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Horton v. California: Searching for a Good Cause

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I. INTRODUCTION

In *Coolidge v. New Hampshire*, a plurality of the Supreme Court held that only inadvertently discovered evidence could be legally seized under the plain view doctrine.¹ The text of the Fourth Amendment, the plurality reasoned, mandated this requirement of inadvertent discovery.² Under the Fourth Amendment, warrants must particularly describe the items to be seized, and police may not circumvent this scope requirement by intentionally omitting objects

1. 403 U.S. 443, 469 (1971) (plurality opinion) (“The second limitation is that the discovery of evidence in plain view must be inadvertent.”).

2. *Id.* at 471 (“If the initial intrusion is bottomed upon a warrant that fails to mention a particular object, though the police know its location and intend to seize it, then there is a violation of the express constitutional requirement of ‘Warrants . . . particularly describing . . . [the] things to be seized.’” (quoting U.S. CONST. amend. IV)).

from their search warrant request and then pretextually relying on the plain view doctrine to justify their actions.³ However, despite the plurality's reliance on the express language of the Constitution, the newly created inadvertence requirement proved controversial.⁴ Initially, criticism focused on the Court's failure to define inadvertence.⁵ Over the next twenty years, several courts rejected *Coolidge's* formulation of plain view seizure, noting that inadvertent discovery had been required by only a plurality of the Court.⁶

The Court resolved this controversy in *Horton v. California* when it eliminated, rather than clarified, inadvertent discovery requirement for plain view seizure.⁷ Horton and an accomplice were suspected of having used a machine gun and a "stun gun"⁸ to steal jewelry and cash.⁹ Although the investigating officer's affidavit referred to both the weapons and proceeds from the robbery, the search warrant for Horton's home permitted the officers to search only for the stolen property.¹⁰ The warrant did not include permission to search for the weapons.¹¹ When the police executed the warrant, they failed to find any stolen property in Horton's residence,¹² although they did dis-

3. *Id.*

4. *Id.* at 517 (White, J., dissenting). Justice White vigorously argued that "the inadvertence rule is unnecessary to further any Fourth Amendment ends and will accomplish nothing." *Id.*

5. Harry Kalven, Jr., *The Supreme Court, 1970 Term—Forward: Even When a Nation Is at War*, 85 HARV. L. REV. 30, 244 (1971) ("The most serious problem with the plurality's approach to plain view is that Justice Stewart nowhere defined the degree of expectation required to make a discovery by the police inadvertent.").

6. *E.g.*, *North v. Superior Court*, 502 P.2d 1305, 1308-09 (Cal. 1972) ("[T]he 'plain view' issue raised by the plurality opinion was in fact considered by an equally divided court, and hence was not actually decided in *Coolidge*. . . . The judgment of an equally divided United States Supreme Court is 'without binding force as precedent.'"); *State v. Pontier*, 518 P.2d 969, 974 (Idaho 1974) ("Justice Stewart's opinion which proposed the adoption of the inadvertent requirement was signed by only four members of the Court Since the inadvertent requirement was not espoused by a majority of the Court, it is not binding upon this court as precedent."); *State v. Romero*, 660 P.2d 715, 718 n.3 (Utah 1983) ("A fourth requirement discussed in the opinions in *Coolidge v. New Hampshire*, that 'the discovery of evidence in plain view must be inadvertent,' is omitted here since it was specified by only a plurality of the justices in that case").

7. 110 S. Ct. 2301, 2305 (1990).

8. *Id.* at 2304. A "stun gun" is an "electrical shocking device" that the perpetrators used to subdue their victim. *Id.*

9. *Id.*

10. *Id.* Although the Court did not specify the cause of the omission of the weapons from the search warrant, it commented that when the officer discovered the weapons during the search for the proceeds, he had probable cause to believe that the weapons were the ones used in the robbery. *Id.* at 2310. This suggests that the police had probable cause to search for the weapons at the inception of the search, and that they were unintentionally omitted from the search warrant through the magistrate's oversight.

11. *Id.* at 2304.

12. *Id.*

cover the weapons in plain view and immediately seized them.¹³ In Horton's motion to suppress the weapons, he argued that since the police had anticipated finding the weapons in his home, they had not found them inadvertently and, therefore, could not seize them under the plain view doctrine.¹⁴ Indeed, the investigating officer testified that while searching for the proceeds from the robbery, as authorized by the warrant, he also desired to uncover other incriminating evidence.¹⁵ Nevertheless, because California had rejected inadvertence as a requirement for a plain view seizure,¹⁶ both the trial and appellate courts ruled that the seized weapons were admissible.¹⁷ On certiorari, Justice Stevens, writing for the majority, conceded that the weapons had not been found inadvertently,¹⁸ but concluded that the "seizure was authorized by the 'plain view' doctrine."¹⁹ He reasoned that as long as a police officer confines his search to its appropriate scope, the inadvertence requirement is unnecessary to protect citizens' privacy rights.²⁰

Consequently, the *Horton* Court dispelled the uncertainty surrounding the inadvertence requirement by abrogating the requirement itself.²¹ Confined to its narrow facts, *Horton* appears innocuous. The

13. *Id.* at 2304-05.

14. *Id.*

15. *Id.* at 2305.

16. *See* North v. Superior Court, 502 P.2d 1305 (Cal. 1972).

17. *Horton*, 110 S. Ct. at 2305. In unpublished opinions, the California Court of Appeal for the Sixth District affirmed Horton's conviction, and the California Supreme Court denied review. Joint Appendix at 43, *Horton* (No. 88-7164).

18. *Horton*, 110 S. Ct. at 2305.

19. *Id.* at 2311.

20. *Id.* at 2309-10. Stewart's argument can be illustrated by applying his reasoning to the facts of *Horton*. Although the warrant in *Horton* only authorized police to search for stolen property, the policeman's affidavit indicated that the police had also expected to find the weapons used by Horton and his accomplice at Horton's home. *Id.* at 2304. Regardless of the policeman's suspicions about the location of the weapons, the police were required to confine their search to places where the stolen property could conceivably have been stored—the scope sanctioned by the warrant. Thus, their discovery of the weapons, even though it was not inadvertent, did not involve an unauthorized invasion of Horton's privacy; the inadvertent discovery requirement did not decrease the number of places where an officer could legally look. *Id.* at 2310 (reiterating White's dissent in *Coolidge*). As a corollary, Stewart concluded that the scope requirement adequately protected privacy interests when evidence seized in plain view was not inadvertently discovered: "If the scope of the search exceeds that permitted by the terms of a validly issued warrant or the character of the relevant exception from the warrant requirement, the subsequent seizure is unconstitutional without more." *Id.* As long as the police officer had restricted his search to its appropriate scope, it was unnecessary to investigate his expectations about the evidence seized in plain view.

21. *Id.* at 2309 ("The fact that an officer is interested in an item of evidence and fully expects to find it in the course of a search should not invalidate its seizure if the search is confined in area and duration by the terms of the warrant or a valid exception to the warrant requirement.").

weapons and proceeds both tied Horton to one robbery—a single criminal act. Furthermore, the police included both the weapons and stolen property in their affidavit, and may have been able to establish probable cause to search for both items.²² Therefore, the exclusion of the weapons from the warrant apparently resulted from an oversight on the part of the issuing magistrate.

However, *Horton*'s true impact on searches and seizures, and the warrant requirement in particular, cannot be analyzed in a superficial, fact-limited fashion. After *Horton*, police will be tempted to obtain warrants authorizing searches for small, easily hidden items so that the scope requirement will pose no impediment to their search for other, larger items—items that they believe with a degree of certainty less than probable cause are in the suspect's residence.²³ The danger posed by this type of police discretion becomes particularly acute when police deliberately exploit a warrant to search for evidence of unrelated criminal activity in the calculated hope of making a plain-view seizure.²⁴

Of course, if police intentionally manipulate a warrant to search for items that it does not include, then the officers are conducting an unlawful, pretextual search.²⁵ Because courts always investigate whether a search was pretextual, the dissent in *Horton* recognized that elimination of inadvertent discovery as a requirement for plain-view seizure might have a "limited impact."²⁶ Implicit in the dissent's reasoning, however, is the assumption that courts are capable of detecting pretextual searches. This Comment argues that the court's ability to detect pretextual searches has been impaired by the interaction between two main factors: (1) the contemporary focus on objective facts as the sole indicia of pretext,²⁷ and (2) modern police policy,

22. *Id.* at 2310 (The investigating officer in *Horton* "had probable cause, not only to obtain a warrant to search for stolen property, but also to believe that the weapons and handguns had been used in the crime he was investigating.").

23. *Id.* at 2313 (Brennan, J., dissenting).

24. See *People v. Albritton*, 187 Cal. Rptr. 652, 653 (Ct. App. 1982) (officer assigned to auto theft detail used warrant to search for narcotics and unlawfully seize stolen vehicles in plain view); *Lockhart v. State*, 305 S.E.2d 22, 23 (Ga. Ct. App. 1983) (narcotics officer used warrant to search for "untaxed whiskey" to seize marijuana in plain view).

25. A pretextual search is one in which "the justification proffered by the State for the search is legally sufficient, but where the searching officer was in fact searching for another, legally insufficient, reason." John M. Burkhoff, *The Pretext Search Doctrine: Now You See It, Now You Don't*, 17 U. MICH. J.L. REF. 523, 523 (1984). For example, if a police officer exploits a warrant authorizing a search for narcotics to search for stolen property, then the officer has engaged in a pretextual search. *E.g.*, *People v. Albritton*, 187 Cal. Rptr. 652 (Ct. App. 1982). Such searches are an affront to the Fourth Amendment's minimization of police discretion through the warrant requirement.

26. *Horton*, 110 S. Ct. at 2313-14 (Brennan, J., dissenting).

27. In a trilogy of recent cases, the Supreme Court has held that pretext can only be

which has institutionalized interdivisional²⁸ and interdepartmental²⁹ cooperation between law enforcement officers who are investigating the unrelated criminal activities of a single suspect.³⁰

proven by objective facts. *Maryland v. Macon*, 472 U.S. 463, 472 (1985); *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983); *Scott v. United States*, 438 U.S. 128, 136 (1978). These objective facts must constitute "extrinsic, non-testimonial evidence of pretext"; an officer's subjective testimony regarding his motivation for conducting the search is irrelevant to whether the search was pretextual. Burkhoff, *supra* note 25, at 524. One example of a relevant, objective indicator of pretext is the presence of state narcotics officers during an administrative search of a vessel for proper documentation. *See id.* at 530-31 (quoting Brief for Respondents at 9, *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983)(No. 81-1350)). Because customs officers normally perform documentation checks without the assistance of other law enforcement officers, the presence of state narcotics officers suggests that the documentation check was an excuse to search for illicit drugs. Therefore, this kind of egregious deviation from normal police policy is an example of a germane objective indicator of pretext. *Id.* at 528. A police officer's arrest of a murder suspect on an old, outstanding arrest warrant for failing to appear in court for parking tickets so that he could detain the suspect and interrogate her about the murder typifies another deviation from normal police policy. *See* Ed Aro, Note, "The Pretext Problem Revisited: A Doctrinal Explanation of Bad Faith in Search and Seizure Cases," 70 B.U. L. REV. 111, 111-16 (1990) (discussing *State v. Blair*, 691 S.W.2d 259 (Mo. 1985), *cert. granted*, 474 U.S. 1049 (1986), *cert. dismissed*, 480 U.S. 698 (1987)). Normal police procedure would not authorize an arrest on such a stale warrant for a minor offense; therefore, the officer's actions would constitute objective proof of pretext.

28. Interdivisional cooperation refers to collaboration between two different divisions of the same police department. It occurs, for instance, when officers assigned to the theft division assist narcotics officers in executing a search warrant for illicit drugs. *See, e.g., People v. Williams*, 243 Cal. Rptr. 914, 915 (Ct. App. 1988) (detectives assigned to investigate non-narcotics related crime aided narcotics officers in serving warrant to search for narcotics); *People v. Albritton*, 187 Cal. Rptr. 652, 653 (Ct. App. 1982) (officer assigned to auto theft detail assisted narcotics officers in search for narcotics).

29. Interdepartmental cooperation occurs when two different law enforcement agencies or departments assist each other in the execution of a single search warrant. One example is assistance provided by city narcotics officers to the Bureau of Alcohol Tobacco and Firearms ("ATF") during an authorized search for firearms. *See United States v. Medlin*, 842 F.2d 1194, 1195 (10th Cir. 1988). When two federal agencies, such as the Drug Enforcement Agency ("DEA") and the ATF, collaborate to execute a search warrant for firearms, interdepartmental cooperation also occurs. *See, e.g., United States v. Hare*, 589 F.2d 1291, 1292 (6th Cir. 1979).

30. Even a sampling of cases involving this type of cooperation between police officers indicates that the practice is widespread. *See, e.g., United States v. Villamonte-Marquez*, 462 U.S. 579, 582 (1983) (state police officers assisted customs agents in on-board ship documentation investigations); *United States v. Medlin*, 842 F.2d 1194, 1195 (10th Cir. 1988) (county deputy sheriff assisted agents in a search for firearms); *United States v. Smith*, 799 F.2d 704, 705-06 (11th Cir. 1986) (Florida State Trooper collaborated with the DEA); *United States v. Wright*, 667 F.2d 793, 795 (9th Cir. 1982) (state narcotics officers assisted ATF agents in executing search warrant for a driver's license); *United States v. Hare*, 589 F.2d 1291, 1292 (6th Cir. 1979) (DEA agents assisted ATF agents in executing warrant for firearms); *People v. Williams*, 243 Cal. Rptr. 914, 915 (Ct. App. 1988) (detectives assigned to investigate non-narcotics related crime aided narcotics officers in serving a warrant to search for narcotics); *People v. Miller*, 242 Cal. Rptr. 179, 180 (Ct. App. 1987) (city police officer assisted agents from Federal Secret Service in search for counterfeit currency); *People v. Albritton*, 187 Cal. Rptr. 652, 653 (Ct. App. 1982) (officer assigned to auto theft detail assisted narcotics officers

The United States Court of Appeals for the Eleventh Circuit has developed a test aimed at detecting pretextual searches that asks "whether a reasonable officer would have made the seizure in the absence of illegitimate motivation."³¹ When an officer proffers a justification for an allegedly pretextual search, this objective test evaluates the genuineness of that justification by measuring the acting officer's conduct against that of a hypothetical "reasonable" officer, rather than relying on the officer's own subjective testimony of his motivation for conducting the search. However, because of the current trend towards interdivisional and interdepartmental cooperation in the execution of search warrants, which may soon become standard police policy, application of the Eleventh Circuit pretextual search test is difficult and its usefulness limited.³²

Consequently, the elimination of the inadvertence requirement

in a search for narcotics); *Lockhart v. State*, 305 S.E.2d 22 (Ga. Ct. App. 1983) (narcotics canine unit assisted county sheriff's department in conducting a search for illicit whiskey); *State v. Harris*, 504 So. 2d 156 (La. Ct. App. 1987) (sheriff who had arrested suspect for reckless driving requested the assistance of a narcotics officer to search the suspect's car for illegal drugs); *State v. Vann*, 432 N.W.2d 810, 812-13 (Neb. 1988) (officers assigned to theft unit assisted narcotics officers in executing a felony arrest warrant for theft).

