

## TWO-WITNESS RULE DURING HOME SEARCH IN THE LIGHT OF THE COVID PANDEMIC

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### **ABSTRACT**

*Authors are analysing the extent of acceptance of rule on mandatory presence of two witnesses during a home search in national criminal proceedings in EU Member States. While some police powers in Croatia are regulated using modern forms of protection of suspects' rights, some other investigative actions are regulated using rules that are uncommon in EU. Home search has a historic model of obligatory presence of two witnesses. These witnesses are often randomly selected among citizens, they are not legal professionals. A suspect has no right to reject witnesses if he considers that they could violate his privacy or health rights. Besides that, the Two-witness Rule has a peculiar impact on the evidence law. Items found during home search cannot be legally used if only one witness was present. According to such consequence, this rule actually requires a certain number of witnesses to prove a fact. Such requirements on number of witnesses have been abandoned in modern evidence law.*

*The results of the analysis of the EU Member States show that the rule on the mandatory presence of two witnesses is widespread only in some post-communist systems. When it comes to EU criminal procedure codes (CPCs), the mandatory presence of witnesses exists in Croatian, Slovenian and Bulgarian CPC. The study is showing influence of former Russian CPC in post-Soviet era as well as the influence of former Yugoslav CPC. Regarded as the relic of the past, these procedural guarantees of home inviolability in the cases of home search should be reassessed and improved.*

*In the context of COVID crisis, mandatory presence of witnesses presents challenge for the protection of suspect's and witnesses' health. Observed from the suspect's right to protect his health or the witnesses' right not to expose themselves to potentially health endangered situations, find-*

*ing witnesses presents even more complexed mission. If the suspect is in COVID quarantine and the search must be conducted, can witnesses be forced to enter such premises? In case that suspect requires fully vaccinated witnesses who can present valid COVID Certificate or negative PCR test, how could his requirement be fulfilled?*

*The possible solution for both evidence law and health reasons could be the use of modern technologies such as video recording that could replace mandatory witnesses presence. Finally, it would be more appropriate to respect the suspect's choice on protection of his rights or to use modern technical means or defence lawyer, as in other investigative actions in criminal procedure.*

**Keywords:** *healt, home search, right to privacy, two witnesses, two-witness rule, two witnesses*

## 1. INTRODUCTION

Since every Member State has its own way of coping with pandemic and enacting anti-pandemic measures, those can be considered in the context of conducting evidentiary actions. The incidence of the two-witness rule in EU Member States, possible historical foundations as well as the safety and health risks for witnesses during home searches, are some issues to be considered in the light of this „new normal“ pandemic situation the world has been for the last two years. In order to place results on the prevalence of two-witness rule and draw some conclusions, comparative study of EU criminal procedure codes was conducted. Survey of some other criminal procedure codes outside the EU (Russian and former Yugoslav CPC) has been conducted as well in order to determine their possible impact. Some EU states prescribe mandatory presence of citizen witnesses during the search of the suspect's home and this rule can be disputable from the aspect of protection of privacy and health rights. Essentially it may pose infringement of citizen's and suspect's fundamental rights.

Mandatory presence of citizen witnesses at home search in Croatian criminal law is prescribed in Art. 254 para. 2 of the Criminal Procedure Act,<sup>1</sup> and is also prescribed by Art. 34 para. 3 of the Constitution of the Republic of Croatia.<sup>2</sup> Police officers gather relevant information through their observations important for establishing decisive facts in criminal proceedings. There are more actions in which police observation is the main way of gathering information. Thus, in case of danger of delay, the police may perform urgent evidentiary actions before the be-

<sup>1</sup> “At least two citizens of age shall be present as witnesses during the search of a dwelling or other premises.”; Criminal Procedure Act, Official Gazette No. 152/08, 76/09, 80/11, 91/12, 143/12, 56/13, 145/13, 152/14, 70/17, 126/19

<sup>2</sup> “A tenant or his/her authorised representative shall be entitled to be present during the search of his/her home or other premises together with the mandatory presence of two witnesses.”; Constitution of the Republic of Croatia, Official Gazette No. 56/90, 135/97, 113/00, 28/01, 76/10, 5/14

gining of criminal proceedings, such as crime scene investigation (Art. 304 of the CPC). Conducting a crime scene investigation involves collecting of traces found through the observation of a police officer at the crime scene. Furthermore, police officers are authorized to conduct an inspection under police law (Art. 73-75 of the Police Duties and Powers Act) or as a part of an official criminal investigation (Art. 207 of the CPC). These actions are essentially no different from a home search because police officers also use their observations to gather information, but here the presence of two witnesses is not required. The question may be asked whether it is necessary to introduce civil supervision of other police actions that infringe the rights of the individual. Guided by this idea, the presence of citizens as witnesses could be extended to the crime scene investigation and inspection when they are carried out in the home, because during these actions the facts and traces important for establishing the truth in criminal proceedings can be found, too. Trechsel states that the search is an old, archaic element of criminal investigation.<sup>3</sup>

Krapac states that the rule on the mandatory presence of two witnesses is “an obstacle to possible abuses of state power”,<sup>4</sup> and the person has the legal right to be present during the search of his home due to the realization of the guarantee of the fundamental right to inviolability of the home.<sup>5</sup> A person whose home is searched cannot waive the mandatory presence of witnesses if he or she wishes to protect his or her privacy. Witnesses to the search cannot be excluded from participating in certain activities during the search of the home because the legal order imposes a legal duty on them to attend the search.<sup>6</sup> The role of home search witnesses according to our CPC is guarantee because their presence guarantees the legality of investigation and ensures the credibility of the evidence. When choosing home search witnesses, citizens do not need to meet any special conditions as there are no rules or guidelines governing their selection. Thus, the situation arises that the selected witnesses, who do not have any legal or criminal investigation knowledge, guarantee the legality of the evidentiary action, on which the legality of all found evidence consequently depends. When it comes to the personal safety and health of search witnesses, the consistent application of this principle requires that citizens expose themselves to potentially dangerous and unsafe situations. Due to the nature of their duty, police officers are obliged to expose themselves to a

<sup>3</sup> Trechsel, S., *Human Rights in Criminal Proceedings*, Volume XII/3, Oxford University Press, Oxford, 2006, p. 558

<sup>4</sup> Krapac, D., *Načela o pribavljanju okrivljenikova iskaza te pretraga stana i prostoriya u krivičnom postupku prema novom ustavnopravnom uređenju u Republici Hrvatskoj*, Zbornik Pravnog fakulteta u Zagrebu, Vol. 41, No. 1, 1991, p. 13

<sup>5</sup> Krapac, D., *Kazneno procesno pravo, Prva knjiga: Institucije*, VII. neizmijenjeno izdanje, Narodne novine, Zagreb, 2015, p. 328

<sup>6</sup> *Ibid.*

greater extent to precarious situations, but such responsibility cannot be expected from citizens. The COVID-19 pandemic requires consideration of the application of this rule of mandatory presence of witnesses from the aspect of endangering their health. By requiring the mandatory presence of citizens to witness potentially health-threatening situation in order to control the legality of the police action, the legislator accepts possible endangerment of the health of his citizens. At the same time, citizens are often unaware of the seriousness of the action they are witnessing.

## **2. TWO-WITNESS RULE IN EU CRIMINAL PROCEDURE CODES**

As this is one rare procedural legal guarantee in the EU legislation of the Member States, a comparative study of procedural norms related to the home search in all EU Member States was conducted. The results of the research have shown that, among EU Member States only Croatia, Slovenia and Bulgaria have this rule on the mandatory presence of two witnesses in a search of a home. Part of the comparative research included other European countries that are not members of the EU that will be considered in concluding remarks and analysis of the results.

