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IN THE SUPREME COURT

STATE OF ARIZONA

PETITION TO ADOPT RULE 2.6,) No. R-2022-0002
ARIZONA RULES OF)
CRIMINAL PROCEDURE) REPLY
)
)
_____)

Petitioner requested the Court to adopt a new Rule 2.6 of the Arizona Rules of Criminal Procedure titled “Search Warrant Applications Requesting an Unannounced Entry or Nighttime Service.” This rule represents, with certain modifications, the work product of the Court’s Task Force on the Issuance of Search Warrants (“Task Force”).

Three comments were filed on the Rules Forum concerning this petition, and Petitioner now files this reply. As the reply explains, Petitioner is requesting additional modifications to the proposed rule. The requested modifications are shown in the Appendix to this reply and include a change to the rule’s title, which now would be “Search Warrant Applications; Data Collection.”

1. Comment from the superior court. The first comment to the petition, which was filed by the Criminal Department Presiding Judge of the Superior Court of Arizona in Maricopa County, “supports enactment of Proposed Rule 2.6.”

2. Comment from public defender agencies. The second comment was filed by the Directors of multiple Maricopa Indigent Director Agencies. The comment concluded that the directors

... 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.

3. Comment from Arizona Attorneys for Criminal Justice (“AACJ”).

The third comment, from the AACJ, also “supports the proposal, as well as the Report of the Task Force on Issuing Search Warrants.” (AACJ comment at page 2. See further the Task Force’s October 21, 2021 [report to the Arizona Judicial Council](#).) The AACJ comment, however, “also recognizes that proposed Rule 2.6, while an important step in the right direction, should not be the end of the line on this issue.”

Petitioner disagrees with the AACJ’s statement that “the Task Force minimized the occurrence of a team of SWAT officers forcibly breaking down a

door and firing flash grenades.” The Task Force did not minimize these scenarios but rather took what Petitioner believes is a prudent and reasonable approach: The Task Force said:

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. (Task Force report, *supra*, pages 10-11)

The AACJ’s comment cites to *State v. Sisco*, 238 Ariz. 229, 240 ¶ 35 (App. 2015), *vacated*, 239 Ariz. 532 (2016). That case involved entry into a storage unit pursuant to a search warrant. Neither the Court of Appeals nor the Supreme Court’s opinion discussed whether the entry was announced or unannounced, nor did that circumstance appear to be an issue on appeal. Petitioner is not familiar with the facts in that case, except as stated in the decisions, but he nevertheless notes that even when a warrant does not authorize an unannounced entry, it can nonetheless be served in that manner in certain circumstances.¹ The AACJ’s comment also requests

¹ A warrant that does not authorize an unannounced entry can nonetheless be served in that manner as expressly permitted by A.R.S. § 13-3916(b)(4), i.e., when “... 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

that the Court consider remedies for such “blatant violations” at some unspecified time “in the future” (comment at page 3) but that is not a matter that is before the Court at this time.

The AACJ comment then discusses three “areas for improvement in the text of the proposal.”

(A) The comment (at pages 3-4) observes that “law enforcement should be expected to conduct surveillance on the location” as a precondition for a dynamic (“no-knock”) entry, and that this information should be included in the application for the warrant. Section (c), which concerns “safety factors,” does not use the word “surveillance,” but the proposed section identifies items that are acquired by surveillance or by other investigative methods. For clarity as well as to ensure that information in the application is not limited to matters acquired by surveillance, Petitioner proposes adding to section (c) the words “surveillance or other investigative methods,” as shown in the Appendix to this reply.

(B) The comment (at page 4) contends that the list of safety factors in section (c)

... provides virtually no guidance as to how those factors should be considered and most of them are so vague that their consideration would necessarily result in a judicial preference toward granting unannounced entry

entering would endanger the safety of any person or result in the destruction of evidence.”

Legislators (see the Task Force report at pages 5-7) and Task Force members spent considerable time developing lists of safety factors. Not every factor specified in section (c) will be applicable in every case. A judicial officer should thoughtfully consider factors that are discussed in any particular application for a no-knock warrant and -- as provided in proposed Rule 2.6(b)(2) -- determine whether the facts concerning those factors "... demonstrate why an announced entry would endanger the safety of any person or would result in the destruction of evidence sought by the warrant;" There is no formulistic approach. The AACJ does not propose one or suggest that one exists. The determination is inevitably left to the sound judgment of a neutral magistrate.

(C) The AACJ's third recommendation concerns data collection under proposed Rule 2.6(f). The comment again refers to the facts in *Sisco, supra.*, and requests that the AOC's data collection distinguish cases where the warrant was not issued as a no-knock warrant but was served without knocking and announcing. Petitioner believes that few warrants will be executed in this matter, but nonetheless inclusion of this category, as the AACJ suggests, should help to empirically demonstrate whether that is indeed the case.

Petitioner has accordingly added that category to the data fields enumerated in section (e). Petitioner has also added a sixth category in section (e) to cover the reverse situation, i.e., a warrant that was issued with no-knock authority but was

served by officers who first knocked and announced their presence. These changes are shown in the Appendix.

With the caveat of the three recommendations discussed above, the AACJ's comment, at page 6, concludes with a request that the Court grant the petition to adopt Rule 2.6.

