



# Search Warrants Under Scrutiny As Police Killings Spark Reforms

Jacob Ryan

July 8<sup>th</sup>, 2020

The police officers who killed Breonna Taylor came with a search warrant that allowed detectives to raid the 26-year-old's home without first knocking.

Such warrants — called no-knocks — instantly proved controversial once Taylor's death was thrust into the national spotlight. The Louisville Metro Council was swift to ban the use of no-knock warrants last month in a unanimous vote.

In practice, no-knock warrants like those solicited for the Taylor search are rare: of more than 6,000 search warrants served by LMPD since 2018, fewer than 1% were no-knocks, according to LMPD data.

And now, the call to reform the process by which police seek and obtain search warrants from Louisville judges is broadening, sparking introspection and infighting at the courthouse.

Some attorneys, civil liberty advocates and criminal justice experts say the search warrant process lacks transparency, oversight and fairness. But many Louisville judges defend the system, saying a judge's oath alone binds them to act with integrity and the push for reform is little more than window dressing.

Ted Shouse, a Louisville-based defense attorney, pushed for reform to the broader system of search warrants in an op-ed in the Courier Journal last month. Shouse argued the current system is unnecessarily secret, and gives police an upper hand not afforded to criminal defendants.

Police can call, email or meet-in person with a judge to get a warrant. Officers can take their pick between 30 judges with jurisdiction in the county to present their case for a search warrant. And anecdotally, judges, lawyers and researchers have concluded that officer's warrant requests are rarely refused — for those that are, there's no record to show for it and no system to track how or if a request is modified or just presented to another judge for approval.

“All I'm advocating is transparency,” Shouse said in an interview with KyCIR last week. “Why would a judge not want transparency?”

Chief Jefferson Circuit Judge Angela McCormick Bisig said judges are “gatekeepers” and “neutral listeners.” They may be cordial with officers, but they're not casual and they don't play favorites, she said.

“We take this responsibility very seriously,” she said. “We try to be transparent.”

## Police Generally Pick Judge

In the aftermath of Taylor's death, the Louisville Metro Police Department amended its search warrant policy to require officers get approval from their commander before applying for a search warrant. Local court rules and police policy advise police officers to contact court clerks during business hours and be assigned a judge, but that doesn't always happen, said Chief Jefferson District Court Judge Anne Haynie.

Jefferson District Court

Local District Court rules.

Occasionally, officers will catch a judge in the courtroom or in their office and present their case for a search warrant, she said. Some search warrant requests are processed electronically, via email, said Haynie. After hours, an on-call District Court judge is available 24 hours a day to respond to requests, Haynie said. But officers are not required to contact the on-call judge.

"It's really just whoever is available," she said.

Once a judge receives the affidavit, the review can be quick, said Leland Hulbert, a defense attorney and former prosecutor.

"Typically, what I see is judges are asked in the middle of the day or middle of the night to approve a warrant and they don't have a lot of time to digest," Hulbert said. "They are usually signed the day they are presented."

But now, amid the fallout and outrage from Taylor's death and the circumstances that led to it, Hulbert believes judges will be more scrupulous in their review of search warrant applications. More requirements — like the creation of an independent warrant review panel or mandating that judges explain, in writing, why they are approving a warrant — could further strengthen the process, Hulbert said.

"Just stating that in writing could bring more transparency," he said.

Bisig said judges can only consider the information included in the affidavit when making their decision to approve or reject an officer's request and the conversation between judge and officer has no basis in the ultimate decision.

The affidavits are included in court files, and can be subject to review by judges and defense attorneys once a case begins crawling through the criminal justice system.

"We're not trying to hide anything here," Bisig said.

Still, Shouse, and others, say documenting that interaction is a critical step towards transparency.

"These conversations, however brief they may be, are critical to the criminal justice system," he said. "Why not have that brief exchange between a police officer or a judge available? What's the argument against it?"

"The system, as it exists now, affords zero transparency," Shouse said.

Getting details about search warrant requests can be cumbersome, if not impossible. The courts don't maintain a database of search warrant requests, and in turn, there's no record of search warrants requests that are rejected by a judge.

Shouse thinks judges should be randomly assigned to officers who come seeking a search warrant. Judges are randomly assigned in criminal and civil cases, which are heavily documented from beginning to end. But when it comes to search warrants — which can be an intrusive tipping off point for allegations that pull people into the criminal justice system — no such requirements exist.