Furthermore, several cases indicate that assistance between police officers conducting independent investigations of a single suspect's unrelated criminal activity has become standard police procedure. See *United States v. Medlin*, 842 F.2d 1194, 1196-97 (10th Cir. 1988) (ATF agents routinely take along local police officers when executing search warrants); *People v. Williams*, 243 Cal. Rptr. 914, 915 (Ct. App. 1988) ("Usually, when additional manpower was required by the narcotics detail in executing a warrant, normal procedure was to contact the lieutenant in charge of the detective division, or, if he was unavailable, to go to one of the sergeants in charge of various details and ask for 'anybody' who might be available."); *People v. Miller*, 242 Cal. Rptr. 179, 180 (Ct. App. 1987) (field office of United States Secret Service had only four agents and "routinely" relied on other agencies for assistance).

31. *E.g.*, *United States v. Smith*, 799 F.2d 704, 708 (11th Cir. 1986). The Eleventh Circuit test was designed to address the allegations of pretext arising when police officers seize narcotics during investigative traffic stops. See also *United States v. Guzman*, 864 F.2d 1512, 1517 (10th Cir. 1988) (adopting the Eleventh Circuit test). *But see* *United States v. Cardona-Rivera*, 904 F.2d 1149, 1154 (7th Cir. 1990) (rejecting the Eleventh Circuit test when a pretextual search for narcotics was alleged during a suspended license stop); *United States v. Trigg*, 878 F.2d 1037, 1041-42 (7th Cir. 1989) (rejecting the Eleventh Circuit test when pretextual search for narcotics was alleged during stop for driving with a suspended license); *United States v. Causey*, 834 F.2d 1179, 1184 (5th Cir. 1987) (rejecting the Eleventh Circuit test when an officer arrested the defendant on an outstanding petty theft warrant to interrogate him about a bank robbery). This Comment applies the Eleventh Circuit test to a variety of plain view seizures, such as seizures of stolen property in a defendant's home under a warrant to search for narcotics. See *infra* part VI.

32. For instance, because the "reasonable officer" assigned to burglary can always be called upon to assist narcotics officers in the execution of a narcotics search warrant, it will be nearly impossible to prove that the burglary officer exploited the narcotics warrant as a pretext to search for stolen property. Moreover, if the burglary officer's participation in the search conforms to standard operating procedures, there will be no deviation from police policy, which normally is a *prima facie* indicator of pretext. Burkhoff, *supra* note 25, at 528.

for plain view seizure in *Horton* creates an unforeseen, but foreboding potential for undetectable pretextual searches. In the absence of the inadvertence requirement, officers may now be able to circumvent the Fourth Amendment's mandate that warrants "particularly describ[e] the place to be searched and the persons or things to be seized"³³ by requesting search warrants for small, easily secluded items in the hope that they will discover other, larger items that they only suspect are located in the suspect's residence or business. Freed of the inadvertence requirement, police officers investigating a single suspect's independent crimes can exploit a warrant authorizing the search for evidence of one crime to search for evidence of an unrelated crime for which they lack requisite probable cause.³⁴ Thus, in *Horton*, the Court may have unintentionally created a perilous paradox: the warrant requirement, whose primary purpose is to minimize police discretion,³⁵ instead becomes a vehicle for enhancing discretion. When the *Horton* Court eliminated the inadvertence requirement, it abrogated a vague but necessary restriction on police discretion—it threw out the baby with the proverbial bath water.

Part II of this Comment analyzes the contemporary pretextual search doctrine. It defines pretextual searches and details the three Supreme Court cases³⁶ that mandate that alleged pretextual searches be analyzed exclusively on the basis of objective facts, rather than the subjective testimony of the investigating officer. Following discussion of Supreme Court precedent, Part II presents the two tests lower appellate courts have developed to detect pretextual searches in response to the Court's focus on objective criteria. Part II also examines how pretextual searches undermine the protection of privacy rights, and how the warrant requirement should ideally minimize police discretion. Part III analyzes *Coolidge v. New Hampshire*,³⁷ a

33. The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

U.S. CONST. amend. IV.

34. As this Comment illustrates, police discretion becomes especially problematical when the evidence seized in "plain view" is unrelated to the evidence listed in the warrant, such as when burglary or theft officers seize stolen property in plain view during a search authorized by a narcotics warrant. See *People v. Williams*, 243 Cal. Rptr. 914 (Ct. App. 1988); *People v. Albritton*, 187 Cal. Rptr. 652 (Ct. App. 1982).

35. See Anthony G. Amsterdam, *Perspectives On the Fourth Amendment*, 58 MINN. L. REV. 349 (1974).

36. *Maryland v. Macon*, 472 U.S. 463 (1985); *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983); *Scott v. United States*, 438 U.S. 128 (1978).

37. 403 U.S. 443 (1971).

case that illustrates the role of the inadvertence requirement in limiting police discretion through preservation of the warrant process. Part IV traces the development of the inadvertence requirement from *Coolidge* to its definitive link with police discretion and pretextual searches in *Texas v. Brown*.³⁸ Part V analyzes and discusses *Horton*, and focuses on the majority's claim that judicial enforcement of the scope of a search will adequately protect Fourth Amendment rights in the absence of the inadvertence requirement. Part VI forecasts the potential impact of eliminating the inadvertence requirement for plain view seizures: police exploitation of a warrant authorizing a search for evidence of one crime in order to conduct their own investigation of unrelated criminal activity. Further, this Part examines the contemporary cooperation between law enforcement agencies investigating unrelated criminal conduct of a single suspect. By comparing three California cases, Part VI demonstrates that adoption of an objective test for pretextual searches and institutionalization of police cooperation may frustrate judicial attempts to analyze allegedly unlawful police discretion. Ultimately, the goal of this Comment is propose a new scheme aimed at minimizing the ability of police to use the plain view doctrine as a pretext for implementing their own discretion at the expense of the warrant requirement and individual privacy rights.

II. PRETEXTUAL SEARCHES

A pretextual search occurs when the "justification proffered by the State for the search is legally sufficient, but where the searching officer was in fact searching for another, legally insufficient, reason."³⁹ For example, discovery of contraband in plain view during a routine traffic stop often results in allegations of a pretextual search.⁴⁰ Typically, after an arrest for a narcotics violation, the defendant moves to suppress the seized drugs, claiming that the traffic stop was merely a pretext for a general exploratory search for illicit drugs.⁴¹

But pretextual searches are not confined to cars on public highways. When stolen property is seized in "plain view" during a search

38. 460 U.S. 730 (1983).

39. Burkhoff, *supra* note 25, at 523.

40. *See, e.g.*, *United States v. Cardona-Rivera*, 904 F.2d 1149 (7th Cir. 1990); *United States v. Trigg*, 878 F.2d 1037 (7th Cir. 1989); *United States v. Guzman*, 864 F.2d 1512 (10th Cir. 1988); *United States v. Smith*, 799 F.2d 704 (11th Cir. 1986).

41. *See, e.g.*, *Cardona-Rivera*, 904 F.2d at 1151-53; *Trigg*, 878 F.2d at 1038; *Guzman*, 864 F.2d at 1514-15; *Smith*, 799 F.2d at 706. In these cases, the defendant contended that although the justification proffered by the state for the search, the traffic stop, was sufficient, the officer had intended all along to search for narcotics, a legally insufficient reason in the absence of probable cause.

of a defendant's home for narcotics, the defendant occasionally accuses the police of having used the narcotics warrant as a pretext to search for the stolen property that the officers had expected to find all along.⁴² Thus, illegal pretextual searches and constitutional plain view seizures are often inextricably intertwined; where both are alleged, a court must ascertain which one actually occurred.

A. *The Focus on Objective Facts as the Sole Indicia of Pretext*

In three cases—*Scott v. United States*,⁴³ *United States v. Villamonte-Marquez*,⁴⁴ and *Maryland v. Macon*⁴⁵—the Supreme Court held that nontestimonial, objective facts⁴⁶ are the sole criteria for evaluating allegations of pretext. Testimonial evidence of the officer's subjective intent is irrelevant.⁴⁷ Limiting the pretextual search inquiry to objective facts harmonizes the test for pretext with other aspects of the Court's Fourth Amendment jurisprudence,⁴⁸ such as the *Terry v. Ohio*⁴⁹ test, which permits limited pat-down searches of individuals for officer safety purposes.

1. *SCOTT v. UNITED STATES*

In *Scott v. United States*⁵⁰—a case that did not involve allegations of a pretextual search—the Supreme Court first employed *Terry*'s objective framework in holding that an officer's subjective intent was irrelevant to a judicial review of his behavior during a search.⁵¹ In

42. See, e.g., *People v. Williams*, 243 Cal. Rptr. 914 (Ct. App. 1988); *People v. Albritton*, 187 Cal. Rptr. 652 (Ct. App. 1982).

43. 436 U.S. 128 (1978).

44. 462 U.S. 579 (1983).

45. 472 U.S. 465 (1985).

46. See Burkhoff, *supra* note 25, at 524-25.

47. *Macon*, 472 U.S. at 470-71; *Villamonte-Marquez*, 462 U.S. at 584 n.3; *Scott*, 436 U.S. at 136-37.

48. See Aro, *supra* note 27, at 127-35.

49. 392 U.S. 1, 30 (1968). In *Terry*, the court held that an officer could conduct a "stop and frisk" when he reasonably concluded that a suspect was armed and dangerous and about to commit a crime. *Id.* The officer, however, has to justify his conduct by identifying the "specific, articulable" facts which serve as the basis for his conclusion. *Id.* at 21. The Court explained that objective standards were crucial to evaluation of all searches and seizures:

The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard

Id. (footnote omitted).

50. 436 U.S. 128 (1978).

51. *Id.* at 137-38. Searches that are challenged on constitutional grounds should be examined by using a "standard of objective reasonableness without regard to the underlying

Scott, federal agents wiretapped a narcotics suspect's telephone, ignoring a judicial order that limited the types of calls they could intercept.⁵² The government officers intentionally listened to all calls made on the tapped line, except wrong numbers.⁵³ Despite the agents' apparently egregious disregard for the limits imposed by the order, the Supreme Court held that the agents had conducted a constitutional search and seizure.⁵⁴ The Court discounted the officers' intentional violation of the order, commenting that evaluation of alleged violations of the Fourth Amendment depends solely upon an "objective assessment of an officer's actions in light of the facts and circumstances then known to him."⁵⁵ For the Court, the officer's state of mind or subjective intent during the search is not relevant when a judge reviews the officer's conduct.⁵⁶ As a result, the Court concluded that the agents had acted reasonably in "seizing" all the calls because, as a practical matter, they had to listen to a call in its

intent or motivation of the officers involved." *Id.* at 138. In *Scott*, the Court justified the exclusive role of objective factors in an evaluation of pretext by noting that the Fourth Amendment prohibited "unreasonable searches," and *Terry* had emphasized the objective aspect of the term "reasonable." *Id.* at 137. Without further elaboration, this justification is unenlightening and unpersuasive. One federal appellate court reasoned that "an examination of a police officer's subjective intent in individual cases would unwisely involve the court in unproductive inquiries" because officers would "adopt the proper purpose as the basis for their action." *United States v. Guzman*, 864 F. 2d 1512, 1516 (10th Cir. 1988) (citation omitted). However, when an officer is questioned under oath, he or she may divulge the pretextual nature of his search in open testimony. *See, e.g., id.* at 1514 (officer admitted under oath that he stopped the defendant's car to investigate whether he was transporting contraband, not for a seat belt violation); *United States v. Causey*, 834 F.2d 1179, 1180 (5th Cir. 1987) (officer testified that the only reason he arrested the defendant on an outstanding petty theft warrant was so that he could interrogate him about a bank robbery); *United States v. Smith*, 799 F.2d 704, 706 (11th Cir. 1986) (officer testified that he stopped the defendants' car to search it for contraband, not because it "weaved"). Thus, questioning an officer about his subjective intent may very well be revealing.

52. *Scott*, 436 U.S. at 132.

53. *Id.* at 133 n.7 (The agent in charge of the investigation testified that the "only effective steps taken by us to curtail the reception of conversations was in that instance where the line was connected to—misconnected from the correct line and connected to an improper line.").

54. *Id.* at 142-43.

55. *Id.* at 137. The court based its conclusion on the Fourth Amendment's prohibition of unreasonable searches and on *Terry's* emphasis of "the objective aspect of the term 'reasonable.'" *Id.*

56. *Id.* at 136. The Court agreed with the government's position that "subjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional." *Id.* (footnote omitted). The Court noted that in past cases it had "held that the fact the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." *Id.* at 138. To illustrate this point, the Court cited *United States v. Robinson*, 414 U.S. 218 (1973), where it held that an officer could conduct a search incident to an arrest even though he did not fear that the suspect was armed. *Scott*, 436 U.S. at 138. The arrest endowed the officer with objective authority to conduct the search. Therefore, his state of mind, i.e., subjective intent, was irrelevant. *Id.* at 138.

entirety to determine whether it was narcotics related, and therefore incriminating or innocent.⁵⁷

2. UNITED STATES v. VILLAMONTE-MARQUEZ

In *United States v. Villamonte-Marquez*,⁵⁸ the Court employed its analytical framework where an alleged pretextual search was directly at issue. In that case, an agent of the U.S. Customs Service, accompanied by a Louisiana state policeman, boarded the defendant's vessel under the auspices of the agent's statutory authority to check the ship's documentation.⁵⁹ Once on board, the customs agent smelled marijuana burning and, after peering through an open hatch, observed bales of contraband.⁶⁰ The ensuing search uncovered 5,800 pounds of marijuana, which was subsequently seized.⁶¹

At trial, the defendants alleged that the Louisiana State Police and U.S. Customs agents had used the documentation check as a pretext to search for illicit drugs.⁶² To substantiate their claim, the defendants noted that the night before the search, an informant had told customs that a vessel in the ship channel was laden with marijuana, prompting customs agents to form a narcotics patrol with the Louisiana narcotics officers⁶³—an action which the defendants claimed was objective proof of pretext.⁶⁴ However, citing *Scott v. United States*, the Court dismissed this argument.⁶⁵ It held that the boarding of the defendants' vessel and the subsequent seizure of mari-

57. *Scott*, 436 U.S. at 142. Burkhoff notes that "[a] subjective inquiry . . . was irrelevant to the decision in *Scott* because the majority concluded that whatever the searching officers' subjective intent, lawful or otherwise, they had not acted upon it." Burkhoff, *supra* note 25, at 528. The agents simply had no "opportunity to minimize" the number of calls they intercepted because it was impossible for them to determine whether a call was covered by the warrant until they had listened to the call. *Id.* at 526. Burkhoff concludes that the Court's dismissal of the agents' subjective motivations might have been mere dicta. *Id.* at 528.

