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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)	Amended 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 amended 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 proposed that clarifying language be included in the amended rule. In light of these proposals, stakeholders from the law enforcement community provided feedback that prompted additional consultation.

Petitioner supports the addition of clarifying language based on Judge Green and Clerk of Court Fine's proposals as further refined through consultation to address the additional feedback from law enforcement. The refined language is attached as Appendix A.

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 headings reflect the scope of the rule as amended. Through consultation with Judge Green and her team, the title, applicability provision, and headings included in the language attached as Appendix A have been edited to reflect that goal.

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.

Petitioner supports inclusion of the additional language to address the concern raised by Judge Green while also balancing the feedback from law enforcement. With the assistance of Judge Green and her team, our consensus is that the language suggested in (e)(1) as shown in Appendix A accomplishes that goal.

c. Copy of Inventory Addressed in Statute

A.R.S. § 13-3921(B) addresses a magistrate's responsibility in delivering a copy of the inventory. In part 5 of her comment, Judge Green proposed also addressing that responsibility in the amendment to Rule 2.6. Based on further discussions, this topic was not addressed in the consensus language attached. No specific incidents of problems in delivering copies were identified and, as mentioned, the topic is addressed in statute.

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 comply with A.R.S. § 13-3921. Petitioner supports inclusion of language to accomplish this goal. Again, with the assistance of Judge Green and her team in focusing on key aspects, our consensus is that the language suggested in (e)(3) and (4) as shown in Appendix A accomplishes that goal.

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 was 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.

Judge Green’s concerns are well-taken, and Petitioner supports inclusion of language to better standardize this process. Consensus language suggested in (f)(2) and (3) as shown in Appendix A was developed with the assistance of Judge Green and her team as we worked together to develop more focused verbiage. Addressing this topic in the amended rule also resolves an issue raised in Clerk of Court Fine’s comment as mentioned below.

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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. AOC counsel discussed this topic with counsel for Clerk of Court Fine to determine if the topic had been raised in the comment due to a specific incident or problem. The impetus had been more the goal for symmetry. Based on that understanding, Petitioner recommends that the Court allow law enforcement flexibility in determining how to make a return to a court.

b. Records Open Unless Otherwise Ordered

Clerk of Court Fine proposed in his comment 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. 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). The process arising out of Judge Green's comment and encapsulated in (f)(2) and (3) of the proposed amendment attached provides a mechanism for requesting that search warrant records be maintained outside of the public record. The substitution of this more formal mechanism in place of the current informal exchange with the magistrate is designed, in part, to address the concern raised by Clerk of Court Fine. A court's ruling on the request to modify will provide the clarity needed.

IV. Post-Comment Coordination with Stakeholders

Stakeholders from the law enforcement community provided feedback on the rule petition through AOC staff upon being advised of the proposed language put forward by Judge Green. Their feedback served as the impetus to meet with Judge Green and her team to refine the proposed amendment to address that feedback while meeting the needs of the court. The improved draft was circulated to (1) the stakeholders in the law enforcement community, (2) administrators of the Superior Court throughout the state, and (3) the stakeholders who previously submitted comments: the Maricopa County Attorney's Office, the State Bar, and Jessica Fotinos, counsel for Jeff Fine, Clerk of the Superior Court for Maricopa County. Neither the county attorney's office nor bar provided further input. Ms. Fotinos, however, kindly provided editing suggestions and shared initial plans for working

with the Superior Court to implement any amendment to Rule 2.6. Petitioner appreciates the comments and feedback from all of the stakeholders who participated in this process.

V. Request.

Petitioner requests that the Court adopt the rule changes as shown in Appendix

A.

RESPECTFULLY SUBMITTED this 5th day of July, 2023.

By /S/ David K. Byers

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APPENDIX A

(language to be removed is shown in ~~strikethrough~~, new language is underlined)

RULES OF CRIMINAL PROCEDURE

Rule 2.6 - Search Warrant Applications and Returns; Maintenance of Search Warrant Records; Data Collection

(a) **Applicability.** Rule 2.6(b) and (c) apply to search warrant applications requesting an unannounced entry into a structure. Rule 2.6(d) applies to applications requesting service of a search warrant at night. Rule 2.6(e) applies to return of a search warrant. Rule 2.6(f) applies to maintenance of search warrant records. Rule 2.6(~~e~~) and (~~f~~)(~~g~~) and (h), which pertain to data collection, apply to every issued search warrant.

(b) through (d) [No changes]

(e) Return of Search Warrant and Inventory.

(1) Return to Issuing Court; Additional Returns. The return on a search warrant must be made to the magistrate who issued the warrant by delivering a written form of return to that magistrate's court along with a written inventory of the property taken. Supplemental, amended and corrected returns and inventories may be made with respect to any search warrant. If additional property is seized or received after the initial return of the warrant, a supplemental return and inventory must be made.

(2) Manner of Delivery. Delivery of a search warrant return and inventory must be made by facsimile, electronic means, in a manner permitted by

the court, or in person.

(3) Contents of Inventory; Signed Written Oath. The return and inventory must recite that it contains a true and detailed account of all the property taken, and if applicable, state that further property is expected to be taken or received pursuant to the warrant and how that information is known.

(4) Verification. The return and inventory must be verified through a signed, written oath swearing or affirming that the information on the return and inventory is true and detailed. A signed written oath on a return and inventory, including those signed electronically, shall have the same legal effect as if taken in the presence of the magistrate.

(f) Maintenance of Search Warrant Records.

(1) Clerk of Court. The clerk of the court that issued the warrant must maintain a record of the warrant and any return and inventory.

(2) Request to modify the time search warrant records are maintained outside of the public record. A request to modify the time search warrant documents are maintained outside of the public record made at the time the return and inventory is delivered must be submitted on a separate page accompanying the return and inventory, signed by the affiant or the officer returning the warrant and state specifically whether it pertains to:

(A) the application and affidavit,

(B) the issued search warrant,

(C) the return and inventory,

(D) any other specific document, or

(E) all documents associated with the search warrant.

(3) *Submission through an electronic portal.* For search warrants that are submitted and issued through an electronic portal approved by the Administrative Office of the Courts, a request to modify the time before a document relating to a search warrant is open to the public record may be programmed or incorporated into the return and inventory documents compiled by the electronic system rather than submitted as a separate page.

~~(e)~~ **(g) Cover Sheet for the Return. [No change to text of Rule]**

~~(f)~~ **(h) Court Data. [No change to text of Rule]**

~~(g)~~ **(i) Definitions. [No change to text of Rule]**