ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE
David J. Euchner, SB#021768
33 N. Stone Ave., 21st Floor, Tucson, AZ 85701
TEL: (520) 724-6800
E-Mail: david.euchner@pima.gov
Attorney for Arizona Attorneys for Criminal Justice

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:	) No. R-21-0051
	)
	) **COMMENT OF ARIZONA**
Petition to Adopt Arizona Rule of Criminal Procedure 2.6	) **ATTORNEYS FOR CRIMINAL**
	) **JUSTICE (AACJ) IN SUPPORT OF**
	) **PETITION TO ADOPT ARIZONA**
	) **RULE OF CRIMINAL**
	) **PROCEDURE 2.6**

Pursuant to Rule 28 of the Arizona Rules of the Supreme Court, Arizona Attorneys for Criminal Justice ("AACJ") hereby submits the following comment on the petition to adopt Arizona Rule of Criminal Procedure 2.6.

AACJ, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 in order to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public

awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

AACJ supports the proposal, as well as the Report of the Task Force on Issuing Search Warrants. By adopting this rule, this Court would take an unprecedented step toward policing and monitoring how judges issue search warrants. To say "unprecedented" does not imply that the proposal is without legal authority. On the contrary, the Task Force recognized the proper role of judicial rulemaking in this arena and did not attempt to overstep its bounds by encroaching on the powers bestowed upon the other branches of government. Similarly, the Task Force did not attempt to solve all societal problems through the rule change process. In short, this is a laudable step forward.

With that said, AACJ 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. The Task Force minimized the occurrence of "a team of SWAT officers forcibly breaking down a door and firing flash grenades, i.e., a 'dynamic entry,'" Report at 2, but the experience of AACJ members is much different. For example, in one prominent case decided by this Court, the court of appeals described the circumstances of the service of the warrant:

> [T]he record here underscores the fallibility of such sensory impressions. Police officers initially were mistaken about the location of the marijuana based on its odor, and they consequently deployed a SWAT team to the wrong building.

State v. Sisco, 238 Ariz. 229, 240 ¶ 35 (App. 2015), *vacated*, 239 Ariz. 532 (2016). In that case, the officer who contacted a judge by telephone did not request unannounced entry at all, but police used a SWAT team anyway.[1] In the future, this Court should consider rules or other remedies for such blatant violations of the Fourth Amendment and A.R.S. § 13-3915(B).

AACJ also sees some areas for improvement in the text of the proposal. AACJ makes the following suggestions:

1) In Rule 2.6(b)(2), the affiant / requestor of an unannounced-entry warrant should demonstrate not only "why an announced entry would endanger the safety of any person or would result in the destruction of evidence…" but also whether law enforcement could choose to serve the warrant under circumstances that would reduce those risks. This Court has noted that law enforcement cannot create its own exigency, *State v. Ault*, 150 Ariz. 459, 463 (1986), and likewise it should not be allowed to increase the risks inherent in a "dynamic entry" when a less risky process is readily available. At a minimum, unless there are exigent circumstances, law enforcement should be expected to conduct surveillance on the location to be searched to attempt to determine the necessity for a "dynamic entry." In fact, Rule

[1] Undersigned counsel represented the defendant in that case and reviewed the case file to confirm this fact.

2.6(c) presumes that the affiant already knows this information, or at least has made a good-faith attempt to obtain it, so requiring the affiant to include that information in the request for a dynamic entry warrant should pose no hardship.

2) In Rule 2.6(c), the list of factors 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, particularly for drug crimes. For example, there is enough of a belief that selling drugs alone is sufficiently serious to support a finding that the seller is inherently dangerous. And because some drug users and sellers carry weapons to protect themselves, the affiant will almost certainly include a statement that the suspect may be armed, without regard to the particular suspect.

3) Rule 2.6(f) requires each court to assemble data as to four categories enumerated in Rule 2.6(e). After receiving the statement from law enforcement pursuant to Rule 2.6(e), the court should then review the statement and create two additional categories by subdividing Subsections (2) and (4). The court needs to assemble data on warrants that are executed by unannounced entry with authorization separately from those without authorization (to account for cases such as *Sisco*), and likewise for nighttime-entry warrants.

The Task Force recognized that several recent cases have held that officers' violation of the requirement to seek judicial approval for nighttime service and/or

unannounced entry does not require suppression of evidence in a criminal trial. Report at 3-4. It recognized that there are some lawsuits against law enforcement for violation of civil rights, *id*. at 11 n.7, but it failed to note that the U.S. Supreme Court has largely stripped citizens of their right to sue police officers who act illegally through a recently expanded view of the doctrine of qualified immunity. *See* David J. Euchner and Barbara E. Bergman, ARIZONA CRIMINAL PRACTICE MANUAL (2021 ed.), § 14:1 & n.22 (citing *Safford Unified School Dist. No. 1 v. Redding*, 557 U.S. 364 (2009); *Kisela v. Hughes*, 138 S.Ct. 1148 (2018)); *Zadeh v. Robinson*, 928 F.3d 457, 480-81 (5th Cir. 2019) (Willett, J., concurring in part) ("Indeed, it's curious how this entrenched, judge-created doctrine excuses constitutional violations by limiting the statute Congress passed to redress constitutional violations."). There needs to be some meaningful judicial oversight in the area of issuance and service of search warrants. This Petition takes an important step as to the first, but much remains to be done with regard to the latter.

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Conclusion

For these reasons, AACJ requests this Court grant the petition to adopt Rule 2.6, with the caveat that it adopt minor changes to the text proposed by the Petitioner.

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ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE

By: /s/ David J. Euchner
David J. Euchner

Comment electronically mailed to:

David K. Byers
Administrative Office of the Courts
projects2@courts.az.gov