IV and Ariz. Const. art. II, § 8. Law enforcement should be continuously encouraged to seek search warrants under all circumstances. But "no knock" search warrants—executed without law enforcement officers first knocking and announcing their presence—undermine the common law knock-and-announce rule deeply rooted in our country's heritage. The knock-and-announce rule exists to protect the sanctity of individual privacy rights in the home and to protect law enforcement and citizens alike.

In particular, "no knock" warrants can invite tragedy by creating chaotic, confusing, and dangerous situations for civilians and law enforcement alike. High profile cases across the United States and locally illustrate the dire consequences of "no knock" warrants.[1] "No knock" warrants may be a rare occurrence in Arizona, but "when even one situation goes badly, it can seriously impact the public's trust in the justice system." Sup. Ct. A.O. No. 2021-34. Because of the significant risks inherent to the execution of "no knock" warrants, limiting the authorization of such warrants to situations in which an announced entry would either endanger the safety of law enforcement and citizens or situations in which evidence will likely be destroyed is crucial.

[1] https://abcnews.go.com/US/charges-officer-shot-killed-amir-locke/story?id=83910346
https://people.com/crime/2-years-after-breonna-taylors-death-family-continues-fight-against-no-knock-warrants/
https://news.bloomberglaw.com/social-justice/no-knock-raids-political-inaction-has-deadly-consequences

II. The mandatory judicial findings required under proposed Rule 2.6(b) ensure law enforcement agency accountability and narrow the circumstances in which law enforcement may obtain a "no knock" warrant.

If enacted, Rule 2.6 would establish two mandatory findings a magistrate must make before authorizing a "no knock" warrant, as well as a third finding to be mandatorily made only if the application for the "no knock" warrant is based on the potential destruction of evidence. The purpose of these mandatory findings is to create accountability on behalf of both law enforcement agencies and the judiciary to ensure that "no knock" warrants are being requested and authorized in only the limited, appropriate situations where a standard knock-and-announce warrant would risk the safety of law enforcement officers or citizens or where it would risk the destruction of important evidence to be seized. These three juridical findings are enumerated as Rule 2.6(b)(1)—(b)(3).

Rule 2.6(b)(1) requires that a search warrant application requesting the issuance of a "no knock" warrant first be approved by a supervising law enforcement officer within the requesting agency before a magistrate can authorize such a warrant. Such supervisory approval ensures that "no knock" warrants are being requested in appropriate circumstances, consistent with the agency's internal policies. While many law enforcement agencies already do this as a best practice, this requirement promotes a uniform supervisor approval. Under this rule, agencies still maintain considerable leeway in determining which higher-level officer is responsible for review, considering the size of the department, organizational structure, and chain of command. Ultimately, Rule 2.6(b)(1) ensures law

enforcement agency accountability across the board by establishing the need for a higher-level supervisory check on every "no knock" warrant request.

Rule 2.6(b)(2) requires that, before authorizing a "no knock" warrant, a magistrate must make an individualized finding that the warrant application includes and discusses enumerated safety factors and facts known to law enforcement that demonstrate why an announced entry would endanger safety of any person or would result in destruction of evidence sought. The purpose of this finding is to ensure that law enforcement affiants are actively identifying and detailing the particular facts and safety factors that contribute to the safety risk or likelihood of evidence destruction that an announced entry would create. It also ensures that a magistrate properly weigh and consider these facts and factors before authorizing a "no knock" warrant. Essentially, Rule 2.6(b)(2) establishes a responsibility on behalf of both law enforcement agencies and the judiciary to take the authorization of "no knock" warrants seriously and to determine that a safety risk or evidence destruction risk necessarily exists before issuing such a warrant.

Rule 2.6(b)(3) requires that, if a "no knock" warrant is being sought on the basis that an announced entry would result in the potential destruction of evidence, a magistrate must make a third finding that necessitates the warrant application explain the likelihood of the destruction of evidence and that the magistrate weigh the likelihood of evidence destruction against the risk to personal safety associated with unannounced entry. Ultimately, Rule 2.6(b)(3) provides additional balancing in cases where destruction of evidence is prioritized over the preservation of life.

III. <u>"Safety factors" listed in proposed Rule 2.6(c) adequately address safety concerns law enforcement agencies may have while also protecting the community from the dangers posed by "no knock" warrants.</u>

Rule 2.6(c) enumerates the safety factors first referenced in Rule 2.6(b)(2) that a law enforcement affiant must discuss in an application for a "no knock" warrant. Those factors are as follows:

(1) Criminal activity

(2) Violence

(3) Weapons

(4) Security characteristics

(5) Hostages

(6) Occupants

(7) Other information

These safety factors sufficiently encompass the potential motivations for a law enforcement agency to seek a "no knock" warrant. Requiring law enforcement agencies to discuss these above factors in detail within applications for "no knock" warrants ensures that a magistrate can consider all the applicable safety concerns relevant to the search before determining the appropriateness of an unannounced entry.

IV. <u>Nighttime service</u>.

In addition to establishing mandatory findings that must be made by a magistrate before a "no knock" warrant is issued, the proposed Rule 2.6 would establish a requirement that applications for warrants to be served at nighttime contain specific facts providing good cause as to why daytime service is not reasonable or practicable. This requirement is

enumerated under Rule 2.6(d). This subsection reflects the existing statutory requirement under A.R.S. § 13-3917 that "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." Under the statute, if the good cause showing is not made, a warrant may only be served in the daytime. Thus, Rule 2.6(f) simply serves to provide law enforcement agencies with clear direction that they must articulate the specific facts that support such a good cause finding and justify a nighttime search warrant.

V. Requiring superior courts to capture data on "no knock" and nighttime warrants will provide critical information for the Administrative Office of the Courts to continue to refine proposed Rule 2.6.

The proposed Rule 2.6 also creates requirements regarding the return on a warrant. Under Rule 2.6(e), when returning a warrant, law enforcement agencies would be required to further submit a statement of the affiant or of the officer who is returning the warrant. That statement would need to detail whether the service of the warrant involved entry into a structure and, if so, 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.

Ariz. R. Crim. P. 2.6(e).

Rule 2.6(f) would additionally require that all Arizona courts collect data on the following:

> (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).

Ariz. R. Crim. P. 2.6(f). This provision will impose no additional burden to the Maricopa County Superior Court, as this data collection already occurs. It is important, however, that this information be obtained from each county for the Administrative Office of the Courts to analyze. Data collection will empower the Administrative Office of the Courts and criminal justice stakeholders to evaluate the efficacy of Rule 2.6 and refine Rule 2.6 as needed.

VI. Conclusion

For these reasons, the directors of indigent defender agencies of Maricopa County support the adoption of the proposed Rule 2.6, Ariz. R. Crim. P. Enacting Rule 2.6 would create vital procedural safeguards regarding the authorization of "no knock" warrants by not only requiring law enforcement to sufficiently detail the necessity of a "no knock" warrant to a magistrate, but also ensuring that magistrates make requisite findings regarding the need for such a warrant. Ultimately, this will serve to promote the safety of our clients, law enforcement, and the community at large.

DATED this 25th day of April 2022.

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This comment has been submitted
This 25th day of April, 2022, to:

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