58. 462 U.S. 579 (1983).

59. *Id.* at 583. ("Any officer of the customs may at any time go on board of any vessel or vehicle . . . and examine the manifest and other documents.") (quoting 19 U.S.C. § 1581(a)(1986)).

60. *Id.*

61. *Id.*

62. *Id.* at 584 n.3.

63. *Id.*

64. Burkhoff, *supra* note 25, at 531 (quoting Brief for Respondents at 9, *Villamonte-Marquez*, (No. 81-1350)).

65. *Villamonte-Marquez*, 462 U.S. at 584 n.3. ("This line of reasoning was rejected in a similar situation in *Scott v. United States* . . . , and we again reject it."). Burkhoff claims that the Court misconstrued *Scott*. Even if *Scott* held that a police officer's subjective motivation is irrelevant, the *Villamonte-Marquez* Court could not use *Scott* to dismiss the defendants' objective proof that the search was pretextual: "The *Scott* decision did not purport to cut off defendant's right to present, at the bare minimum, 'objective' evidence supporting their allegations of pretext." Burkhoff, *supra* note 25, at 530.

juana was lawful,⁶⁶ notwithstanding the officers' potentially devious motivations for conducting the search for narcotics. Thus, in *Villamonte-Marquez*, the Court eliminated the officer's state of mind as a factor in determining whether a search is pretextual, despite the arguably persuasive, objective evidence of pretext.⁶⁷

3. MARYLAND v. MACON

In *Maryland v. Macon*,⁶⁸ the Court reiterated that objective facts are the sole indicia of pretext.⁶⁹ Posing as a paying customer, a detective purchased two magazines from Macon using a marked \$50 bill.⁷⁰ After concluding that the magazines were obscene, the detective returned to the store, retrieved the marked bill, and arrested Macon.⁷¹ At trial, the court convicted Macon for distributing obscene material after the prosecution introduced several seized magazines into evidence.⁷² On appeal, Macon argued that because the policeman had intended to retrieve the marked bill when he "purchased" the magazine, he had used the "sale" as a pretext to make a warrantless, unconstitutional seizure.⁷³ The Court, however, rejected Macon's position, citing *Scott* for the proposition that an officer's subjective motivations are irrelevant to Fourth Amendment issues—only the objective facts and circumstances surrounding the search are material.⁷⁴ The Court reasoned: "Objectively viewed, the transaction was a sale in the ordinary course of business. The sale is not retrospectively transformed into a warrantless seizure by virtue of the officer's subjective intent to retrieve the purchase money to use as evidence."⁷⁵

66. *Villamonte-Marquez*, 462 U.S. at 579.

67. Burkhoff criticizes the Court for its summary dismissal of the defendant's objective evidence. Burkhoff, *supra* note 24, at 531-32.

What was the *Villamonte-Marquez* majority's response to these claims of objective manifestations of pretext? In one sentence, taken again from footnote three, the Court concluded "this line of reasoning was rejected in a similar situation in *Scott* . . . , and we again reject it." *No, a thousand times no!* The *Scott* decision only involved the issue of the significance of *subjective* evidence of pretext, and even then, arguably in dictum.

Id. at 531-32 (footnote omitted).

68. 472 U.S. 463 (1985).

69. *Id.* at 470-71.

70. *Id.* at 465.

71. *Id.*

72. *Id.* at 466.

73. *Id.* at 470.

74. "Whether a Fourth Amendment violation has occurred 'turns on an objective assessment of the officer's actions in light of the circumstances confronting him at the time . . . and not on the officer's actual state of mind at the time the challenged action was taken.'" *Id.* at 470-71 (citation omitted).

75. *Id.* at 471.

B. Federal Appellate Court Tests to Detect Pretextual Searches

In response to the *Scott/Villamonte-Marquez/Macon* trilogy, several federal appellate courts developed tests that use objective criteria to distinguish unconstitutional pretextual searches from constitutional plain view seizures. Two dramatically different tests have emerged as a result.

1. UNITED STATES *v.* SMITH: THE ELEVENTH CIRCUIT TEST

The first test, advanced by the Court of Appeals for the Eleventh Circuit in *United States v. Smith*,⁷⁶ asks whether a "reasonable officer would have made the seizure in the absence of illegitimate motivation."⁷⁷ In *Smith*, a state trooper was cooperating with the Drug Enforcement Agency ("DEA") in an operation to intercept drug couriers.⁷⁸ The trooper ostensibly stopped Smith for "weaving" after his car allegedly veered six inches into the emergency lane, though later the trooper testified that Smith's "overly cautious" driving originally aroused his suspicions because it matched a drug courier profile.⁷⁹ After making the stop, the patrolman summoned a DEA agent and a dog trained in drug detection to the scene. The subsequent search of Smith's car uncovered a kilogram of cocaine hidden in the trunk.⁸⁰ At trial, the trooper admitted that he had stopped Smith's car to conduct a search for drugs, not for weaving.⁸¹ Based on this testimony, the trial court found that the traffic stop was pretextual, as no traffic violation had occurred.⁸² Nevertheless, the court denied Smith's motion to suppress the evidence, holding that the drug courier profile "provided adequate grounds for the stop."⁸³

On appeal, the Eleventh Circuit agreed with trial court's determination that the search was pretextual,⁸⁴ but rejected the trial court's reliance on the patrolman's testimonial admission that he had stopped Smith's car to search for narcotics.⁸⁵ Relying on *Maryland v. Macon*

76. 799 F.2d 704 (11th Cir. 1986).

77. *Id.* at 708.

78. *Id.* at 705.

79. *Id.* at 706.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 707.

84. *Id.* at 711.

85. "[W]hile Trooper Vogel's courtroom declaration of motive is intriguing, what turns this case is the overwhelming objective evidence that Vogel had no interest in investigating drunk driving charges . . ." *Id.* at 710. The court also held that Trooper Vogel's reliance on the drug courier profile was unconstitutional because the factors cited by him—the presence of two young men driving in an out-of-state car at 3:00 a.m. in accordance with traffic

and *Scott v. United States*, the Eleventh Circuit created a test to detect pretextual searches during investigative traffic stops which focused on an objective evaluation of an officer's conduct and ignored the officer's underlying, personal motivations.⁸⁶ The Eleventh Circuit held that "in determining whether an investigative stop is invalid as pretextual, the proper inquiry is whether a reasonable officer would have made the seizure in the absence of illegitimate motivation."⁸⁷ In applying its newly fashioned test to the facts of *Smith*, the court dismissed the officer's testimony that he had stopped Smith's car to search for drugs, rather than to issue a traffic citation, as irrelevant.⁸⁸ Instead, the Eleventh Circuit assessed the officer's actions objectively,⁸⁹ noting that the patrolman initially pursued Smith before observing any weaving.⁹⁰ Indeed, despite Smith's weaving, the officer did not investigate whether Smith was drunk.⁹¹ The court also noted that the officer had originally characterized Smith's driving as "overly cautious,"⁹² a direct contradiction to his later assertion that Smith was driving erratically.⁹³ On these facts, the Eleventh Circuit concluded that a reasonable officer would not have stopped Smith absent an additional illicit purpose, such as the desire to search for the suspected narcotics.⁹⁴ Thus, after an objective evaluation of this officer's conduct, the Eleventh Circuit held the traffic stop pretextual and the subsequent search unreasonable.⁹⁵

2. *UNITED STATES v. CAUSEY*: THE FIFTH CIRCUIT TEST

The Court of Appeals for the Fifth Circuit applied a radically different interpretation of the same Supreme Court precedents in *United States v. Causey*.⁹⁶ After an anonymous informant told police that Causey had robbed a bank, the police arrested Causey on an out-

regulations—were "insufficient to give rise to a reasonable suspicion of drug activity." *Id.* at 708 n.5.

86. *Id.* at 709.

87. *Id.* at 708. The United States Court of Appeals for the Tenth Circuit adopted this test in *United States v. Guzman*, 864 F.2d 1512, 1517 (10th Cir. 1988).

88. *Smith*, 799 F.2d at 710. "In determining the validity of the stop of appellants' automobile by Trooper Vogel, we . . . are not concerned with Trooper Vogel's subjective intent." *Id.* Accordingly, the court found the patrolman's testimony concerning his motive "intriguing" but not relevant. *Id.*

89. *Id.* at 710-11.

90. *Id.* at 710.

91. *Id.*

92. *Id.* at 706.

93. *Id.* at 711.

94. *Id.*

95. *Id.*

96. 834 F.2d 1179 (5th Cir. 1987).

standing warrant issued years earlier for failure to appear in court on a petty theft charge.⁹⁷ While Causey was in custody, the police interrogated him about the bank robbery and obtained a confession.⁹⁸ At trial, Causey moved to suppress his confession on Fourth Amendment grounds, claiming that his arrest on the warrant for failure to appear had been pretextual, merely a facade that the police had used to interrogate him about the unrelated bank robbery.⁹⁹ At the suppression hearing, one of the officers testified that their only reason for arresting Causey on the warrant was "to take him downtown and continue [the] investigation of the bank robbery."¹⁰⁰ Ignoring the testimony to the contrary, the trial court held that Causey's arrest was not pretextual and admitted his confession into evidence.¹⁰¹

Like the Eleventh Circuit in *Smith*, the Fifth Circuit began its analysis with the Supreme Court's rule that objective facts alone are dispositive in evaluating an alleged pretextual search, and thus an officer's subjective intent is irrelevant.¹⁰² However, while the Eleventh Circuit analyzed the officers' objective actions in terms of what a reasonable officer *would* do, the Fifth Circuit evaluated them from the standpoint of what a reasonable officer *could* do. Because the arresting officers in *Causey* had legal authority to arrest Causey on the outstanding warrant, the Fifth Circuit reasoned that their seizure of Causey had been objectively reasonable.¹⁰³ The rule that emerged from *United States v. Causey* is that "so long as police do no more than they are objectively authorized and legally permitted to do, their motives in doing so are irrelevant and hence not subject to inquiry."¹⁰⁴

Consequently, the Fifth Circuit gave a substantively different meaning and role to "objective facts." While the Eleventh Circuit based its finding of pretext in *Smith* on the officer's failure to investigate Smith's sobriety after stopping him for weaving, it was of no consequence to the Fifth Circuit that the arresting officers in *Causey* never investigated the petty theft charges. The Fifth Circuit never even considered whether a reasonable officer, whose primary law

97. *Id.* at 1180.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 1185.

102. *Id.* at 1182. "[T]he Supreme Court—in three cases of its own—has made plain that it is irrelevant what subjective intent moves an officer in taking such an action as this; what signifies is the officer's actions, objectively viewed in light of the circumstances confronting him." *Id.* at 1182; see also *id.* at 1182-84 (citing *Scott*, *Villamonte-Marquez*, and *Macon*).

103. *Id.* at 1185.

104. *Id.* at 1184.

enforcement responsibility is to investigate bank robberies, would have arrested Causey for failing to appear in court on the petty theft charges absent the informant's tip regarding the bank robbery. The Eleventh Circuit would have noted that a reasonable officer who lacked an ulterior motive would not have gone out of his way to arrest a suspect like Causey on a stale warrant for a minor offense, such as failure to appear in court to answer to a petty theft charge. Thus, the Eleventh Circuit would have concluded that the arresting officer's primary motivation was to interrogate Causey about the bank robbery. It would have viewed the petty theft warrant as a mere facade for this illicit, underlying impetus. Once the Eleventh Circuit uncovered the pretextual character of the officer's conduct, it would have suppressed Causey's confession.¹⁰⁵

Thus, the Eleventh Circuit test validates an officer's conduct only if a reasonable officer would have acted in the same way absent the alleged illicit motivation. Any justification that an officer proffers for his conduct is insufficient if a hypothetical reasonable officer under identical circumstances would have ignored the offense as inconsequential. However, the Fifth Circuit test only asks whether the reasonable officer would have had the legal capacity to conduct the search or seize the evidence at issue. It ratifies police conduct as long as the officer can provide some legitimate source of authority—no matter how attenuated or dubious—to support his actions. It does not evaluate whether the officer used one source of authority as a pretext to accomplish an unrelated, unconstitutional objective; so long as the officer is empowered to stop a defendant's car for minor traffic violations, it does not matter that he did so only to search the car for narcotics that he hoped to find in plain view. Indeed, the Fifth Circuit test renders an investigation of pretext unnecessary. If an officer conducts a search or seizes evidence when a hypothetical, reasonable officer would have lacked the authority to do so, then the actual officer acted illegally regardless of the justification that he offers for his conduct. Despite the differences in the approach of the two tests,¹⁰⁶ there is likely to be little difference in result when police validate their initial intrusion on a suspect's privacy with a search warrant and exploit the new trend towards institutionalized law

105. *United States v. Smith*, 799 F.2d 704 (11th Cir. 1986). The Eleventh Circuit rejected the Fifth Circuit's analytical framework: "We conclude . . . that in determining when an investigatory stop is unreasonably pretextual, the proper inquiry, again, is not whether the officer could validly have made the stop but whether under the same circumstances a reasonable officer would have made the stop in the absence of the invalid purpose." *Id.* at 709.

106. *See infra* part VI.

enforcement cooperation.¹⁰⁷ Then, even the Eleventh Circuit test will likely provide inadequate protection from the pretextual use of plain view seizure.

C. *Pretextual Searches and the Fourth Amendment*

Pretextual searches imperil Fourth Amendment rights—ideals which the Supreme Court had historically preserved.¹⁰⁸ This Part discusses the interaction between the warrant requirement, police discretion, pretextual searches, and the inadvertence requirement for plain view seizure.

In its Fourth Amendment jurisprudence, the Supreme Court has struggled to reconcile two competing concerns: crime control and privacy rights.¹⁰⁹ While citizens need protection from outlaws, they also must be shielded from overzealous police officers who are consumed by the “competitive enterprise” of apprehending criminals.¹¹⁰ To prevent the abuses of unbridled police discretion,¹¹¹ the Court has traditionally required rigid adherence to the warrant requirement, absent an exigency.¹¹² To preserve privacy rights, the Court has imposed a “neutral and detached magistrate” between a suspect and an policeman’s ambitious impulses.¹¹³

107. See *infra* notes 196-98 and accompanying text.

108. Daniel S. Jonas, Comment, *Pretext Searches and the Fourth Amendment: Unconstitutional Abuses of Power*, 137 U. PA. L. REV. 1791 (1989).

109. *E.g.*, *United States v. Place*, 462 U.S. 696, 703 (1983); *Michigan v. Summers*, 452 U.S. 692, 702-03 (1981); *Terry v. Ohio*, 392 U.S. 1 (1968). See generally *Amsterdam*, *supra* note 35.