4. Revisions made on Petitioner's initiative. Petitioner proposes several changes to the draft rule, some of which originated from the changes to section (e) discussed above.

First, Petitioner proposes changing the name of the document filed with the return under section (e), from the previous document title of "statement filed with the return," which is admittedly clunky, to the more descriptive name "cover sheet."

Second, while the original version of Rule 2.6 required this document to "be in a format promulgated by the Director of the Administrative Office of the Court," the revised version provides that the form must be in a format and "contain information" as determined by the Director. The words "contain information" will permit the Director to adjust the categories in the form as future circumstances arise, similar to the Director's authority to designate case categories in the civil cover sheet under Civil Rule 8(g)(1)(B)(v).

Third, the proposed revisions to section (e) require that every search warrant return be submitted with a cover sheet. Like civil filings, there shouldn't be some

search warrant returns filed with a cover sheet and some returns filed without one. A cover sheet should always be filed. This is a more logical way of collecting information, helps ensure that the data is comprehensive, and should yield better quality data. As contemplated by section (e), however, the data will continue to focus on search warrants involving entries into structures.

Fourth, because the proposed revisions to section (e) would apply to the return on every warrant, the previous title of Rule 2.6, which limited its application to no-knock and nighttime warrants, and the content of section (a) that similarly limited the application of this rule, would no longer be appropriate. Petitioner has accordingly modified the title of Rule 2.6 and section (a) as shown in the Appendix to this reply.

Fifth, because sections (b) and (c) continue to apply to unannounced entries into structures, and for additional clarity, Petitioner has added the words “into a structure” and made further modifications to the title of each of these two sections.

5. Conclusion. As requested in the petition, and especially in light of the three supportive comments, Petitioner requests the Court to adopt proposed Criminal Rule 2.6, as modified pursuant to this reply and as shown in the Appendix.

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RESPECTFULLY SUBMITTED this 27th day of May 2022.

/s/
David K. Byers, Administrative Director
by Marcus Reinkensmeyer, Deputy Director
Administrative Office of the Courts

Copy emailed this 27th day
of May 2022 to:

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Appendix to the Reply: Proposed Criminal Rule 2.6

There are two versions of this new rule in this Appendix. The first version has strikethrough and underline that show changes to the version appended to the January 2022 rule petition. The second version is clean.

Rule 2.6. Search Warrant Applications; ~~Requesting an Unannounced Entry or Nighttime Service~~ Data Collection

(a) Applicability. ~~This Sections (b) and (c) of this rule applies apply to search warrant applications requesting an unannounced entry into a structure. or Section (d) applies to applications for nighttime requesting service of a search warrant at night. Sections (e) and (f), which pertain to data collection, apply to every issued search warrant.~~

(b) ~~Unannounced~~ Required Findings for an Unannounced Entry into a Structure. 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 for an Unannounced Entry into a Structure. An application for an unannounced entry into a structure must discuss safety factors, as determined by surveillance or other investigative methods and 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~~ Cover Sheet for the Return. The return on a warrant must be accompanied by a ~~statement of~~ cover sheet completed and signed by the affiant or the officer returning the warrant. The ~~statement cover sheet~~ must be in a format, ~~promulgated~~ and contain information, as determined by the Director of the Administrative Office of the Courts. The cover sheet must ~~indicate~~ specify

whether service of the warrant required entry into a structure. If service of the search warrant required entry into a structure, the ~~statement~~ cover sheet also must indicate whether the warrant:

- (1) authorized an unannounced entry and was executed by an unannounced entry;
- (2) ~~was executed by an unannounced entry~~ authorized an unannounced entry but was executed by knocking and announcing before entry;
- (3) did not authorize an unannounced entry and was executed by knocking and announcing before entry;
- (4) did not authorize an unannounced entry but was executed by an unannounced entry;
- (5) authorized nighttime service; and
- (6) 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.
- (3) “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.

The clean version begins on the next page.

Rule 2.6. Search Warrant Applications; Data Collection

(a) Applicability. Sections (b) and (c) of this rule apply to search warrant applications requesting an unannounced entry into a structure. Section (d) applies to applications requesting service of a search warrant at night. Sections (e) and (f), which pertain to data collection, apply to every issued search warrant.

(b) Required Findings for an Unannounced Entry into a Structure. 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 for an Unannounced Entry into a Structure. An application for an unannounced entry into a structure must discuss safety factors, as determined by surveillance or other investigative methods and 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) Cover Sheet for the Return. The return on a warrant must be accompanied by a cover sheet completed and signed by the affiant or the officer returning the warrant. The cover sheet must be in a format, and contain information, as determined by the Director of the Administrative Office of the Courts. The cover sheet must specify whether service of the warrant required entry into a structure. If service of the search warrant required entry into a structure, the cover sheet also must indicate whether the warrant:

- (1) authorized an unannounced entry and was executed by an unannounced entry.
- (2) authorized an unannounced entry but was executed by knocking and announcing before entry.

(3) did not authorize an unannounced entry and was executed by knocking and announcing before entry.

(4) did not authorize an unannounced entry but was executed by an unannounced entry.

(5) authorized nighttime service; and

(6) 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).

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

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