Jefferson Circuit Court Judge Charles L. Cunningham penned a rebuke of Shouse's call for reform in his own op-ed in the Courier Journal last week. In it, Cunningham dismissed the notion that police "cherry pick" judges when they need a search warrant approved.

"Judges are not anyone's rubber stamp," he said.

He said assigning a judge at random to approve a warrant would be cumbersome, and clog the schedules of both police and judges.

"Judges don't just sit around waiting for the police to show up," Cunningham said. "We often can't drop what we are doing to hear a warrant application. The police have to hunt for a judge who will make the time to hear them. Some judges dodge this task; some make the time."

But Cunningham is open to some reform. In an interview with KyCIR last week, he said a welcome improvement in the search warrant process would be to develop a tracking system to monitor which warrant requests are denied, and what becomes of them.

Cunningham said it's impossible to know if an officer who failed to get approval goes on to gather more evidence, or simply walks down the hall to another judge. Keeping a record of when a judge rejects a warrant could quell any concern that law enforcement effectively go judge shopping when they need a warrant, he said.

"Would it stop them from shopping around? It would definitely stop it," he said. "Would that somehow fix a problem? That's a much tougher question."

A spokesperson for LMPD did not respond to a request for comment for this report.

### **Judges Say New Process Would Be Prohibitive**

Haynie says a randomized process that only allows one judge at a time to issue warrants could be a barrier for law enforcement and a burden to the criminal justice system.

Jefferson District Court

Chief Jefferson District Judge Anne Haynie

The 17 judges presiding over district court deal with crowded dockets of misdemeanor crimes and traffic offenses, as well as weddings, arrest warrants, emergency protective orders and more, she said.

"You just don't know how busy people are during the day and you don't want warrants just sitting there," Haynie said. "I could not fathom being on a heavy docket and having to break that docket and spend time on a warrant."

Limiting the pool of judges available would be "just window dressing," according to Jefferson Circuit Court Judge McKay Chauvin. He said each judge took an oath to uphold the rule of law,

and that requires scrutinizing warrants equally and fairly, without consideration to their own beliefs or bias.

“Constitutionally, every judge is the same,” he said. “If there is a problem with a judge, this is not how you solve it.”

### **Not Everyone Agrees**

Jefferson District Court Judge Julie Kaelin doesn't think the oath alone is not enough to ensure public trust or accountability.

“I don't think that we are so special that we are infallible,” she said.

Kaelin supports documenting interactions between judges and the police that come seeking a warrant. The mere perception of judge shopping is concern enough to welcome reforms to boost transparency and oversight, she said.

“There is no reason to not make it a more transparent process,” Kaelin said. “I don't know why anyone wouldn't want to.”

Police can execute a search warrant at any time of day. They can bust down doors, seize property, and make arrests. The raw intrusiveness of government prying into the private lives of people is so great the U.S. Constitution provides protections against it — and yet, police searches are key elements of evidence gathering, said Kate Miller, advocacy director for the American Civil Liberties Union of Kentucky. But obtaining and executing search warrants shouldn't come at the cost of people's civil rights.

“It's such an important right to be able to be secure in your own home,” Miller said.

Even as calls to ban no-knock warrants echo nationwide, experts say wider reform would be a struggle. Search warrants are an ingrained aspect of policing, and their immediacy can be crucial to securing evidence and catching suspects.

Getting buy-in for change on how police obtain warrants would be difficult, says Damon Preston, the chief public defender for Kentucky's Department of Public Advocacy. But he thinks some reform is necessary, and one way to hold police and judges accountable would be to require more transparency.

“At the least they should provide data, reports,” he said.

Nationally, little data exists detailing the scope or use of search warrants, said Trevor Burns, a research fellow at The Cato Institute, a libertarian think-tank based in Washington D.C. This is partly by design, he said: Prosecutors and police are not always keen on disclosing the strategies of their crime fighting.

But the process to get a warrant in Louisville is not unusual, Burns said. Since police are only required to prove probable cause, a low evidentiary bar, they typically present true, simple facts to a judge, Burns said. The question lies with how much scrutiny a judge is willing to give to a warrant request, he said.

Oftentimes, it's not much, Burns said.

“Judges just trust police,” he said. “It’s hard to think of a situation where the judge will give hard scrutiny to a warrant.”