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# POLICE CAN BE MORE AGGRESSIVE WHEN GATHERING EVIDENCE, COURT SAYS

By TIM KERRIGAN

In what some are calling a disturbing trend, two recent Supreme Court decisions concerning police aggression could ease prosecutions by restricting exclusions of evidence due to unreasonable search-and-seizures.<sup>1</sup>

*Hudson v. Michigan* allowed evidence admitted when police executed a search warrant without knocking and announcing their presence,<sup>2</sup> and *Samson v. California* allowed police to search parolees without probable cause.<sup>3</sup> Combined, these rulings indicate the Court is less likely to allow evidence to be

excluded from trial when police violate established search-and-seizure laws in the post-September 11 era.

David Moran, the defense attorney in *Hudson*, stated that the decisions “show how pro-prosecution, pro-police the current Court is.”<sup>4</sup> Moran contends that not excluding evidence obtained when police violate the knock-and-announce rule, a common law rule established by the Court in 1961<sup>5</sup> which excluded evidence from trial if seized by police who failed to wait 15-20 seconds after knocking on a door before executing a search warrant, will lead to tragedies when police or residents make mistakes or react out of fear.<sup>6</sup> Such a tragedy occurred when Mississippi resident Cory Raye shot a police officer who entered his home during a no-knock nighttime raid.<sup>7</sup> The police officer, operating on the basis of a false tip, was in search of drugs.<sup>8</sup> Raye is now on Mississippi’s death row.<sup>9</sup>

Notwithstanding the seriousness of the knock-and-announce rule’s demise, Moran says the most noteworthy aspect of the *Hudson* decision is that four justices seemed ready to overrule the exclusionary rule altogether.<sup>10</sup> Such a decision, were it ever to take effect, would prevent any exclusion of evidence at trial resulting from what has been deemed unreasonable police action in the past.

“That means there would be no effective incentive for the police to pay attention to the Fourth amendment, not just in knock-and-announce cases, but in all cases,” Moran said.<sup>11</sup>

Conversely, Justice Antonin Scalia, wrote in *Hudson*’s majority opinion that the knock-and-announce rule simply delayed a police officer’s legal search, and offered residents an opportunity to destroy evidence.<sup>12</sup> Enforcement of the rule, he continued, frequently results in the exclusion of necessary evidence from trials.<sup>13</sup> “The social costs of applying the exclusionary rule to knock-and-announce violations are considerable,” Scalia wrote.<sup>14</sup> “Resort to the massive remedy of suppressing evidence of guilt is unjustified.”<sup>15</sup>

Scalia’s opinion received less than complete support. Justice Anthony Kennedy, in a concurring opinion, supported Scalia’s logic, but stated he would continue to exclude evidence unless the police failed to knock at all.<sup>16</sup> And Justice Stephen Breyer authored a lengthy dissent, in which Justices John Paul Stevens, Ruth Bader Ginsburg and David Souter joined.<sup>17</sup> Justice Breyer

placed the exclusionary rule as the centerpiece of the Fourth Amendment's protection of privacy of the home, and expressed fear that police will now routinely violate the knock-and-announce rule.<sup>18</sup>

The Court also favored preservation of evidence over the right to privacy in *Samson*, when it upheld California's policy of searching parolees without probable cause in light of statistics citing two-out-of-three California parolees return to prison within 18 months of their release.<sup>19</sup>

Ronald Niver, a California deputy attorney general who represented the United States before the Court, said the rule "allows for supervision of parolees in a hand-on kind of way."<sup>20</sup> But Ted Metzler, who represented *Samson*, fears the decision "could be used as a precedent for avoiding well-developed Fourth Amendment doctrines and going straight to a reasonable test (which would determine admissibility based upon whether or not a particular search is reasonable)."<sup>21</sup> Niver and Metzler also disagreed on how other jurisdictions would apply the decision. While Niver suspects other states will have to prove a compelling state interest to institute the rule, as California did,<sup>22</sup> Metzler suspects the Court's opinion would preclude challenges.<sup>23</sup>

The trend indicated by these decisions could affect the way prosecutor's offices function. In the past, prosecutors frequently deferred to the Fourth Amendment and its power to preclude evidence. For instance, Cook County prosecutors were recently asked to drop cases in which nine special operations Chicago police officers, four of whom have been charged with robbing, kidnapping and intimidating drug dealers, took part.<sup>24</sup> The prosecutor's office undertook this action fearing the court would sustain challenges to evidence seized by these officers, thereby precluding necessary evidence from trial.<sup>25</sup> Thus far, the office has dropped 110 criminal cases, and the city is facing a flood of civil suits.<sup>26</sup>

The Court's recent decisions indicate such foresight by the prosecutor's office may have been unnecessary.

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#### NOTES

1 Telephone Interview with David Moran, State of Mich. Appellate Defenders Office (Oct. 3, 2005).

Loyola Public Interest Law Reporter

- 2 Hudson v. Michigan, 126 S.Ct. 2159, 2170 (2006).
- 3 Samson v. California, 126 S.Ct. 2193, 2196 (2006).
- 4 Telephone Interview with David Moran, *supra* note 1.
- 5 Mapp v. Ohio, 81 S.Ct. 1684, 1694 (1961).
- 6 Telephone Interview with David Moran, *supra* note 1.
- 7 Cathy Young, *Exclusionary Rule Sends Dangerous Message*, SEATTLE POST INTELLIGENCER, July 9, 2006.
- 8 *Id.*
- 9 *Id.*
- 10 *Hudson*, 126 S.Ct. at 2163.
- 11 Telephone Interview with David Moran, *supra* note 3.
- 12 *Hudson*, 126 S.Ct. at 2167.
- 13 *Id.* at 2165.
- 14 *Id.* at 2168.
- 15 *Id.*
- 16 *Id.* at 2170.
- 17 *Id.* at 2171.
- 18 *Id.*
- 19 Samson, 126 S.Ct. at 2200.
- 20 Telephone interview with Ronald Niver, State of Cal. Att'y General's Office (Oct. 2, 2006).
- 21 Telephone interview with Ted Metzler, Assoc., Covington and Burling LLP (Oct. 2, 2006).
- 22 Telephone interview with Ronald Niver, *supra* note 20.
- 23 Telephone interview with Ted Metzler, *supra* note 21.
- 24 Maurice Possley, *When Cops Go Bad, Everyone Pays*, CHI. TRIBUNE, Oct. 22, 2006, at Zone C, pg. 1.
- 25 *Id.*
- 26 *Id.*