

# Warrant restrictions ease

## More leeway in law raises concerns over loss of civil rights

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Police and prosecutors thought they had Joshua Hayes.

Convicted of peddling cocaine and marijuana, he was sentenced in 2007 to 29 years in prison after authorities said they found bricks of marijuana, a hydroponic grow operation in a hot tub and 400 grams of cocaine while executing a search warrant at his Nashville home.

But a simple typo on the warrant undid all of that. An appeals court reversed Hayes' conviction, and prosecutors are now trying to see if they can retry the case without any of the evidence obtained through that search warrant.

Tennessee's legislature has since passed a law to relax what was once an unflinching legal standard that for decades dictated the standards for seeking warrants in the state. The new law allows more room for errors in warrants in criminal cases.

The move, which is also reflected in other state legislatures and even the U.S. Supreme Court, troubles civil liberties advocates and defense attorneys, who note a national shift tipping the judicial system more in favor of police and prosecutors as opposed to the accused.

"It's very concerning to the defense bar," said Jeff Henry, executive director of the Tennessee District Public Defenders Conference. "It's a change in the precedent that we have been interpreting for years in judicial decisions. We see it as less recognition of individual rights."

But police and prosecutors say some of the changes — particularly the Tennessee bill that makes search warrant requirements more flexible — are reasonable allowances if they mean fewer situations like the Hayes case.

"It was obvious to everybody in the courtroom and the judge that it was nothing but a clerical error," said [Nashville District Attorney General Torry Johnson](#). "This bill was an effort to, I think, bring a little bit more common-sense approach to things that are primarily clerical errors or mistakes and have nothing absolutely whatever to do with the underlying probable cause."

Hayes' attorney could not be reached for comment.

### Law passes easily

[David Raybin](#), a Nashville criminal defense attorney who sat on the first statewide judicial rules committee, said the state has traditionally held strict standards for warrants. Even small mistakes could lead to a judge tossing out all evidence obtained from a warrant.

“These are very important rules that, for example, require police to knock on someone’s door before they execute a search warrant,” Raybin said. “You have these simple rules, and they have simple consequences.”

But those consequences, particularly after the Hayes case, prompted the call for more leeway.

“Significant amounts of drugs or other evidence can be totally excluded from cases due to a totally innocent typo,” Metro Police Chief Steve Anderson said. “Our state’s suppression rule is among the harshest in the nation.”

In spite of aggressive lobbying by law enforcement, the bill didn’t gain traction until this year, when it passed handily. The Exclusionary Rule Reform Act, sponsored by Rep. Eric Watson, R-Cleveland, and Sen. Randy McNally, R-Oak Ridge, will become law July 1.

### **New national trend**

Tennessee is not the only place where prosecutors and police are being given more power. On May 16, the U.S. Supreme Court in an 8-1 opinion gave police across the nation more leeway in searching homes without a warrant. The case involved police in Kentucky who chased a suspect to his apartment and broke in when they thought evidence was being destroyed.

Until this ruling, police needed a warrant to make such a search unless there was some emergency that required swift action — such as the imminent destruction of evidence. And police themselves couldn’t be the source of that emergency.

“The Supreme Court has become progressively more prosecution-oriented since the early 1970s with only an occasional exception,” said Christopher Slobogin, a professor at Vanderbilt Law School who has written extensively about criminal procedure and evidence.

“Before, police couldn’t create an emergency and then use it as an excuse for not getting a warrant. That argument seems to be gone.”

Elsewhere, state legislatures are chipping away at similar protections, loosening and sometimes eliminating requirements for search warrants in some cases. In California, a bill is advancing that would allow law enforcement to search without a warrant in cases of suspected movie and music piracy. A Florida law targeting pill mills will allow police to search through pain clinic records with a warrant.

Raybin said citizens should expect to see the trend to continue.

“You begin to wonder have we lost some basic fundamental values?” he said. “I don’t know that this will change. I don’t see the pendulum swinging the other way anytime soon.”

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