110. See *United States v. Leon*, 468 U.S. 897, 913-14 (1984); *Steagald v. United States*, 451 U.S. 204, 212 (1981); *Payton v. New York*, 445 U.S. 573, 586 n.24 (1979); *Terry*, 392 U.S. at 12; *Johnson v. United States*, 333 U.S. 10, 14 (1947); see also *Amsterdam*, *supra* note 35, at 414.

111. *E.g.*, *Brown v. Texas*, 443 U.S. 47, 51 (1979) (“A central concern . . . has been to assure that an individual’s reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field.”); *Mincey v. Arizona*, 437 U.S. 385, 394-95 (1978) (“[T]hese so-called guidelines are hardly so rigidly confining as the state seems to assert. They confer unbridled discretion upon the individual officer . . .”); *Florida v. Wells*, 110 S. Ct. 1632, 1635 (1990); *Warden v. Harden*, 387 U.S. 294, 301 (1967).

112. “[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject to only a few specifically established and well-delineated exceptions.” *Katz v. United States*, 389 U.S. 347, 357 (1967); see also *Mincey*, 437 U.S. at 390; *Vale v. Louisiana*, 399 U.S. 30, 34 (1969); *Terry*, 392 U.S. at 20; *Texas v. Brown*, 460 U.S. 730, 735 (1983).

113. *E.g.*, *Leon*, 468 U.S. at 913-14 (“[A] search warrant ‘provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer ‘engaged in the often competitive enterprise of ferreting out crime.’” (quoting *United States v. Chadwick*, 433 U.S. 1, 9 (1977)); *Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979) (“The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of ‘reasonableness’ upon the exercise of discretion by government officials, including law enforcement agents” to protect individual privacy.); *Terry*, 392 U.S. at 21 (“The scheme of the Fourth Amendment becomes meaningful only when it is

A search warrant protects privacy rights and deters abuse of police discretion in two ways. First, an impartial magistrate's antecedent evaluation of probable cause prevents police from initiating unjustified searches based entirely on their own suspicions.¹¹⁴ In addition, the Fourth Amendment requires that a warrant "particularly describ[e] the place to be searched, and the persons or things to be seized."¹¹⁵ A magistrate, therefore, also minimizes police discretion in the execution of searches by specifying the scope of the search in the warrant.¹¹⁶ Thus, when police officers seize items not particularly described in a warrant, they tip the fragile balance between law and order and individual privacy rights prescribed by the Fourth Amendment.¹¹⁷

assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances."); *see also Mincey*, 437 U.S. at 395-96 (holding that the Arizona Supreme Court's guidelines authorizing a warrantless search of a scene of a murder investigation were unconstitutionally vague because they permitted police to circumvent probable cause and scope determinations of a neutral and detached magistrate); *Amsterdam*, *supra* note 35, at 414-17; *Aro*, *supra* note 27, at 118-26.

114. *E.g.*, *Steagald v. United States*, 451 U.S. 204, 212-16 (1981) ("The purpose of a warrant is to allow a neutral judicial officer to assess whether the police have probable cause to make an arrest of conduct a search A contrary conclusion—that the police, acting alone and in the absence of exigent circumstances, may decide when there is sufficient justification for searching the home of a third party the subject of an arrest warrant—would create a significant potential for abuse."); *Payton v. New York*, 445 U.S. 573, 586 (1980) ("[W]e have long adhered to the view that the warrant procedure minimizes the danger of needless intrusions"); *Katz*, 389 U.S. at 356 ("It is apparent that the agents in this case acted with restraint. . . . [T]he inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer. They were not required, before commencing the search, to present their estimate of probable cause for detached scrutiny by a neutral magistrate."); *see also Amsterdam*, *supra* note 35, at 417 ("A paramount purpose of the Fourth Amendment is to prohibit arbitrary searches and seizures as well as unjustified searches and seizures.").

115. U.S. CONST. amend. IV.

116. *E.g.*, *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 325 (1979) (holding an open-ended warrant invalid because it "left it entirely to the discretion of the officials conducting the search to decide what items were likely to be obscene and to accomplish their seizure"); *Stanford v. Texas*, 379 U.S. 476, 485 (1965); *Marron v. United States*, 275 U.S. 192, 196 (1927) ("The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant."); *see also United States v. Place*, 462 U.S. 696, 701 (1982); *Walter v. United States*, 447 U.S. 649, 656 n.7 (1980); *Andresen v. Maryland*, 427 U.S. 463, 480 (1976); *Amsterdam*, *supra* note 35, at 412 ("Under the [F]ourth [A]mendment, even where the initial justification for a search was determined by a magistrate, executive discretion in its execution was to be curbed by the requirement of particularity of description in the warrant of the items subject to seizure.").

117. *E.g.*, *Lo-Ji Sales*, 442 U.S. at 321-29. In *Lo-Ji Sales*, police purchased two allegedly obscene films from the defendant's adult bookstore. *Id.* at 321. After viewing the two films, the town justice issued a search warrant for the store, which authorized the seizure of all copies of the two films and other items that the court "independently [on examination] has

Similarly, pretextual searches compromise the restrictions on police discretion provided by the warrant requirement.¹¹⁸ If police may exploit a warrant authorizing the search for one item by searching for another item, they in effect bypass the Fourth Amendment's probable cause and scope requirements.¹¹⁹ Relying on only their own judgment that a search is justified, police officers can initiate an investigation without a judicial review of their basis for searching for the item excluded from the search warrant. Thus, through pretextual searches, police officers determine the justification for and scope of a search—the role that the Constitution expressly conferred to a neutral and detached magistrate as a safeguard against police officers' competitive impulses.

III. *COOLIDGE v. NEW HAMPSHIRE*: THE ORIGIN OF THE INADVERTENCE REQUIREMENT

*Coolidge v. New Hampshire*¹²⁰ was the genesis of the inadvertence requirement for plain view seizure.¹²¹ Indeed, a comparison of the different opinions delivered in *Coolidge*¹²² graphically illustrates the policies underlying the inadvertence requirement: deterring the pretextual use of plain view seizure, and controlling police discretion

determined to be possessed in violation" of the state obscenity law. *Id.* at 321-22. While executing the search warrant, the policemen and the town justice seized many films and magazines that were not particularly specified in the warrant. *Id.* at 322-23. The defendant moved to suppress the evidence, claiming that it had been seized in violation of the Fourth Amendment. His motion was denied, and he pled guilty to second degree obscenity charges. *Id.* at 324. On appeal, the Supreme Court observed that "[e]xcept for the specifications of copies of two films previously purchased, the warrant did not purport to 'particularly describe . . . the . . . things to be seized.'" *Id.* at 325 (quoting U.S. CONST. amend. IV). The Court compared the open-ended warrant to a general warrant of the Eighteenth Century, the primary target of Fourth Amendment protection against unreasonable search and seizure. *Id.* at 325. In reversing the defendant's conviction for obscenity, the Court commented: "Our society is better able to tolerate the admittedly pornographic business of petitioner than a return to the general warrant era; violations of law must be dealt with within the framework of constitutional guarantees." *Id.* at 329.

118. See Burkhoff, *supra* note 25, at 534 (noting that pretextual searches "pervert the whole notion that the [F]ourth [A]mendment is capable of supporting workable restrictions on police misconduct"); Aro, *supra* note 27, at 118-26.

119. Aro, *supra* note 27, at 125-26.

120. 403 U.S. 443 (1971).

121. *Id.* at 469-72.

122. Justice Stewart wrote for the plurality and was joined by Justices Douglas, Brennan, and Marshall. *Id.* at 445. Justice Harlan filed a separate concurring opinion. *Id.* at 490. Justice Burger dissented in part, and concurred in part. *Id.* at 492. Justice Black delivered his own concurring and dissenting opinion, *id.* at 493, as did Justice White, who was joined by Chief Justice Warren, *id.* at 510.

through the warrant requirement.¹²³

A. *The Facts of Coolidge v. New Hampshire*

Coolidge was convicted of murdering a fourteen year-old girl¹²⁴ whose abandoned body was found near a highway.¹²⁵ After the attorney general who headed the murder investigation issued arrest and search warrants,¹²⁶ police officers arrested Coolidge and seized his car.¹²⁷ The car was then towed to the police station where it was searched on three different occasions over a fifteen-month period.¹²⁸ At Coolidge's murder trial, the State introduced incriminating vacuum sweepings from the car into evidence.¹²⁹ Subsequently, Coolidge was found guilty of murder and sentenced to life imprisonment.¹³⁰

Writing for the plurality, Justice Stewart began by holding that the warrant issued by the attorney general was invalid because, as "the chief investigator and prosecutor" on the case, the attorney general had not acted as a neutral or detached magistrate.¹³¹ Consequently, unless the search fell within one of the exigency exceptions to the warrant requirement, the vacuum sweepings were inadmissible.¹³² Before discussing plain view seizure, the plurality held that the search and seizure were not justifiable as either a search incident to arrest,¹³³

123. See *Texas v. Brown*, 460 U.S. 730, 743 (1983); Burkhoff, *supra* note 25 at 546-48; see also *infra* part IV.

124. *Coolidge*, 403 U.S. at 448.

125. *Id.* at 445.

126. *Id.* at 446-47. The attorney general later served as chief prosecutor at Coolidge's trial. *Id.* at 450.

127. *Id.* at 447.

128. *Id.* at 447-48.

129. *Id.* at 448.

130. *Id.*

131. *Id.* at 453.

132. *Id.*

133. *Id.* at 455-57. The plurality based its conclusion on the requirement that a search incident to arrest must occur contemporaneously with the arrest and be restricted to the immediate vicinity of the arrest. *Id.* at 456. Coolidge's car was searched well after Coolidge had been arrested, and Coolidge had been arrested inside his house while his car was located outside. *Id.* In his dissent, Justice Black argued that the search and seizure of Coolidge's car was valid as a search incident to an arrest. *Id.* at 505-10 (Black, J., dissenting). On the basis of this precedent, he noted that evidence seized during a search incident to an arrest would seldom be discovered inadvertently, and concluded that the plurality's holding "abolishe[d] seizure incident to arrest." *Id.* at 509. In response to Black, Stewart stressed that judicial review of a search incident to arrest involved an evaluation of the timing of arrest; it did not implicate inadvertent discovery. *Id.* at 471 n.27. Furthermore, the seizure in *Coolidge* could not be justified as a search incident to arrest because it involved a "planned warrantless seizure" of evidence, suggesting that the police had timed Coolidge's arrest so that they could seize his car—a practice prohibited by *Chimel v. California*, 395 U.S. 752, 767 (1969). *Coolidge*, 403 U.S. at 471 n.27.

Stewart's reliance on *Chimel*, however, was incorrect. Earlier in his opinion, Stewart

or under the automobile exception to the warrant requirement.¹³⁴ Because the police had known the description and location of the car and had intended to seize it, Coolidge's car had not been discovered inadvertently.¹³⁵ Thus, the plain view doctrine could not justify its seizure.¹³⁶ Indeed, procuring a valid warrant would not have been impractical, and thus the officers' unfettered exercise of discretion made the vacuum sweepings inadmissible.¹³⁷

B. *The Plurality's Formulation of the Inadvertence Requirement*

In *Coolidge*, the plurality's insistence on inadvertent discovery as a condition for plain view seizure¹³⁸ may be interpreted as an attempt to reconcile crime control with privacy rights.¹³⁹ In addressing the State's argument that the police seized Coolidge's car under the plain view exception to the warrant requirement, Justice Stewart reasoned that plain view seizure could only be understood in light of the "two distinct constitutional protections served by the warrant requirement."¹⁴⁰ Therefore, the inadvertence requirement's primary function was to limit police discretion by preserving the Fourth Amendment's warrant process.¹⁴¹

Plain view seizure, the Court reasoned, did not violate the first

conceded that *Chimel* did not govern because it only changed the law prospectively, and Coolidge's car had been seized before *Chimel* was decided. *Id.* at 455-56. Pre-*Chimel* law permitted officers to time arrests so that they could search a suspect's home or car. *Id.* at 471 n.27. *Chimel's* prohibition on the pretextual timing of a search incident to arrest was thus irrelevant to the search in *Coolidge*. In the text of his opinion, Stewart provided a better answer to Black's objections. He noted that even before *Chimel*, a search incident to an arrest had to be conducted contemporaneously with the arrest—a requirement which had not been satisfied in *Coolidge* because the car was not searched until two days after Coolidge's apprehension. *Id.* at 456-58.

134. 434 U.S. at 458-64. The plurality reasoned that the facts in *Coolidge* did not correspond to the rationale behind the automobile exception to the warrant requirement. *Id.* at 459-60. The police had expected to seize the car and had known of its location for some time; consequently, they could have previously obtained a valid search warrant for the car. *Id.* at 460. Because Coolidge's car was seized long after Coolidge realized that he was a murder suspect, he previously obtained already had an opportunity to dispose of any evidence located inside of it; thus, the evidence was not threatened by imminent destruction. *Id.* Furthermore, Coolidge's car was seized while parked in his driveway, eliminating the threat to the evidence posed by the inherent mobility of a car on a public roadway. *Id.*

135. *Id.* at 472.

136. *Id.*

137. *Id.* at 472-73.

138. *Id.* at 470-71.

139. Stewart rationalized the plain view exception to the warrant requirement by recognizing that while plain view seizure would result in a "major gain [to] law enforcement," it presented only a "minor peril" to privacy rights. *Id.* at 467.

140. *Id.*

141. *Id.* at 466-72.

function of the warrant requirement—the prevention of all searches and seizures not based on probable cause¹⁴²—because “plain view [seizure] does not occur until a search is in progress.”¹⁴³ By this, Justice Stewart meant that a policeman could only make a valid plain view seizure if his initial intrusion on the suspect’s privacy had been authorized either by a search warrant or exigent circumstances.¹⁴⁴ Moreover, the incriminating character of the plain view evidence had to be “immediately apparent to the police,”¹⁴⁵ insuring that the officers had the requisite probable cause to make the seizure.

Furthermore, because only evidence located in plain view could be seized, the plain view doctrine would not convert the search into a “general or exploratory one,” and therefore did not compromise the second function of the warrant requirement—minimization of the scope of searches and seizures through the description of “places to be searched” and “things to be seized” in the warrant.¹⁴⁶

Consequently, Justice Stewart concluded that while plain view seizure did not jeopardize any Fourth Amendment rights, it resulted in a “major gain in effective law enforcement.”¹⁴⁷ If evidence was discovered in plain view during a lawful search, then requiring the police to procure a warrant tailored to the new evidence would be a “needless inconvenience” that could endanger both the evidence and the police officers.¹⁴⁸

Despite the value of plain view seizure to effective law enforcement, Justice Stewart reasoned that the doctrine was restricted by two important qualifications, both of which implicated police discretion. The first limitation required that police have lawful access to the evidence that they seize in plain view¹⁴⁹—that is, they could not use the plain view doctrine to justify the initiation of a search.¹⁵⁰ The second limitation was that the police could seize only inadvertently discov-

142. *Id.*

143. *Id.* at 467.

144. *Id.* at 465.

145. *Id.* at 466.

146. *Id.* at 467.

147. *Id.*

148. *Id.* at 467-68.

149. *Id.* at 468 (“[P]lain view seizure *alone* is never enough to justify the warrantless seizure of evidence. . . . [N]o amount of probable cause can justify a warrantless search or seizure absent ‘exigent circumstances.’”). Consequently, police can make a valid plain view seizure only where their initial intrusion was either authorized by a warrant or required by an exigency.

150. *Id.* (“But even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure.”). Thus, if a policeman sees a piece of evidence in a suspect’s home through his window, the officer may not use the plain view doctrine to enter the suspect’s house without a warrant.

ered evidence in plain view.¹⁵¹ Where police, in the course of a lawful search, unexpectedly encountered evidence that had not been included in a warrant, they could seize it legally under the plain view doctrine. However, the plurality expressed a limitation to the doctrine:

But where the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it, the situation is altogether different. The requirement of a warrant to seize imposes no inconvenience whatever, or at least none which is constitutionally cognizable in a legal system that regards warrantless seizures as "per se unreasonable" in the absence of "exigent circumstances."¹⁵²

Where police had not anticipated finding the evidence seized in plain view during a lawful search, they could not have intentionally initiated the search for the sole of purpose of discovering the evidence. Thus, the inadvertence requirement was tied directly to the curb on police discretion provided by the Fourth Amendment's imposition of a neutral magistrate between the policeman and the general public. As plain view seizure of inadvertently discovered evidence did not permit the unchecked free exercise of police judgment in either the initiation or the execution of the search, it was justified as a helpful tool for law enforcement. However, where the police did not discover evidence inadvertently, the Fourth Amendment's warrant requirement outweighed any gain in crime control achieved by plain view seizure; thus, plain view seizure ended where the Fourth Amendment's limitations on unchecked police discretion began.

Convinced that the seizure of Coolidge's car was constitutional, Justices Black¹⁵³ and White¹⁵⁴ each wrote vigorous dissents disputing the constitutional relevance of the inadvertence requirement to plain view seizure.¹⁵⁵ The dissenters' debate regarding the inadvertence requirement in *Coolidge* foreshadowed the skepticism of other courts regarding inadvertence, which lasted until its internment in *Horton v.*

151. *Id.* at 469.

152. *Id.* at 470-71.

153. *Id.* at 493.

154. *Id.* at 510.

155. Justice Black commented:

The majority confidently states: "What the 'plain view' cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused." But the prior holdings of this Court not only fail to support the majority's statement, they flatly contradict it.

Id. at 506 (Black, J., dissenting). Further, Justice White noted: "The inadvertence rule is unnecessary to further any Fourth Amendment ends and will accomplish nothing." *Id.* at 517 (White, J., dissenting).

California.¹⁵⁶

Despite the vigorous dissent in *Coolidge*, “[f]orty-six states and the District of Columbia and twelve United States Courts of Appeals” subsequently adopted inadvertent discovery as a requirement for plain view seizure.¹⁵⁷ Thus, the Court’s elimination of inadvertent discovery in *Horton v. California*¹⁵⁸ is a dramatic revision of at least the theoretical underpinnings of plain view seizure. The remainder of this Comment depicts the evolution of the inadvertence requirement and analyzes the logic and impact of *Horton*. Part IV details courts’ efforts to define and implement inadvertent discovery as an essential element of plain view seizure, Part V evaluates the arguments presented by both sides of the Court in *Horton*, and Part VI forecasts the practical implications of *Horton* on American law enforcement.

IV. EVOLUTION OF THE INADVERTENCE REQUIREMENT

Criticism of the inadvertence requirement in *Coolidge* was immediate and persistent. Initially, it focused on the plurality’s failure to define inadvertent discovery precisely.¹⁵⁹ Subsequently, courts struggled to define the inadvertence requirement¹⁶⁰—an odyssey which continued until the abolition of inadvertent discovery in *Horton v. California*.¹⁶¹

A. *Hare v. United States: An Initial Interpretation of the Inadvertence Requirement*

Seizing upon Stewart’s reference to the scenario where police had advance knowledge of the evidence but had failed to obtain a warrant,¹⁶² in *United States v. Hare*, the Court of Appeals for the Sixth Circuit held that the inadvertence requirement was violated only where police had probable cause to seize the evidence and made a

156. 110 S. Ct. 2301, 2301-11 (1990).

157. *Id.* at 2312 (Brennan, J., dissenting) (footnotes omitted).

158. *Id.* at 2303-11.

159. See Kalven, *supra* note 5, at 244.

160. *Texas v. Brown*, 460 U.S. 730, 743 (1983); *United States v. Hare*, 589 F.2d 1291, 1293-95 (6th Cir. 1979).

161. 110 S. Ct. at 2304-11.

162. *Coolidge*, 403 U.S. at 470-71. The Court said:

But where the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it, the situation is altogether different. The requirement of a warrant to seize imposes no inconvenience whatever, or at least none which is constitutionally cognizable in a legal system that regards warrantless seizures as “*per se* unreasonable” in the absence of “exigent circumstances.”

Id.

warrantless seizure.¹⁶³ Therefore, a mere suspicion or hunch that evidence was located within the scope of a lawful search satisfied the inadvertence requirement, and police could seize the evidence under the plain view doctrine.¹⁶⁴

Such an interpretation of the plurality's position is fallacious. Where police have actual knowledge of the existence of evidence and then make a planned warrantless seizure, there is a prototypical violation of the inadvertence rule: police have used the plain view doctrine as a facade to circumvent the warrant process. However, this scenario does not exhaust the unlawful use of plain view seizure.¹⁶⁵ Another likely example, which is equally violative of the warrant requirement, is where police manipulate a warrant authorizing a search for one piece evidence to enter a suspect's home and seize other evidence that they had only suspected to find there. Thus, the principal point of contention concerning the use of the plain view doctrine is that police should not be permitted to use it as a pretext to seize evidence for which they lack probable cause to search in the first place. Permitting them to do so nullifies the Fourth Amendment's prohibition of arbitrarily initiated and executed searches—a principle that drove the *Coolidge* plurality's position.

The warrant requirement mandates that the police present their evidence, whether it amounts to probable cause or something less, to a magistrate before they initiate a search. When police conduct a search outside this judicial process and subsequently attempt to use the plain view doctrine as a pretext to justify their actions, they act unconstitutionally, regardless of the quality of their proof that the

163. *Hare*, 589 F.2d at 1294. In *Hare*, the ATF began investigating Hare after he was arrested carrying a firearm registered to another individual. *Id.* at 1292. In the course of the ATF's investigation, an ATF agent learned that the DEA was investigating Hare for violations of narcotics laws. *Id.* The ATF agents obtained a warrant to search Hare's residence for firearms, and invited DEA agents to accompany them during its execution. *Id.* After both firearms and narcotics were seized during the search, Hare moved to suppress the evidence, claiming the discovery of the narcotics was not inadvertent as required by the plain view doctrine. *Id.* at 1292-93. On appeal, the Sixth Circuit held that because the DEA agents lacked probable cause, they could not have obtained a warrant for narcotics; therefore, the discovery of the narcotics was inadvertent within the meaning of the plain view doctrine. *Id.* at 1295-98. The DEA agents had only suspected that narcotics would be discovered at Hare's house. Despite the "hint of subterfuge . . . that the DEA was using [the] ATF to gain access to a residence which they could not search on their own," the court found that the government agents had not used plain view as a pretext to circumvent the warrant requirement. *Id.* at 1296.

164. *Id.* at 1294.

165. The *Horton* Court commented that "[i]f the officer has knowledge approaching certainty that the item will be found, we see no reason why he or she would deliberately omit a particular description of the item to be seized from the application [of the] warrant." *Horton*, 110 S. Ct. at 2309.

suspect was engaged in criminal activity. Once police circumvent the warrant requirement, it would be illogical to allow them to sterilize their actions by claiming that they lacked probable cause to search for the seized item in the first place.

Thus, not only did the *Hare* court misconstrue *Coolidge*, but its interpretation of the inadvertence requirement warps the objectives of the warrant requirement. The Fourth Amendment contemplates detached, judicial evaluation of probable cause before the search, not mechanical, antecedent approval of a police officer's suspicions. Prevention of unjustified searches is the heart of the warrant requirement,¹⁶⁶ and a magistrate's rejection of an officer's request to conduct a search in the absence of probable cause is the method of achieving this objective. By holding that the police violated the inadvertence requirement only if they had probable cause to search for the disputed evidence but failed to obtain a warrant, the Sixth Circuit reduced judicial scrutiny of probable cause to a mere formality.

B. *Texas v. Brown: The Supreme Court's Link Between the Inadvertence Requirement and Police Discretion*

The *Hare* court's analysis of the inadvertence requirement is an affront to the control on police discretion mandated by the Fourth Amendment and correctly identified by the *Coolidge* plurality. The goal of the inadvertence requirement was to limit police discretion by preventing attempts to use plain view seizure as a facade. The Supreme Court verified this interpretation of the plurality's inadvertence requirement in *Texas v. Brown*,¹⁶⁷ which held that an analysis of inadvertent discovery focused on whether the police had used "plain view doctrine only as a pretense" for an unauthorized seizure.¹⁶⁸

166. In *Steagald v. United States*, 451 U.S. 204 (1981), the Court stated:

The purpose of the warrant [requirement] is to allow a neutral judicial officer to assess whether the police have probable cause to make an arrest or conduct a search

. . . .

A contrary conclusion—that the police, acting alone and in the absence of exigent circumstances, may decide when there is sufficient justification for searching the home of a third party for the subject of an arrest warrant—would create a significant potential for abuse.

Id. at 212-16; *see also* *Payton v. New York*, 445 U.S. 573, 586 (1980) ("We have long adhered to the view that the warrant procedure minimizes the danger of needless intrusions."); *Katz v. United States*, 389 U.S. 347, 356 (1967) ("[T]he agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer. They were not required, before commencing the search, to present their estimate of probable cause for detached scrutiny by a neutral magistrate.").

167. 460 U.S. 730 (1983).

168. *Id.* at 743. After *Brown* was stopped at a routine driver's license checkpoint, officers

Texas v. Brown accurately reflects the *Coolidge* plurality's concern that police not use plain view seizure as a method to implement their own arbitrary judgment and satiate their competitive impulses. Because the Supreme Court itself defined the inadvertence requirement as a control on pretextual searches in *Brown*, the Court's subsequent elimination of inadvertent discovery in *Horton* makes citizens more vulnerable to unbridled police discretion.¹⁶⁹

V. *HORTON v. CALIFORNIA*: JUDICIAL ENFORCEMENT OF SCOPE AS A SUBSTITUTE FOR THE INADVERTENCE REQUIREMENT

In *Horton v. California*, the Supreme Court eliminated inadvertent discovery as a requirement for plain view seizure.¹⁷⁰ Writing for the Court, Justice Stevens argued that "plain view alone is never enough to justify the warrantless seizure of evidence."¹⁷¹ In order to seize evidence under the plain view doctrine, an officer must have "a lawful right of access to the object itself."¹⁷² Therefore, even in the absence of the inadvertence requirement, judicial enforcement of the Fourth Amendment's scope requirement prevents unconstitutional searches.¹⁷³ The *Horton* Court reasoned that if an officer confines his search to its proper scope, then the inadvertence requirement will not "reduce the number of places into which they may lawfully look."¹⁷⁴ The invasion of the suspect's privacy will be the same whether the

discovered a balloon in his possession which contained heroin. *Id.* at 734. Brown moved to suppress the narcotics evidence on the grounds that it could not be seized under the plain view doctrine because it had not been discovered inadvertently. *Id.* at 735. On appeal, the Supreme Court noted that only a plurality of the Court in *Coolidge* had required inadvertent discovery and therefore, it was not binding as precedent. *Id.* at 737. Nevertheless, the Court addressed the inadvertence requirement and held that it had been met because the police had not used the roadblock as a pretext to search for and seize narcotics in plain view. *Id.* at 743; *see also* Burkhoff, *supra* note 25, at 546-48.

169. *See infra* part VI.

170. *Horton*, 110 S. Ct. at 2310-11. Recall that *Horton* was convicted of armed robbery after the police seized the weapons used in the crime from his residence. *Id.* at 2304-05. Although the police had included both the proceeds and weapons in their affidavit for a search warrant, the warrant only authorized them to search for the stolen property. *Id.* at 2304. Since the police had suspected that the weapons would also be found in *Horton's* home, "the seized evidence was not discovered inadvertently." *Id.* at 2305. Nevertheless, the Court ruled that the weapons had been properly seized under the plain view doctrine. *Id.* at 2311.

171. *Id.* at 2307 (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 468 (1971)).

172. *Id.* at 2308.

173. *Id.* at 2309 ("[T]he suggestion that the inadvertence requirement is necessary to prevent the police from conducting general searches, or from converting specific warrants into general warrants, is not persuasive because that interest is already served by the requirement that no warrant issues unless it 'particularly describ[es] the place to be searched and the person or things to be seized.'" (quoting U.S. CONST. amend. V)).

174. *Id.* at 2310.

evidence is discovered inadvertently or purposefully. Moreover, if a police officer conducts a search that breaches the scope prescribed by a warrant or permitted by an exigency, then the seizure is unconstitutional on that ground alone, and an analysis of inadvertent discovery is superfluous.¹⁷⁵

175. *Id.* The *Horton* Court also argued that the inadvertence requirement produced illogical results. For example, if an officer had a warrant authorizing a search for a rifle, and he found two photographs—one incriminating photograph which he had expected to find and a second, identical one whose discovery he had not anticipated—then the inadvertence rule would prohibit seizure of the first photograph only. The Court considered these different outcomes irrational because the seizure of each photograph caused an equivalent interference in respect to the suspect's property rights. Furthermore, the reliability of the evidence and the inconvenience of obtaining a warrant were the same under either scenario. *Id.* at 2309.

This argument, however, is flawed. Admittedly, the seizure of the deliberately discovered evidence results in an equivalent intrusion on the suspect's property rights as the seizure of the inadvertently found evidence. Nevertheless, the planned seizure is an incremental intrusion on possessory interests—two items of evidence are seized rather than one—that must be supported by probable cause and authorized by either a warrant or exigency. An unlawful seizure cannot be justified by a mere reference to its similarity to another lawful seizure. Under some circumstances, the risk that the second item of evidence will be destroyed or removed while police obtain a second warrant may create an exigency that will support a warrantless seizure of that evidence. However, the police can diminish, or even eliminate, this threat to the evidence if they arrest the suspect or block off access to his house until they procure the necessary warrant and seize the rest of the evidence. Moreover, enamored with the similarities between intentionally and inadvertently discovered evidence, the Court ignores a critical distinction between the two—the increase in police discretion. This element justifies suppression of evidence seized by choice and permits seizure of evidence found by chance. When police suspect that they will find evidence in a suspect's home but lack probable cause to search for it, a subsequent plain view seizure of that evidence suggests subterfuge, especially when the police use a warrant authorizing a search for an entirely different item to enter the suspect's home. Such activity implies that the police are using the plain view doctrine as a facade to avoid judicial review of their probable cause to search for the evidence seized in plain view. *See State v. Hamilton*, 573 A.2d 1197 (Conn. 1990) (discovery of van keys not listed in warrant was not inadvertent within the meaning of plain view); *Lockhart v. State*, 305 S.E.2d 22 (Ga. Ct. App. 1983) (use of narcotics dog was outside scope of search for untaxed whiskey); *Hewell v. State*, 471 N.E.2d 1235 (Ind. Ct. App. 1984) (plain view did exception did not justify officers' seizure of silver items not described in warrant); *State v. White*, 361 S.E.2d 301 (N.C. Ct. App. 1987) (stolen goods not listed in warrant were not discovered inadvertently and thus not subject to seizure under plain view exception); *Fritz v. State*, 730 P.2d 530 (Okla. Crim. App. 1986) (seizure of credit cards not listed in warrant was unlawful). Thus, police manipulation of plain view seizure requires the police to have a hunch that evidence will be found in plain view even though it has been omitted from the warrant that authorizes their search. But when evidence is inadvertently discovered in plain view, the police, a fortiori, lack this requisite advance suspicion. The definition of inadvertence implies that when the police applied for a search warrant, they were unaware that other evidence would be discovered in plain view. Consequently, they could not have used the plain view doctrine as a pretense to avoid the warrant requirement, and police discretion is not at issue. Despite the *Horton* Court's assertion that there is no material difference between inadvertent seizure of evidence and seizure of evidence which has been deliberately sought, inadvertent discovery is a reliable indicator of pretext and police discretion. *E.g.*, *Texas v. Brown*, 460 U.S. 730, 743 (1983); *see also Burkhoff*, *supra* note 25, at 546-48. Thus, the *Horton* Court assumes its own conclusion: because there is no difference between inadvertently discovered evidence and evidence which the police expect to find, the inadvertence requirement is not an essential element of plain view

In response to the majority's argument that judicial enforcement of scope adequately protects Fourth Amendment rights, the dissent countered that the inadvertence requirement is necessary to prevent a police officer from manipulating the scope of the warrant by "listing only one or two hard-to-find items [in the affidavit for the warrant], . . . confident that he will find in plain view all the other evidence he is looking for before he discovers the listed items."¹⁷⁶ After discovering evidence in plain view, either by choice or by chance, the officer could always claim that he had been searching for the small, easily concealed items listed in warrant. Thus, the Fourth Amendment's mandate that a warrant "particularly describ[ing] the place to be searched, and the persons or things to be seized" could facilitate rather than limit police discretion, pending an evaluation of pretext.

Analysis of cases where courts suppressed evidence because it was omitted from a warrant indicates that judicial enforcement of scope inadequately protects privacy rights from police discretion.¹⁷⁷

seizure. The Court disregards the capacity for the abuse of police discretion implicated by a planned seizure of evidence in plain view—a danger which is necessarily absent during an inadvertent seizure of evidence. Dismissing this distinction, the Court legitimizes all plain view seizures as long as the officer's search conforms to the scope dictated by a warrant or an exigency. *Horton*, 110 S. Ct. at 2309.

176. *Horton*, 110 S. Ct. at 2313 (Brennan, J., dissenting). The dissent also contended that elimination of the inadvertence requirement would jeopardize the protection of property rights provided by the Fourth Amendment's mandate that a warrant particularly describe the things to be seized, as well as the places to be searched. The warrant requirement protects two independent interests from police discretion. By requiring a particular description of the places to be searched, a warrant preserves the privacy rights of individual citizens. By demanding a particular description of the things to be seized, the warrant requirement prevents police from arbitrarily invading a suspect's property rights. The inadvertence requirement does not protect privacy interests because it does not limit the number or type of places that a police officer may search. However, because it precludes police from indiscriminately seizing items not included in a warrant, the inadvertence requirement protects possessory interests. By abolishing the inadvertence requirement, therefore, the majority "eliminates a rule designed to further possessory interests on the ground that it fails to further privacy interests." *Id.* at 2311-13; *see also* *Arizona v. Hicks*, 480 U.S. 321, 328 (1987) ("Although the interest protected by the Fourth Amendment injunction against unreasonable searches is quite different from that protected by its injunction against unreasonable seizures, neither the one nor the other is of inferior worth or necessarily requires lesser protection."); *Maryland v. Macon*, 472 U.S. 463, 469 (1985) ("A search occurs when 'an expectation of privacy that society is prepared to reasonable is infringed.' . . . A seizure occurs when 'there is some meaningful interference with an individual's possessory interests' in the property seized." (quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)); *Amsterdam*, *supra* note 35, at 411 (The warrant "requirement of particularity of description of things is important to note, for it shows that even when there is sufficient cause to intrude upon an individual by a search, the framers decreed that it was unreasonable and should be unconstitutional to subject his premises or possessions to indiscriminate seizure.").

177. *See* *State v. Hamilton*, 573 A.2d 1197 (Conn. 1990) (holding that a set of van keys which had not been included in a warrant authorizing a search for narcotics could not be seized under the plain view doctrine because its discovery had not been inadvertent); *Hewell v.*

When a warrant authorizes a search of a suspect's home for either stolen jewelry¹⁷⁸ or cash,¹⁷⁹ there are few places in which a police officer may not search. Because the items are small and can be concealed in any drawer or behind any door, searches can be extensive and intrusive.¹⁸⁰ Thus, a search warrant for the proceeds of a robbery will often authorize the investigating officer to invade a suspect's privacy in an all-compassing manner, subject only to the officer's discretion. Furthermore, if the warrant empowers the police to search for firearms, either as fruits¹⁸¹ or instrumentalities¹⁸² of a crime, then a suspect's privacy rights are also at the mercy of a police officer's whims. A suspect's ingenuity is the only limitation on the number and type of places where he can store small firearms.¹⁸³ When police search a suspect's home for contraband under the authority of a warrant, moreover, they are also free to exercise their own discretion in identifying the places to be searched.¹⁸⁴ Narcotics are so difficult to find,¹⁸⁵ that occasionally police must rely on specially trained narcotics dogs to detect illicit drugs.¹⁸⁶ Furthermore, once police discover narcotics or proceeds, they will not immediately terminate their

State, 471 N.E.2d 1235 (Ind. Ct. App. 1984) (holding that plain view exception did not justify officer's seizure of silver items not described in warrant); *State v. White*, 361 S.E.2d 301 (N.C. Ct. App. 1987) (holding that stolen property, which had been omitted from a warrant authorizing a search for other stolen property, had not been inadvertently found and could not be seized under the plain view doctrine); *Fritz v. State*, 730 P.2d 530 (Okla. Crim. App. 1986) (holding that credit cards, which had not been included in a warrant that authorized a search for other proceeds from a robbery, could not be seized under the plain view doctrine because they had not been inadvertently found); *State v. Albright*, 418 N.W.2d 292 (S.D. 1988) (holding that stolen property omitted from a warrant authorizing a search for other stolen property could not be seized under the plain view doctrine).

178. See, e.g., *White*, 361 S.E.2d at 306; *Hewell*, 471 N.E.2d at 1237.

179. See, e.g., *Fritz*, 730 P.2d at 532.

180. *Hewell*, 471 N.E.2d at 1237 (search for stolen jewelry took 17 hours and involved 20 police officers).

181. In the law of evidence, "fruits of a crime" are "material objects acquired by means and in consequence of the commission of a crime, and sometimes constituting the subject matter of the crime." BLACK'S LAW DICTIONARY 670 (6th ed. 1990). Thus, when a suspect steals a firearm during the course of a robbery or burglary, the stolen firearm is considered a fruit of the crime. See, e.g., *White*, 361 S.E.2d at 306.

182. An "instrumentality" is "[s]omething by which an end is achieved; a means, medium, agency." BLACK'S LAW DICTIONARY 801 (6th ed. 1990). Therefore, when a suspect uses a firearm as a weapon while committing a crime, the firearm is an instrumentality of the crime. See, e.g., *Fritz*, 730 P.2d at 532.

183. E.g., *Warden v. Hayden*, 387 U.S. 294, 298 (1967) (shotgun and a pistol discovered in the flushtank of a toilet and under a mattress).

184. See, e.g., *State v. Hamilton*, 573 A.2d 1197 (Conn. 1990).

185. See, e.g., *id.* at 1205 (detectives found "crack" cocaine packaged in small vials in a suspect's van); *People v. Miller*, 242 Cal. Rptr. 179 (Ct. App. 1987) (narcotics discovered in a hidden, locked safe in the suspect's bedroom).

186. See *Lockhart v. State*, 305 S.E.2d 22, 23 (Ga. App. Ct. 1983) (narcotics canine located marijuana in a water reservoir and in a bedroom chest drawer)

search. Rather, they will continue their investigation until they are satisfied that they have discovered all the illicit drugs or money. Thus, when the police can establish probable cause to search for cash, contraband, jewelry, or firearms, a warrant's scope provides minimal security of a suspect's right to privacy.

Despite recognizing that judicial enforcement of a warrant's scope was not an adequate substitute for the inadvertence requirement,¹⁸⁷ the *Horton* dissent downplayed the inadvertence requirement's role in preventing pretextual searches.¹⁸⁸ Indeed, the threat of police discretion is minimal in cases like *Horton*. In *Horton*, the proceeds, which were included in the warrant, and the weapons, which were discovered in plain view, tied Horton to a single crime—the robbery.¹⁸⁹ Furthermore, the officers' affidavit requested permission to search for both the weapons and the proceeds;¹⁹⁰ consequently, the officers adhered to the warrant process and did not attempt to use the plain view doctrine to circumvent the Fourth Amendment. The Court concluded that the officers had probable cause to search for both the weapons and the proceeds,¹⁹¹ implying that the magistrate had inadvertently failed to include the weapons in the warrant. *Horton*, therefore, was correctly decided, and its holding does not jeopardize Fourth Amendment rights when police procure a warrant to search for one type of evidence and discover other related evidence in plain view. When officers can establish probable cause to a search a suspect's home for evidence of a single crime, they usually have probable cause to search for all the evidence of that crime,¹⁹² and thus have no incentive to enlarge their authority by manipulating scope and relying on the plain view doctrine as a mere pretext.

However, when two sets of police officers conduct independent investigations of a suspect's unrelated criminal activity,¹⁹³ and one set

187. *Horton v. California*, 110 S. Ct. 2301, 2313 (1990) (Brennan J., dissenting).

188. *Id.* at 2313-14 ("Fortunately, this decision should have only a limited impact, for the Court is not confronted today with what lower courts have described as a 'pretextual search' . . . [E]ven state courts that have rejected the inadvertent discovery requirement have held that the Fourth Amendment prohibits pretextual searches." (citations omitted)).

189. *Id.* at 2304-05.

190. *Id.* at 2304.

191. *Id.* at 2310-11. (The officers had "probable cause, not only to obtain a warrant to search for stolen property, but also to believe that the weapons and handguns had been used in the crime he was investigating.")

192. *See, e.g., id.* at 2310-11; *People v. Miller*, 242 Cal. Rptr. 179, 180 (Ct. App. 1987) (federal agents established probable cause to search for "any property which constituted evidence of the offense."); *People v. Albritton*, 187 Cal. Rptr. 652, 653 (Ct. App. 1982) (narcotics officers establish probable cause to search for any articles or items showing that the suspect was involved in the sale of narcotics).

193. *See, e.g., People v. Williams*, 243 Cal. Rptr. 914 (Cal. Ct. App. 1988) (burglary

of officers lacks probable cause to conduct a search, the temptation to evade the warrant process through the pretextual use of the plain view doctrine increases.¹⁹⁴ After *Horton*, courts will initially focus their examination of pretext on whether the officer's search conformed to the scope of the warrant. Because the scope of a warrant to search for illicit narcotics, small firearms, or common proceeds often does not limit an officer's discretion, courts must resort to pretextual search tests based on objective criteria, such as the Fifth and Eleventh Circuit tests.¹⁹⁵ Thus, it is helpful to examine the relationship between the now-defunct inadvertence requirement and police cooperation in determining whether a given search is pretextual.

VI. THE CALIFORNIA MODEL: INTERACTION BETWEEN THE INADVERTENCE REQUIREMENT, POLICE COOPERATION, AND PRETEXTUAL SEARCHES

When police use a warrant to search for evidence of an unrelated crime, the dangers of police discretion are particularly acute. A necessity of contemporary law enforcement—pooling manpower and data between different police divisions and departments—impairs the courts' ability to identify this pretextual use of the plain view doctrine. Faced with an increasing crime rate and a new breed of sophisticated criminals, police agencies that investigate different types of crime often share personnel and information to maximize their resources.¹⁹⁶ In some police departments, this cooperation is stan-

officers investigating stolen property and narcotics officers investigating drug trafficking charges); *Miller*, 242 Cal. Rptr. at 179 (federal secret service agents investigating allegations of counterfeiting while city narcotics officers investigating drug trafficking charges); *Albritton*, 187 Cal. Rptr. at 652 (officer investigating allegations of auto theft while narcotics officers were investigating drug trafficking charges).

194. See, e.g., *Albritton*, 187 Cal. Rptr. at 652.

195. See *supra* notes 76-107 and accompanying text.

196. See *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983) (state police officers assisted customs agents in on-board ship documentation investigations); *United States v. Medlin*, 842 F.2d 1194 (10th Cir. 1988) (county deputy sheriff assisted ATF agents in search for stolen firearms); *United States v. Smith*, 799 F.2d 704 (11th Cir. 1986) (Florida Highway Patrol officer collaborated with DEA agents in operation to apprehend drug couriers); *United States v. Wright*, 667 F.2d 793 (9th Cir. 1982) (state narcotics officers assisted ATF agents in executing search warrant for a driver's license); *United States v. Hare*, 589 F.2d 1291 (6th Cir. 1979) (DEA agents assisted ATF agents in executing search for firearms); *Williams*, 243 Cal. Rptr. at 915 (burglary detectives aided narcotics officers in serving a warrant to search for narcotics); *Miller*, 242 Cal. Rptr. at 180 (city police officer assisted agents of Federal Secret Service in search for counterfeit currency); *Albritton*, 187 Cal. Rptr. at 653 (officer assigned to auto theft detail assisted narcotics officers in a search for narcotics); *Lockhart v. State*, 305 S.E.2d 22 (Ga. App. Ct. 1983) (narcotics canine units assisted county sheriffs in executing a search warrant for illicit whiskey); *State v. Harris*, 504 So. 2d 156 (La. Ct. App. 1987) (sheriff who arrested suspect for reckless driving requested the assistance of a narcotics officer to

dard operating procedure.¹⁹⁷ Statutes permit some of this collaboration,¹⁹⁸ such as local police assistance of federal agents in the execution of a warrant,¹⁹⁹ or federal agencies' collaboration.²⁰⁰ The danger posed by the interaction between contemporary police procedure, pretextual searches, and the new plain view doctrine is illustrated by three California cases: *People v. Albritton*,²⁰¹ *People v. Miller*,²⁰² and *People v. Williams*.²⁰³

A. *People v. Albritton*

In *Albritton*, narcotics officers obtained a warrant to search Albritton's residence for illicit drugs,²⁰⁴ and requested that Detective Boggs, who was assigned to the auto theft detail,²⁰⁵ assist them in the search.²⁰⁶ However, once the search had commenced, Boggs separated himself from the narcotics officers and immediately proceeded to Albritton's garage.²⁰⁷ Inside the garage, Boggs located eight stolen motor vehicles, which he seized.²⁰⁸ At Albritton's trial, Boggs testified that prior to search, he had suspected that Albritton was dealing in stolen vehicles and was aware of Albritton's past arrests for posses-

search the suspect's car for illegal drugs); *State v. Vann*, 432 N.W.2d 810 (Neb. 1988) (theft investigation officers assisted narcotics officers in executing a felony arrest warrant for theft).

197. See *United States v. Medlin*, 842 F.2d 1194, 1197 (10th Cir. 1988) (ATF agents routinely take along local police officers when executing search warrants); *Williams*, 243 Cal. Rptr. at 915 ("Usually, when additional manpower was required by the narcotics detail in executing a warrant, normal procedure was to contact the lieutenant in charge of the detective division, or, if he was unavailable, to go to one of the sergeants in charge of various details and ask for 'anybody' who might be available."); *Miller*, 242 Cal. Rptr. at 180 (field office of United States Secret Service had only four agents and "routinely" relied on other agencies to assist the office when needed).

198. For example:

A search warrant may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, but by no other person, except in the aid of the officer on his requiring it, he being present and acting in its execution.

18 U.S.C. § 3105 (1988). The method of executing the warrant, including the cooperation between different law enforcement agencies and departments, is left to the officers' discretion. See *Dalia v. United States*, 441 U.S. 238, 257 (1979); *United States v. Wright*, 667 F.2d 793, 797 (9th Cir. 1982); *United States v. Cox*, 462 F.2d 1293, 1306 (8th Cir. 1972).

199. See *Medlin*, 842 F.2d at 1194.

200. See *United States v. Hare*, 589 F.2d 1291 (6th Cir. 1979).

201. 187 Cal. Rptr. 652 (Ct. App. 1982).

202. 242 Cal. Rptr. 179 (Ct. App. 1987).

203. 243 Cal. Rptr. 914 (Ct. App. 1988).

204. *Albritton*, 187 Cal. Rptr. at 653.

205. *Id.* at 657.

206. *Id.* at 653.

207. *Id.*

208. *Id.* at 654.

sion of stolen property.²⁰⁹ After an unsuccessful attempt to suppress this evidence, Albritton pled guilty to receiving stolen property but reserved his objection regarding the constitutionality of the search.²¹⁰

On appeal, the State argued that Boggs had seized the stolen vehicles lawfully under the plain view doctrine.²¹¹ However, the court held that because Boggs had expected to find the stolen vehicles in Albritton's garage, he had not discovered them inadvertently.²¹² Instead, Boggs had used the narcotics warrant as a "pretext to gain entry to the premises for the purpose of conducting a general exploratory search for stolen vehicles."²¹³ The court reversed Albritton's conviction, holding that the the lower court had erred in denying Albritton's motion to suppress the inadmissible evidence.²¹⁴

In reversing the conviction, the court relied on both objective and subjective indicia of pretext. It partially relied on Boggs' subjective intent—his testimony that he had knowledge of Albritton's previous arrest for possession of stolen property, as well as his expectation that he would find the stolen vehicles in Albritton's garage—as proof that he had pretextually used the narcotics warrant and the plain view doctrine.²¹⁵

In addition, when viewed objectively, Boggs' actions also indicated that he had used the narcotics warrant and the plain view doctrine as a pretext. Although Boggs' worked the auto theft detail, he had accompanied narcotics detectives on a search for illicit drugs and then had discovered stolen property.²¹⁶ Furthermore, he immediately searched Albritton's garage—a sensible location to store stolen vehicles but an unlikely place to hide narcotics—while the narcotics officers proceeded to the main house.²¹⁷

Given the court's emphasis on the warrant's scope,²¹⁸ its decision

209. *Id.* at 653-54.

210. *Id.* at 653.

211. *Id.* at 655.

212. *Id.* at 657. In holding that plain view seizures in California required inadvertent discovery of evidence, the *Albritton* court ignored *North v. Superior Court*, 502 P.2d 1305 (Cal. 1972). In *North*, the Supreme Court of California held that there was no inadvertence requirement for plain-view seizure in California. *Id.* at 1308-09. Five years later, another California appellate court dismissed *Albritton* as precedent, noting the discrepancy between *Albritton* and *North*. *People v. Miller*, 242 Cal. Rptr. 179, 183 (Ct. App. 1987).

213. *Albritton*, 187 Cal. Rptr. at 658.

214. *Id.* at 653.

215. *Id.* at 657.

216. *Id.*

217. *Id.*

218. "The Fourth Amendment to the United States Constitution . . . require[s] that the warrant particularly describe the thing or property to be seized. . . . The police are foreclosed from seizing items indiscriminately." *Id.* at 656.

must be read as a reaction to Boggs' attempt to supplant his discretion for that of a neutral, detached magistrate in an attempt to circumvent the warrant requirement and conduct his search for stolen property. The court thwarted his efforts by insisting that only inadvertently discovered evidence may be seized under the plain view doctrine. Thus, *Albritton* can be read as holding that inadvertent discovery or the lack thereof determines whether an officer had used the plain view doctrine as a pretext and had indulged his own suspicions outside the warrant requirement.

B. *People v. Miller*

People v. Miller,²¹⁹ decided five years later, demonstrated that when the inadvertence requirement for plain view seizure is ignored and police cooperation is institutionalized, it becomes difficult to detect and deter dubious searches. In *Miller*, Agent Stribling of the United States Secret Service claimed that his agency lacked the necessary manpower to execute a search warrant on Miller's home for evidence of counterfeiting. Therefore, following well-entrenched agency policy, he requested the assistance of San Jose narcotics officers.²²⁰ Two city narcotics detectives, Hyland and Micelli, who had conducted their own unsuccessful independent investigation into suspicions of Miller's narcotics trafficking,²²¹ joined the search of Miller's residence for evidence of counterfeiting. As a result of the search, the officers and agents seized cocaine as well machines used to print counterfeit money, both of which were found in plain view.²²² After Miller unsuccessfully moved to suppress the narcotics, he pled guilty to cocaine possession.²²³ On appeal, Miller challenged the state's use of the plain view doctrine on two grounds: the discovery of narcotics had not been inadvertent, and the city narcotics officers had used the warrant to search for evidence of counterfeiting as a pretext to pursue their narcotics investigation.²²⁴

The California Court of Appeal for the Sixth District, holding

219. 242 Cal. Rptr. 179 (Ct. App. 1987).

220. *Id.* at 180. Stribling testified that the Secret Service Field Office was staffed by only four agents and, therefore, "routinely" relied on other agencies such as local police departments to assist in serving search warrants. *Id.*

221. Prior to the search for counterfeiting evidence, Hyland had twice placed Miller's residence under surveillance to gather evidence on narcotics trafficking, but did not observe suspicious activity. *Id.* Furthermore, this investigation was prompted by a tip from Stribling, the Secret Service agent, that Miller was dealing in narcotics. *Id.*

222. *Id.*

223. *Id.* at 179.

224. *Id.* at 181.

that *North v. Superior Court*²²⁵ had eliminated inadvertent discovery as a requirement for plain view seizure, quickly disposed of Miller's first argument,²²⁶ and proceeded to address Miller's contention that the search had been pretextual.²²⁷ Emphasizing that the local Secret Service office "routinely relied on outside agencies for assistance when needed," the court held that the narcotics detectives had conducted their search in good faith.²²⁸ Furthermore, Hyland, the narcotics officer, had been directed to search for counterfeiting evidence and had confined his search to its appropriate scope.²²⁹

The conduct of the law enforcement officers in *Miller*, however, suggests subterfuge. Because Stribling, the Secret Service agent, had originally notified Micelli, a city narcotics detective, that Miller possessed illegal drugs,²³⁰ Stribling must have known of the narcotics officers' desire to search Miller's home for contraband when he requested their assistance. Moreover, after two unsuccessful surveillances of Miller's residence, the narcotics detectives must have realized that they lacked probable cause to search Miller's residence for illicit drugs. Instead of excusing themselves from the search, however, Hyland and Micelli readily joined Stribling in his search for counterfeiting evidence. In addition, Stribling did not ask for any specific officers when he requested Micelli's assistance.²³¹ Therefore, Micelli, knowing that Hyland had failed to accumulate sufficient evidence to obtain a narcotics search warrant on his own, must have approached Hyland personally to participate in the search for counterfeiting evidence. Viewed as an aggregate, the law officers' and agent's actions in *Miller* suggest a conspiracy to circumvent the Fourth Amendment by avoiding a judicial review of probable cause to search for narcotics.

Admittedly, this interpretation of the officer's behavior is somewhat speculative. Nevertheless, *Miller* does illustrate that institutionalized cooperation between law enforcement officers makes it easier to validate any questionable behavior conduct ex-ante and more difficult to detect pretextual searches. At best, in the absence of the inadvertent discovery requirement for plain view seizure, this new trend weakens the Fourth Amendment protection against unbridled

225. 502 P.2d 1305 (Cal. 1972).

226. *Miller*, 242 Cal. Rptr. at 181.

227. *Id.* at 182-83.

228. *Id.* at 183.

229. *Id.*

230. *Id.* at 180.

231. *Id.*

police discretion. At worst, this trend jeopardizes the personal privacy rights of everyone, not merely criminal suspects.

Even the Eleventh Circuit's pretextual search test, which asks whether a "reasonable officer would have made the seizure in the absence of illegitimate motivation,"²³² becomes difficult to apply when cooperation between police departments is regularized. For example, prior to the institutionalization of police cooperation, Hyland's presence during a search for evidence of counterfeiting—a crime unrelated to his primary law enforcement responsibilities—would have constituted powerful objective evidence of pretext.²³³ Under normal circumstances, without the history of institutionalized cooperation, Hyland would not even have been present during a search for evidence of counterfeiting; therefore, he would not have seized the narcotics without an illicit motivation to circumvent the warrant requirement. Under the Eleventh Circuit test, this would likely prove that the search was pretextual, resulting in suppression of evidence.²³⁴

Institutionalization of police cooperation in executing warrants frustrates the Eleventh Circuit test's ability to detect pretextual searches by obscuring an officer's illicit motivations. If narcotics officers such as Hyland routinely assist federal agents in serving warrants to search for evidence of counterfeiting, then the officer's presence during the search is not objective evidence of pretext. Even in the absence of the alleged illicit motivation—a desire to search for narcotics without probable cause—a "reasonable" narcotics officer would adhere to police policy, accompany the federal agents on their search for evidence of counterfeiting, and seize any illicit drugs discovered in plain view. Therefore, once police cooperation is standardized, it becomes difficult to distinguish conscientious police work from unconstitutional police discretion. Even though the policy of interdepartmental cooperation may have provided the narcotics officers with the opportunity to circumvent the warrant requirement, it becomes objective evidence of the narcotics officers' honest motives in joining the search. Thus, the Eleventh Circuit's focus on the hypothetical "reasonable officer" blurs the pretext question when officers from different departments execute a single search warrant. Indeed, its test creates a potential for pretextual searches when the cooperating officers conduct independent investigations of a suspect's unrelated criminal activity.

Even if Secret Service Agent Stribling had obtained a warrant to

232. *United States v. Smith*, 799 F.2d 704, 708 (11th Cir. 1986).

233. *See, e.g., People v. Albritton*, 187 Cal. Rptr. 652, 657 (Ct. App. 1982).

234. *See, e.g., Smith*, 799 F.2d at 711.

search for evidence of counterfeiting for the sole purpose of facilitating an illegal search for narcotics, the Eleventh Circuit test would have admitted the seized printing machine as evidence because Stribling had probable cause and a warrant to search for evidence of counterfeiting,²³⁵ and he confined the search to its appropriate scope.²³⁶ Seizure of the printing machine was lawful. The Eleventh Circuit test does not prohibit legitimate law enforcement efforts; it only targets "illicit motivation," for example, the officers' desire to search for controlled substances outside of the warrant process in *Miller*. If the narcotics officers searched for the cocaine without probable cause and a warrant, then they indulged their own discretion at the expense of the Fourth Amendment; however, the court should only suppress the seized drugs.

In contrast, the Fifth Circuit test, which only prohibits a search and seizure if the officer lacked the legal authority to conduct the investigation,²³⁷ essentially makes an analysis of pretext unnecessary. If the officer lacked the authority to initiate his investigation at its outset, then the search and seizure are illegal even if he was not attempting to use the plain doctrine as a pretext.

Furthermore, because the Fifth Circuit's pretextual search test bases its determination on whether the officer could have conducted a particular search,²³⁸ it does not detect pretextual searches when police derive their authority to search from a warrant obtained by different department. The Fifth Circuit validates a policeman's search as long as he proffers adequate authority for his actions.²³⁹ Therefore, in a situation like *Miller*, where the narcotics officers claimed that their search was sanctioned by the warrant authorizing a search for evidence of counterfeiting, the Fifth Circuit would hold that their seizure of narcotics was lawful even if the officers had used the warrant as a mere pretext to search for the drugs, because they

235. *Miller*, 242 Cal. Rptr. at 180.

236. *Id.* at 183. "The warrant authorized seizure of 'counterfeit currency, the means and instruments used in acquiring, manufacturing and disposing of such counterfeit currency, including but not limited to paper, plates, inks, colors, negatives, photographic equipment, cutting materials, and all property that constitutes evidence of the offense.'" *Id.* at 180. Because counterfeit money and the plates used in its manufacture could be concealed in any receptacle, the warrant imposed only minimal scope restrictions. The court held that the search was "completely consistent with a search for the items listed in the warrant." *Id.* at 183.

237. *United States v. Causey*, 834 F.2d 1179, 1184 (5th Cir. 1987).

238. *Id.*

239. *Id.* at 1185. Suspecting Causey of bank robbery, the police arrested him on an outstanding warrant for petty theft. *Id.* After his arrest, they immediately interrogated him about the bank robbery, and secured a confession. *Id.* at 1180. The court held that because Causey had been arrested on a valid warrant, the police had not exceeded their authority in questioning him about the bank robbery. *Id.* at 1184.

had indisputable authority to search for items associated with counterfeiting and limited their search to places where such evidence could be concealed.

The Fifth Circuit test allows the state to refute any allegations of pretext by relying on the allegedly pretextual source of authority itself, such as the warrant to search for counterfeiting evidence in *Miller*. But the seizure of the counterfeiting evidence was not at issue in *Miller*; it was the legality of the seizure of narcotics that was in dispute. *Miller* conceded that the police were authorized to search for items associated with counterfeiting, but he challenged their authority to parlay that power into a search for narcotics. Consequently, reliance on the warrant to search for evidence of counterfeiting ignores the crucial issue: did the officers use one source of authority as a facade to pursue their own suspicions outside the warrant process? The Fifth Circuit test merely begs the question whether a search was pretextual. Thus, when two police departments execute a single warrant, their shared authority under the warrant renders the Fifth Circuit's test obsolete. Regardless of an officer's devious intentions, such as the desire to seize narcotics rather than counterfeiting evidence in plain view, the warrant makes his conduct invulnerable to allegations of pretext. By blindly accepting a police officer's justification for his behavior, the Fifth Circuit forecloses the possibility of ever detecting pretextual behavior. Therefore, in the absence of the inadvertence requirement, widespread adoption of the Fifth Circuit pretextual search test will undermine constitutional protection against unreasonable searches and seizures.

C. *People v. Williams*

Without the inadvertence requirement, courts will rely on objective facts as the sole indicia of pretext and evaluate the probative value of these facts within the context of the entire search. A comparison of *People v. Albritton*²⁴⁰ and *People v. Williams*²⁴¹ reveals a crucial defect in the contemporary use of objective facts as the sole indicator of pretext: different courts will attach different weights to the same objective facts.

In *Williams*, burglary detectives Hackney and Porter seized a large quantity of stolen property found in plain view while assisting narcotics detectives in a search of Williams' home for illicit drugs.²⁴²

240. 187 Cal. Rptr. 652 (Ct. App. 1982).

241. 243 Cal. Rptr. 914 (Ct. App. 1988).

242. *Id.* at 915. The narcotics department claimed that it lacked adequate manpower to conduct the search and, therefore, required the assistance of the burglary department. *Id.*

Prior to the search, the narcotics and burglary detectives had discussed by telephone²⁴³ their ongoing, independent investigations²⁴⁴ of Williams. The trial court granted Williams' motion to suppress the stolen property.²⁴⁵

On the government's appeal, Williams renewed his argument that the officers had used the narcotics search warrant as a pretext to search for stolen property.²⁴⁶ However, the appellate court held that the search was not pretextual²⁴⁷ and that the trial court had erred in suppressing the stolen property recovered from Williams' home.²⁴⁸

The factual similarities between *Albritton* and *Williams* are striking, and both cases were decided by the California Court of Appeal for the Fifth District. In both cases, officers assigned to different divisions within a single police department were investigating unrelated criminal activity of a single suspect. Furthermore, both the auto theft officer in *Albritton* and the burglary officers in *Williams* believed that a suspect was dealing in stolen property, but lacked probable cause to obtain a search warrant.²⁴⁹ In each case, the theft detectives accompanied narcotics officers on a search for drugs—an offense which was unrelated to their primary law enforcement responsibilities—and confirmed their suspicions by seizing stolen property found in plain view while executing a proper warrant for an unrelated offense.

In addition, before the search in *Williams*, the police officers repeatedly exchanged information about their mutual suspect—a strong indicator of pretext totally absent in *Albritton*. Hackney's call to the narcotics division²⁵⁰ put the narcotics officers on notice of the burglary division's desire to search Williams' home for stolen prop-

This type of cooperation was normal police procedure. *Id.* The search warrant procured by the narcotics detectives authorized them to search for "cocaine and drug-related paraphernalia only." *Id.*

243. *Id.* at 916-17. After telling other burglary officers that he wanted to search Williams' home for stolen property but lacked probable cause to obtain a search warrant, Porter notified narcotics officers that he suspected Williams of fencing stolen property. *Id.* at 916. Several days later, the narcotics officers contacted Porter to obtain standard information about Williams so that they could procure a search warrant for narcotics. *Id.* at 917. When cross-examined at Williams' trial about the suspicious timing of this request, Porter was unable to explain why the narcotics officers had specifically called him to supply this data. *Id.*

244. *Id.* at 916. On separate occasions, the two burglary detectives entered Williams' home without a warrant, but neither of them discovered any stolen property. *Id.*

245. *Id.* at 915.

246. *Id.* at 919.

247. *Id.* at 921.

248. *Id.* at 925.

249. Recall that in *Williams*, the burglary officers had conducted unsuccessful, warrantless searches of Williams' home for stolen property before they joined the search for narcotics. *Id.* at 916.

250. *Id.*

erty. When the narcotics officers phoned Porter, another burglary officer, to collect information for a narcotics search warrant,²⁵¹ they sent a clear signal to the burglary detail that they planned to enter Williams' residence. Furthermore, the narcotics division's request for assistance was a conspicuous invitation for Hackney and Porter to join the search—an enticement they eagerly exploited. Thus, the interaction between the burglary and narcotics officers in *Williams* prior to the search indicated that they were working in concert to overcome their lack of probable cause to search Williams' residence for stolen property. In this respect, *Williams* was an even stronger candidate for a finding of pretext than *Albritton*.

Despite the similarities and differences between the two cases and the stronger evidence of pretext in *Williams*, the California Court of Appeal for the Fifth Circuit, which decided both cases, reached seemingly contradictory results. It held that the auto theft officer in *Albritton* had conducted an illegal pretextual search,²⁵² but the burglary officers in *Williams* had not,²⁵³ despite stronger indications of bad faith. The apparent inconsistency is difficult, but not impossible, to harmonize.²⁵⁴ The *Williams* court was not constrained by the plain view doctrine's inadvertence requirement; therefore, the institutionalized cooperation between the burglary and narcotics divisions allowed it to attach different weight to the same objective indicators of pretext that existed in *Albritton*.

Williams' discussion of the inadvertence requirement of plain view seizure is ironic: had the officers discovered the stolen property inadvertently, they probably would not have been able to seize it in plain view. The court reasoned that because the officers had repeatedly received information that Williams was storing property in his

251. *Id.* at 917.

252. *People v. Albritton*, 187 Cal. Rptr. 652, 658 (Ct. App. 1982).

253. *Williams*, 243 Cal. Rptr. at 921.

254. The *Williams* court attempted to distinguish *Albritton* by noting that in *Albritton*, Boggs, the officer assigned to auto theft, "joined in a warranted search for narcotics for the sole purpose of conducting an exploratory search for stolen vehicles; he engaged in no other search, and stolen automobiles were found by him which, we held, should have been suppressed." *Id.* However, in *Williams*, "Officers Hackney and Porter were specifically commanded to search for and seize proscribed drugs; in the course of that search the officers observed in plain sight items they suspected were stolen." *Id.* The court's attempt to reconcile the two cases is ineffective for two reasons. First, the *Williams* court specifically held that subjective criteria, such as an officer's state of mind, were irrelevant to Fourth Amendment issues. *Id.* at 920-21. Therefore, Boggs' subjective motivations in *Albritton* are insufficient to distinguish that case from *Williams*. Furthermore, Boggs testified that he had been "requested by the Vice Division . . . to assist them in the search for narcotics." *Albritton*, 187 Cal. Rptr. at 653. Implicit in this request was a directive that Boggs search for narcotics only. That he received no explicit directive to that effect from the narcotics officers is an insufficient basis on which to distinguish the two cases.

home, they had probable cause to believe that the property was stolen,²⁵⁵ as required by *Arizona v. Hicks*.²⁵⁶ If the officers had not expected to discover the stolen property in Williams' home, they would have lacked the probable cause to believe that the property was stolen, and they would not have been able to seize it under the plain view doctrine. Therefore, in *Williams*, an affirmative showing that the officers had found the stolen property inadvertently would have been fatal to the state's use of the plain view doctrine rather than an essential element of it. Having disposed of the inadvertence requirement, the court then turned to objective facts to evaluate whether the officers had conducted a pretextual search for the stolen property.²⁵⁷

In *Albritton*, the court appreciated the fact that Boggs, an officer assigned to the auto theft detail, had seized stolen property during a search for narcotics.²⁵⁸ A bona fide search for illicit drugs does not require the presence of an auto theft officer; therefore, Boggs' participation in the search constituted objective proof that he had used the narcotics warrant and the plain view doctrine as a pretext to conduct his own independent investigation into whether Albritton was dealing in stolen vehicles.²⁵⁹

In contrast, not only did the burglary officers in *Williams* assist in the search for narcotics, the narcotics officer in charge of the investigation, Leavelle, testified, "Normally, if burglary is with us, [stolen property] is what they are looking for. My mission is drugs; their mission is stolen property."²⁶⁰ Thus, Leavelle admitted under oath that as a matter of procedure, when burglary assisted narcotics in the execution of a search warrant for narcotics, burglary's function was to search for stolen property. This policy evidently approved pretextual searches and allowed the burglary officers to circumvent the warrant requirement when they wanted to search for stolen property but lacked probable cause. Yet, moved by Leavelle's earlier comment that "it was common for the narcotics detail to call in members of other units to assist in serving search warrants,"²⁶¹ the court dis-

255. *Williams*, 243 Cal. Rptr. at 923.

256. 480 U.S. 321 (1987). In *Hicks*, a police officer arrived on the scene of a shooting and discovered stereo equipment in plain view which he suspected was stolen. *Id.* at 323. He moved the equipment so that he could read the serial numbers, and after verifying that it was stolen, he seized it. *Id.* The Supreme Court held that the stereo could not be seized under the plain view doctrine because the officer lacked probable cause to believe that the stereo was stolen. *Id.* at 327-28.

257. *Williams*, 243 Cal. Rptr. at 920-21.

258. *Albritton*, 187 Cal. Rptr. at 657.

259. *Id.* at 658.

260. *Williams*, 243 Cal. Rptr. at 919.

261. *Id.* at 918.

missed Leavelle's commentary on the diverse functions of the burglary and narcotics officers as an assumption which lacked probative value.²⁶² Thus, because cooperation between the burglary and narcotics departments was routine, the presence of the burglary officers was not a reliable indication of pretext; the standardized collaboration between the narcotics and burglary divisions created by the police department's policy sterilized the policy itself.

In *Albritton*, the court also noted that Boggs, the auto theft officer, had immediately proceeded to Albritton's garage to search for stolen vehicles while the narcotics detectives searched the main house for drugs.²⁶³ Although Boggs' contended that he was looking for narcotics as well as stolen vehicles,²⁶⁴ his conduct during the search was strong objective evidence of a pretextual search.²⁶⁵

On the other hand, in *Williams*, the court accurately noted that the burglary officers conducted themselves as though they were genuinely searching for narcotics.²⁶⁶ Yet the court conveniently ignored the suspicious calls between the narcotics and burglary officers that occurred shortly before the search²⁶⁷—powerful objective evidence of a conspiracy to overcome the burglary officers' lack of probable cause to search for the stolen property. Indeed, this type of calculated, preparatory planning is one of the most reliable manifestations of abuse of the plain view doctrine. But once police policy standardizes the sharing of information and personnel between police divisions, these communications lose their incriminating character regardless of their content and timing. All police interaction prior to a search is presumed innocent, and schemes to evade the warrant requirement, no matter how blatant, become undetectable. By neglecting the officers' preliminary collaboration, the *Williams* court implied that a defendant could establish pretextual use of the plain view doctrine only if the police acted improperly during the search itself. Therefore, whenever officers wish to conduct a pretextual search and evade the warrant requirement, they need merely give the appearance of propriety in the execution of the facilitating warrant. Inequitable outcomes under this

262. *Id.* at 921.

263. *Albritton*, 187 Cal. Rptr. at 657.

264. *Id.* at 654.

265. *Id.* at 657.

266. *Williams*, 243 Cal. Rptr. at 925.

267. *Id.* at 916-17. In *Williams*, a burglary detective, after confessing that he lacked probable cause to search Williams' residence for stolen property, admitted he had called the narcotics division and told them that he suspected Williams of fencing stolen property. *Id.* at 916. Then, several days before the search, narcotics officers contacted the burglary division to obtain information about Williams so that they could procure a search warrant for narcotics. *Id.* at 917.

rule are inevitable, and the inadvertence requirement for plain view seizure, which would have resulted in the suppression of evidence in both *Albritton* and *Williams*, emerges as indispensable to the fair administration of justice.

Albritton, *Miller*, and *Williams* illustrate that standardized police cooperation deprives courts of the most credible, objective indicators of pretext. When burglary or auto theft officers routinely assist narcotics officers in the execution of narcotics search warrants, the whole operation appears constitutional. The burglary officers' participation in a search for evidence unrelated to their primary law enforcement responsibilities is not considered unusual, much less sinister. Furthermore, because police departments habitually exchange information about a single suspect's unrelated criminal activity, dubious interaction between police divisions before a search, another objective indication of pretext, can always be rationalized as a bona fide attempt to coordinate personnel and improve law enforcement efficiency. Institutionalized cooperation between police departments thus skews the court's investigation into the objective facts surrounding the search. Even the most egregious police conduct can be excused as a "reasonable" officer's attempt to augment his resources so that he can fight crime more effectively, and our Fourth Amendment rights are compromised in the calculus.

VII. CONCLUSION: DEFINING THE INADVERTENCE REQUIREMENT TO RECONCILE PRIVACY RIGHTS AND CRIME CONTROL

Even if contemporary law enforcement cooperation and the new pretextual search doctrine make the inadvertence requirement essential to the equitable administration of justice, any new inadvertence rule must be carefully formulated to avoid unintended consequences. The objective should be to define the inadvertence requirement to preserve a suspect's right to privacy, minimize unchecked police discretion, and permit legitimate law enforcement efforts. The inadvertence requirement should permit seizures of evidence in plain view when that evidence has been innocently omitted from either a warrant or affidavit. But the inadvertent discovery rule should prohibit seizures of evidence in plain view where the police have made a calculated attempt to evade the warrant requirement.

Because subjective, testimonial proof of an officer's state of mind lends itself to self-serving statements, achieving the delicate balance between crime control and privacy rights requires reliance on objective, non-testimonial evidence, such as written reports and the officer's

conduct before and during the search. However, there must be one exception: where an officer makes a statement against interest by testifying that he deliberately acted on a pretext to evade the warrant requirement,²⁶⁸ the admission should be conclusive proof that a seizure was unconstitutional. This type of statement, because it is inherently credible, should not be excluded from an investigation into alleged pretextual behavior.

When police have a warrant to search a suspect's home, the evidence that they seize under the plain view doctrine falls into two categories. First, during their search, police may discover evidence in plain view directly related to the crime targeted by the warrant.²⁶⁹ Second, police often seize evidence in plain view unrelated to the specific crime for which the warrant was issued.²⁷⁰ When police discover evidence in plain view related to the precise crime targeted by the search warrant, it is unlikely that they have used the warrant or the plain view doctrine as a pretext to circumvent the Fourth Amendment. The police may have carelessly omitted the evidence from their search warrant request even though they had probable cause to search

268. See *United States v. