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IN THE SUPREME COURT  
STATE OF ARIZONA

In the Matter of	Supreme Court No. R-23-0024
PETITION TO AMEND RULE )	
2.6 ARIZONA RULES OF )	Reply to Comments
CRIMINAL PROCEDURE )	
_____ )	

Pursuant to Rule 28 of the Arizona Supreme Court, David K. Byers, Administrative Director, Administrative Office of the Courts, respectfully submits this reply to comments posted in this matter.

**I. Petition Supported by Commenters.**

The Maricopa County Attorney’s Office, the State Bar, Jeff Fine, Clerk of the Superior Court for Maricopa County, and Judge Jennifer Green, Criminal Department Presiding Judge in Maricopa County, filed comments supporting the petition. Judge Green and Clerk of Court Fine propose that clarifying language be included in the amended rule. Petitioner supports the addition of clarifying language with limited exceptions as detailed below.

## **II. Clarifying Language Proposed by Judge Green**

### **a. Title, Applicability, and Headings Match Scope of Amendment**

Petitioner supports Judge Green’s proposal to have (1) the title of Rule 2.6, (2) the applicability provision in Rule 2.6(a), and (3) the heading of Rule 2.6(g) reflect the scope of the rule as amended by the Court. If this Court is inclined to adopt the clarifying language Judge Green proposes, Judge Green’s proposal accomplishes that goal with respect to these items.

### **b. Supplemental, Amended, Corrected Returns and Inventories**

A.R.S. § 13-3918(A) requires that a return be made within days after a warrant is executed. Judge Green notes in part 4 of her comment that many timely returns will not list any property having been received under a warrant because law enforcement may be required to wait weeks or longer for an entity to produce some items. She proposes that Rule 2.6 include language to make clear that law enforcement must file subsequent returns as they receive items past the original return date. Judge Green also proposes clarifying that the return is to be made in “written form.”

Petitioner supports inclusion of the additional language proposed by Judge Green as may be edited for brevity: “Supplemental, amended or corrected returns and inventories may be made with respect to a search warrant. If additional property

is taken after an initial return, a supplemental return and inventory must be made within three court days.”

**c. Require Copy of Return and Inventory Evidencing Receipt**

Judge Green proposes in part 5 of her comment that the receiving court be required to provide a copy of the return and inventory evidencing receipt upon request from law enforcement. Petitioner does not believe this clarification is necessary. Courts routinely provide confirmation that a document has been filed without having it required by rule. Placing such a requirement in this rule may inadvertently suggest that similar confirmation should not also be provided in other contexts. Moreover, A.R.S. § 13-3921(B) requires that the “magistrate shall deliver a copy of the inventory to the person from whose possession the property was taken and to the applicant for the warrant.”

If inclined to include Judge Green’s proposed language on this issue in Rule 2.6, the Court may wish to more closely track A.R.S. § 13-3921(B) in the amended rule. For example, “The court must provide a copy of the return and inventory to the person from whose possession the property was taken and to the applicant for the warrant.”

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**d. Further Delineate Contents to Match A.R.S. § 13-3921**

Judge Green proposes in part 6 further delineating the contents of the return and inventory in Rule 2.6 to provide guidance to fully comply with A.R.S. § 13-3921. Petitioner supports inclusion of the language proposed as may be edited for brevity.

**e. Requests for Non-Public Retention**

As explained in the petition, records of the court relating to a search warrant are typically opened to the public once the return on a warrant is made. A.R.S. § 13-3918(A). A magistrate may lengthen this time for good cause. *Id.* Currently there is no standard mechanism for law enforcement to make such a request and it may be relayed informally when an officer is making a return to a magistrate in person. In keeping with this informal process, the proposal in the petition is to require that law enforcement include a request to lengthen the time in the cover sheet accompanying the return along with an explanation to establish good cause for the request. Judge Green proposes in part 7 of her comment a more formal process through which law enforcement may request that the court refrain from making a search warrant, return, and inventory public without ordering the documents sealed.

Petitioner supports inclusion of the additional language proposed by Judge Green to formalize this process as may be edited for brevity.

**f. “Must” Preferred Style in Court Rules**

Relying on Bryan Garner, *Guidelines for Drafting and Editing Court Rules* (1996), the Rule Restyling Key Principles and Examples in the Rules Forum expresses the Court’s preference for “must” over “shall” to convey an obligation. If the Court adopts Judge Green’s proposals, Petitioner recommends that “must” be used instead of “shall” where an obligation is intended.

**III. Clarifying Language Proposed by Clerk of Court Fine**

**a. Allow Flexibility in Methods of Making Returns**

Law enforcement should be allowed flexibility in determining how to make a return to a court. Clerk of Court Fine recommends that Rule 2.6 require that returns be made electronically on search warrants issued electronically. This symmetry has an appeal and may provide a level of administrative convenience. As noted in the petition, however, allowing returns to be made by electronic means, instead of in person, should reduce the burden on both law enforcement and the court. Petitioner anticipates that the reduced burden will lead law enforcement to make use of its ability to submit returns without traveling to the courthouse. In those instances where law enforcement believes it is worth the extra burden to make the trip, the rule should not prevent them from doing so. Therefore, Petitioner recommends that the Court not adopt the proposal mandating electronic returns.

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## **b. Records Open Unless Otherwise Ordered**

As discussed above, the documents and records relating to a search warrant are to be open to the public as a judicial record and a magistrate may lengthen the time when this occurs. A.R.S. § 13-3918(A). Currently, law enforcement requests the lengthening of time when they appear before the magistrate to make the return. If the rule is amended to allow for electronic delivery of the return, law enforcement needs an option to make a request in written form (either in the coversheet as proposed in the petition or separately as proposed by Judge Green). In whatever form the request is made, the magistrate will need to rule on it. In the absence of such a request, however, there is no need to involve the magistrate to decide. Therefore, Petitioner respectfully opposes the Clerk of Court's proposal to require that a magistrate make a determination upon receipt of every return as to whether documents related to a search warrant are open to the public. Such a determination is unnecessary when there has been no request. Moreover, such a requirement would undermine the benefit to the court in offering a streamlined return process through amendment of Rule 2.6 without adding value to the process.

## **IV. Request.**

Petitioner appreciates the comments stakeholders submitted during the comment period. Petitioner requests that the Court adopt the rule changes proposed

in the petition with the addition of certain clarifying language proposed by Judge Green as discussed above.

RESPECTFULLY SUBMITTED this 25th day of May, 2023.

By /S/ David K. Byers

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