### **2.1. Croatia**

According to the provisions of Art. 240 para. 2 of the CPC, search of home and other premises is a legally regulated action conducted for the purpose of finding the perpetrator of a criminal offence, an object or traces important for criminal proceedings where it is probable that they are located in a specific place, in the immediate surroundings of or on a certain person.<sup>7</sup> The action presupposes entering the home and searching for objects or persons, and includes the search of movables and all persons if it is stated in the search warrant or if in relation to them exist conditions for search without a warrant (Art. 252 para. 3. CPC). If the crime scene is in a home, a home search may be conducted along with the crime scene investigation. Since the protection of the inviolability of the home is a norm of constitutional rank, the CPC contains detailed regulations on material and formal conditions for conducting a search of the home, its conducting and recording, as well as procedural consequences in case of serious violations of these provisions.<sup>8</sup>

Our CPC does not state the grounds for exclusion of evidence when it comes to the presence of two witnesses at a home search, and the said legal provision (Art.

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<sup>7</sup> Krapac, 2015, *op. cit.*, note 5, p. 316

<sup>8</sup> *Ibid.*

254 para. 2) does not state that witnesses must be present together, but this rule was developed by case law since “simultaneous” and “joint presence” of witnesses was often crucial in assessing legality. Persons whose premises are being searched may attend a home search, but two adult citizens must be present as witnesses.<sup>9</sup> Witnesses must be warned before the search that they have to monitor how the search is conducted and that they have the right to make remarks before signing the search record if they think that the search was not conducted in the manner prescribed by the law or that the content of the search record is incorrect (Art. 254 para. 3).

## 2.2. Slovenia

Slovenian CPC<sup>10</sup> in Art. 216 para. 3 prescribes the mandatory presence of two adult witnesses in cases of search of a house or person. Only women can be witnesses when searching a woman. Prior to the search, witnesses are warned to carefully observe how the search is conducted and to have the right to object to the contents of the record before signing it if they think it is inaccurate.<sup>11</sup> This provision is very similar to Croatian Art. 254, para. 2 and 3. The important difference is that the Slovenian CPC still prescribes the mandatory presence of witnesses for personal search as well.<sup>12</sup>

## 2.3. Bulgaria

Bulgarian Penal Procedure Code<sup>13</sup> in Art. 137 generally defines who witnesses of procedural actions are and when their presence is mandatory. The law uses the

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<sup>9</sup> The mandatory presence of two witnesses is also prescribed by the CPC in the case of opening retained shipments in Art. 339 para. 5

<sup>10</sup> *Zakon o kazenskom postupku*, Uradni list RS, št. 32/12 – uradno prečiščeno besedilo, 47/13, 87/14, 8/16 – odl. US, 64/16 – odl. US, 65/16 – odl. US, 66/17 – ORZKP153, 154 in 22/19

<sup>11</sup> Art. 216 para. 3. When a house search or personal search is conducted, two adult persons shall be present as witnesses. A female person may only be searched by a female person, and the witnesses of the act may also only be female. Before the search begins, the witnesses shall be instructed to observe closely how the search is conducted, and shall be informed of their right to make objections, if any, to the content of the record of the search if they believe that it is not correct, before they sign it

<sup>12</sup> This rule existed in the Yugoslav Criminal Procedure Code, and the new Croatian CPC no longer included it as mandatory. The former Yugoslav Criminal Procedure Code of 1976 in Art. 208 para. 3 states: Two adult citizens are present as witnesses during the search of the apartment or person. The search of a female person is performed only by a female person, and only female persons will be taken as witnesses. Jemrić, M., *Zakon o krivičnom postupku*, IV. izmijenjeno i dopunjeno izdanje, Narodne novine, Zagreb, 1977, p. 289

<sup>13</sup> Penal Procedure Code of the Republic of Bulgaria (2006, amended 2011), Promulgated, State Gazzet No. 83/18 Oct 2005, amended State Gazzet No. 46/12 Jun 2007, 109/20 Dec 2007, 69/5 Aug 2008,

term *witnesses of procedural actions*. Thus Art. 137 stipulates that in pre-trial proceedings inspection, search, investigative experiment, identification of persons and objects shall be carried out in the presence of witnesses of procedural actions. The witnesses of the procedural actions shall be selected by the investigating authority, which shall perform the respective action of investigation among the persons who have no other procedural capacity and are not interested of the outcome of the case. After being summoned to participate in the action, they must remain as long as their presence is required, and if they do not perform their duties as witnesses of procedural action, they shall bear liability as witnesses. Witnesses of procedural actions have the following rights: to make notes and objections on the admitted incompleteness and breaches of the law, to request corrections, amendments and supplementations of the records, to sign the record under special opinion, stating in writing their reasons for this, to require cancellation of the acts, which harm their rights and legal interests and to obtain respective remuneration and coverage of the made expenses. The authority conducting a certain investigative action is obliged to inform them of these rights.

Art. 162 para. 1 stipulates that the search and seizure of objects must be carried out in the presence of *witnesses of the act* and the person using the premises or an adult member of his family. If that person or a member of his family cannot be present, the search and seizure shall be conducted in the presence of the house manager or a representative of the municipality or the town hall. In accordance with Art. 163 the opening of seized and sealed computer data media must also be carried out in the presence of witnesses to the proceedings. As far as the admissibility of evidence is concerned, the use of evidence that has not been collected or presented in accordance with the Law is not allowed (Art. 105, para. 2). The Code does not explicitly state the possibility of technical recording of the search, but Art. 241 states that other investigative actions may be audio and video recorded which includes video recording of the home search as well.

As for some other circumstances of the search, Art. 163 para. 3 of the Bulgarian CPC stipulates that the authority conducting the search shall prohibit the persons present to come into contact with other persons or among themselves and to leave the premises until the search is over. The body conducting the search must take the necessary measures so that circumstances from the private life of citizens are not made public (Art. 163, para. 5). Although *Trendafilova* describes the Bulgarian criminal procedure, apart from the legal grounds for conducting the search

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109/23 Dec 2008, 12/13 Feb 2009, 27/10 Apr 2009, 32/28 Apr 2009, 33/30 Apr 2009, 15/23 Feb 2010, 32/27 Apr 2010, 101/28 Dec 2010, 13/11 Feb 2011

of premises, she does not describe in more detail the manner of conducting the action and the mandatory presence of witnesses.<sup>14</sup>

### 3. INFLUENCE OF RUSSIAN AND FORMER YUGOSLAV CPC

As the occurrence of this rule is particularly geographically limited and distributed, a comparative study of some other criminal procedure codes outside the EU has been conducted. Russian Criminal Procedure Code defines a special category of participants in the proceedings called an attesting witness or the witness of an investigative action (Russian *ponyatiye*) - a person who is not interested in the outcome of a case and who is invited by the investigator to confirm the fact that an investigative action has been conducted and to confirm its content, process and results (Art. 60 para. 1).<sup>15</sup> Attesting witnesses can not be minors, participants in criminal proceedings, their close relatives and officials of the executive authority involved in investigation activities. According to the provisions of Russian law, an attesting witness has the right to participate in an investigative action and to make statements and comments on the investigative action, which shall be entered into the record, to get acquainted with the record of the investigative action, in whose performance he has taken part, to file complaints against the actions and decisions of the investigator and the prosecutor, restricting his rights (Art. 60 para. 3). The attesting witness must respond to the summons and may not publish information from the investigation, and if he publishes it, he will be liable under the Russian Criminal Code (Art. 60 para. 4).<sup>16</sup> Witnesses are often unaware of their rights and duties and the legal consequences of participating in the investigation because they are only invited to be present and sign the record, and by deceiving them police officers avoid their refusal to participate in the search because the action can take hours, *Smyshlyayev* explains.<sup>17</sup>

*Foynitskiy* believes that this rule is a relic of an old institute of mandatory public participation in criminal proceedings to ensure the credibility of actions taken by

<sup>14</sup> Trendafilova, E., *The Penal Procedure Legislation of the Republic of Bulgaria*, in: Pavišić, B., Bertaccini, D., *Le altre procedure penali - Transizione dei sistemi processuali penali*, Vol. 1, G. Giappichelli Editore, Torino, 2002, p. 121-186

<sup>15</sup> Criminal-Procedural Code of the Russian Federation No. 174-Fz of December 18, 2001, amended 2012

<sup>16</sup> Bezlepkin, B. T., *Kommentariy k ugolovno protsessual'nomu kodeksu Rossiyskoy Federatsii*, Prospekt, Moskva, 2014, p. 119

<sup>17</sup> Smyshlyayev, A. S., *The Issues of Legal Status of a Witness under the Legislation of the Republic of Kazakhstan*, Asian Social Science, Vol. 11, No. 5, Canadian Center of Science and Education (Online Published), 2015, pp. 320-321



state authorities due to lack of trust in the police.<sup>18</sup> Radchenko et al., in a commentary of the Russian CPC pointed out that people suffering from mental illness or other physical disabilities (hearing and vision deficiency etc.) due to which they cannot effectively monitor the action, and people who cannot read and write in Russian, cannot be attesting witnesses.<sup>19</sup> The Federal Law from 2013 changed the provisions of the Russian CPC and one of the most significant changes was the reduction of the mandatory participation of witnesses in investigative actions.<sup>20</sup> The amendment to the CPC was proposed by former Russian President Medvedev, who considered the institute of attesting witnesses to be a remnant of the past that must adapt to the present.<sup>21</sup> According to Art. 170 of the amended Act, the participation of witnesses is now mandatory in case of search, seizure of data on electronic media, personal search and identification, while in seven other investigative actions witnesses may participate if the investigator deems necessary.<sup>22</sup>

The Criminal Procedure Code of the former Yugoslavia of 1976 in Art. 208 para. 3 prescribed the mandatory presence of two adult citizens as witnesses to the search of premises or person.<sup>23</sup> After the independence of the Republic of Croatia in 1991, the Law on the Adoption of the Criminal Procedure Code was passed,<sup>24</sup> which applied except for the amended provisions. The provision of the previous CPC related to the search was amended, but the mandatory presence of two witnesses during the search of a home or other premises remained.

A comparative study of the criminal procedure codes of the former USSR and the former Yugoslavia states revealed some similarities between Russia and 6 post-Soviet states (Armenia, Azerbaijan, Kazakhstan, Kyrgyzstan, Ukraine, Uzbekistan) and similarities between the five states of the former Yugoslavia (Croatia, Slovenia, Serbia, Montenegro, Bosnia and Herzegovina). The Bulgarian CPC was very likely influenced by the Russian CPC because Bulgaria, due to its geopolitical position, gravitated to the influence of the former USSR. Pavišić pointed out that the legislative systems of the Czech Republic, Slovakia, Hungary, Slovenia, Croa-

<sup>18</sup> Foynitskiy, I. Y., *Kurs ugovolnogo sudoproizvodstva*, Tom 2, Alfa, Sankt-Peterburg, 1996, p. 259

<sup>19</sup> Radchenko, V. I.; Tomin, V. T.; Polyakov, M. P., *Kommentariy ugovolno protsessual'nomu kodeksu Rossiyskoy Federatsii*, 2. izdanje, Urait, Moskva, 2007, p. 236

<sup>20</sup> Leynova, O. S., *Problemy uchastiya ponyatykh v sledstvennykh deystviyakh posle vneseniya izmeneniy v UPK RF*, Vestnik Sankt-Peterburgskogo universiteta MVD Rossii, No 3 (59), 2013, p. 82

<sup>21</sup> Migal, S. D., *Ob otmene instituta ponyatykh v ugovolnom protsesse rossiyskoy federatsii*, Tverskoy gosudarstvennyy universitet, Vestnik TvGU, Seriya "Pravo", 2013, Vypusk 34, p. 247

<sup>22</sup> *Ibid.*

<sup>23</sup> The presence of two witnesses is no longer required for a personal search in Croatia, while some countries still have such a provision, such as Slovenia (Art. 216 para. 3 of Slovenian CPC)

<sup>24</sup> Official Gazette No. 53/1991



tia, Bosnia and Herzegovina, Serbia, Montenegro, Northern Macedonia, Albania, Kosovo and Bulgaria were forcibly subjected to communist rule, and the transition of criminal proceedings in the late 20th century was the result of intensive comparative analyzes.<sup>25</sup> According to *Pavišić*, the reform of the criminal procedures of the former socialist countries took place in a period of fundamental social, political and economic changes, and most countries implemented the reform in two stages.<sup>26</sup> In the first instance, pragmatic changes were made: a simple and effective way of prosecuting crimes was defined, procedural elements of the socialist regime were removed, and the protection of individual rights was affirmed. *Pavišić* points out that the new criminal proceedings in the first period were a temporary legislative solution in young democracies, and in the second stage dogmatic changes followed (or should have followed) which represent regular criminal procedure reform as a necessity for European countries.<sup>27</sup>

#### 4. SAFETY AND HEALTH RISKS FOR WITNESSES

The ability to testify has been considered a special honor in history and has been an indicator of a person's credibility and reputation. Venetian documents state that testifying was a difficult experience, sometimes even dangerous, and witnesses lost their precious time for which they received no compensation.<sup>28</sup> Police officers are obliged to expose themselves to danger in order to protect the lives of others, but citizens cannot be expected to do so. Any entry into the home of a potential perpetrator, especially in the case of violent crimes, is a potential safety risk. For this purpose, police officers are equipped with firearms, safety vests and other protective police equipment. Citizen witnesses enter the home with police officers and the precondition for starting the search is that there is no danger for police officers or witnesses, but there is no absolute safety. Caution should always be exercised when dealing with known perpetrators facing probable prosecution. With all this in mind, it is not surprising that citizens are reluctant to witness a search of home because they are consciously exposing themselves to potential danger. In human nature is the need for self-preservation and willful consent to enter the home of a perpetrator of a crime therefore defies the natural human need to be in a safe environment.

<sup>25</sup> Pavišić, B., *Transition of Criminal Procedure Systems*, Vol. 2, Pravni fakultet Sveučilišta u Rijeci, Rijeka, 2004, p. XXXI

<sup>26</sup> *Ibid.*, p. LIII

<sup>27</sup> Pavišić, 2004, *op. cit.*, note 25, p. LIII

<sup>28</sup> Cristellon, C., *Marriage, the Church, and its Judges in Renaissance Venice, 1420–1545*, Early Modern History: Society and Culture, 2017, p. 84

In the light of „new normal“ and pandemic, law enforcement officers are at a heightened risk of exposure to the COVID-19 virus due to their close contact with citizens, noted *Jennings and Perez*. In order to protect police officers, the American Center for Disease Control and Prevention (CDC) defined recommendations for law enforcement agencies to protect officers and the public.<sup>29</sup> One of the CDC’s recommendation is social distancing which, given the nature of police work, cannot be easily carried out. On the other hand there is a tendency of limiting sharing COVID-19 data with law enforcement agencies. According to *Molldrema, Hussain and McClelland*, it is against best practice and public interest to share identifiable health data with police.<sup>30</sup> This is in line with the protection of personal data, especially when it comes to health data. If sharing COVID-19 health data is prohibited, the question is how witnesses can be warned of their possible health endangerment in the case of a COVID-19 positive suspect in question. Sharing COVID-19 data with police officers poses many risks and the pandemic does not allow the suspension of basic rights of control over the disclosure of health data outside the health system, concluded *Molldrema, Hussain and McClelland*.<sup>31</sup> If there is a strict limitation of sharing these data with law enforcement officers, then these rules apply to the citizens even more. One can conclude how the benefits of disclosing health information do not outweigh the risks of violating the right to privacy and health of either police officers or citizen witnesses. On the other hand, *Kugler et al.* conducted a survey of American local police departments in 2020 and they concluded that there was no national effort to connect pandemic surveillance against COVID-19 with police enforcement of stay-at-home and social distancing orders.<sup>32</sup> If there was no organized national streaming for the enforcement of these measures, it is hard to expect the implementation of some kind of measures that would regulate COVID-19 and the presence of citizen witnesses during home search.

*Rooney and McNicholas* concluded that Irish police officers are exposed to an increased level of psychological distress in time of COVID-19 pandemic which presents an occupational hazard associated with their profession.<sup>33</sup> The pandemic

<sup>29</sup> Jennings, W. G.; Perez, N. M., *The immediate impact of COVID-19 on law enforcement in the United States*, American Journal of Criminal Justice, Vol. 45, No. 4, 2020, p. 690

<sup>30</sup> Molldrem, S.; Hussain, M. I.; McClelland, A., *Alternatives to sharing COVID-19 data with law enforcement: Recommendations for stakeholders*, Health Policy, Vol. 125, No. 2, 2021, p. 135

<sup>31</sup> *Ibid.*, p. 139

<sup>32</sup> Kugler, M. B.; Oliver, M.; Chu, J.; Lee, N., *American Law Enforcement Responses to COVID-19*, 112 Journal of Criminal Law and Criminology Online, Northwestern Public Law Research Paper No. 20-25, 2020, p. 30

<sup>33</sup> Rooney, L.; McNicholas, F., *‘Policing’ a pandemic: Garda wellbeing and COVID-19*, Irish Journal of Psychological Medicine, Vol. 37, No. 3, 2020, p. 195

exposed officers to indeterminate levels of physical and psychological threat,<sup>34</sup> but that exposure to health threat cannot be imposed on citizen witnesses. *Stogner et al.* state that COVID-19 pandemic “altered norms for all members of society, but its effects on first responders have been particularly profound” and it is assumed that COVID-19 policing is a significant stressor for police officers.<sup>35</sup> This new circumstances have emerged as “the new normal” operational conditions, but there has been no additional support mechanism for police officers coping with them. Since there are no additional measures to combat COVID-related operational conditions for police officers, even less there are recommendations for police officers how to conduct certain actions in which they have to come to close personal contact with citizens, like home search and presence of citizen witnesses. As *Stogner et al.* concluded, COVID-19 pandemic affected the mental health of law enforcement officers and, although it is impossible to completely remove stress from police work, training on positive coping skills should help them deal with the stress they face without negative side effects.<sup>36</sup> Possible health endangerment of citizen witnesses presents stressor both for police officers in charge of the action and citizens who should be present during the home search. These are certainly not normal circumstances and conditions to which citizens should be exposed.

*Drew and Martin* state that police officers are more at risk of physical and psychological harm and „COVID-19 must be recognized as a critical event that is likely to induce trauma responses.“<sup>37</sup> Another significant factor can be noticed - police officers worry about bringing home the virus to their families so police work is directly impacting the health and safety of their family members, as *Drew and Martin* and *Grover et al.* stated.<sup>38</sup> In this regard, a parallel can be drawn with potential endangering the lives of the families of citizen witnesses of home search. *Frenkel et al.* in 2020 conducted an online survey on 2567 police officers from five European countries in order to research the impact of the COVID-19 pandemic.<sup>39</sup> The results showed that police officers seemed to tolerate pandemic

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<sup>34</sup> *Ibid.*, p. 192

<sup>35</sup> Stogner, J.; Miller, B. L.; McLean, K., *Police stress, mental health, and resiliency during the COVID-19 pandemic*, American Journal of Criminal Justice, Vol. 45, No. 4, 2020, p. 718

<sup>36</sup> *Ibid.*, pp. 727-728

<sup>37</sup> Drew, J. M.; Martin, S., *Mental health and well-being of police in a health pandemic: Critical issues for police leaders in a post-COVID-19 environment*, Journal of Community Safety and Well-Being, Vol. 5, No. 2, 2020, p. 31

<sup>38</sup> *Ibid.*, p. 33; Grover, S.; Sahoo, S.; Dua, D.; Mehra, A.; Nehra, R., *Psychological impact of COVID-19 duties during lockdown on police personnel and their perception of the behavior of people: an exploratory study from India*, International Journal of Mental Health and Addiction 20, 2020, p. 839

<sup>39</sup> Frenkel, M. O.; Giessing, L.; Egger-Lampl, S.; Hutter, V.; Oudejans, R. R.; Kleygrewe, L.; Plessner, H., *The impact of the COVID-19 pandemic on European police officers: Stress, demands, and coping resources*, Journal of Criminal Justice, Vol. 72, 2021, p. 1

stress with slight decreases in strain over time and risk of infection and deficient communication emerged as main stressors.<sup>40</sup> They concluded that legislating and communicating unambiguous health safety policies and clear instructions for action should reduce uncertainty and stress.<sup>41</sup> Similar recommendations may apply to citizen witnesses and it should be borne in mind that police officers are partly responsible for the lives and health of the witnesses they call. The study of *Grover et al.* suggested as well that COVID-19 pandemic has led to significant stress and negative emotional response among police officers.<sup>42</sup> *Brooks and Lopez* stated that traditional police actions like search in pandemic present a substantial risk of infection for police officers, suspects and citizens which led to an unusual paradox that police practice which usually enhances public safety is now most likely to endanger public safety.<sup>43</sup> They concluded that law enforcement agencies should suspend enforcement of requiring close proximity or physical contact between police officers and citizens, except in cases where it would create an imminent danger of death or serious bodily injury.<sup>44</sup> In line with that view, the presence of citizen witnesses during home search is directly related to endangering their health. If there are clear recommendations that police officers must limit their close actions towards citizens as part of preventing the spread of pandemics, there should be clear instructions on how to minimize this risk for witnesses of procedural action.

## 5. CONCLUSION

Based on the conducted research, it can be concluded that the mandatory presence of two adult citizens as witnesses in a home search is a rarity in the legal systems of the Member States, which is very likely a relic of the past. In relation to other actions carried out by the police, this rule is a reflection of inequality, because for the credibility of the results, additional procedural formalities would be required for other police actions that may result in finding evidence, too.

The fact that no modern European criminal justice system has such a restrictive provision is certainly a significant circumstance that must be interpreted in the light of the legal sources on which it originated. Member States that do not have this rule certainly do not have a lower level of protection of suspects' rights and human rights in criminal proceedings in general. It can be assumed that in the sec-

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<sup>40</sup> *Ibid.*

<sup>41</sup> Frenkel *et al.*, 2021, *op. cit.*, note 39, p. 13

<sup>42</sup> Grover *et al.*, 2020, *op. cit.*, note 38, p. 840

<sup>43</sup> Brooks, R.; Lopez, C., *Policing in a time of pandemic: Recommendations for law enforcement*, COVID-19 Rapid Response Impact Initiative, White Paper 7, Edmond J. Safra Center for Ethics, Georgetown University Law Center, 2020, pp. 2, 9

<sup>44</sup> *Ibid.*

ond step of the transformation of the former socialist criminal justice system into a modern criminal procedure, there was no dogmatic consideration of the need for such control of the lawful conduct of action. Citizens' participation in investigation dates back to ancient historical times, as evidenced by records of a home search in the case of theft under ancient Roman private criminal law in the Code of Twelve Plates.<sup>45</sup> Considered in the context of that historical time and the private nature of theft, the presence of citizen witnesses as a form of supervision over the action made sense. Viewed from the aspect of modern criminal law, mandatory civil supervision of the legality of police work does indeed seem like an obsolete remnant of ancient times.

Viewed from the aspect of protection witnesses' health, in case of COVID-positive suspect witnesses must not be forced to enter the premises and take part in the search of home. If the suspect would require fully vaccinated witnesses who can present valid COVID Certificate or negative PCR test, this would be problematic from the point of sharing health data with unauthorized persons outside the health system. As we have seen, sharing health data with police officers could present violation of rights to privacy, so sharing COVID-related health data with citizens could be even more questionable. The best longterm solution would be the elimination of mandatory citizen presence during home search which would have multiple effect - on the citizens' safety and health, as well as on the safety and health of police officers and suspect in question. The existence of this provision should be reconsidered, as well as the possibility of improving control over police enforcement in other ways, such as mandatory video recording, strengthening the role of defense counsel or introducing the mandatory presence of the suspect or his representative.

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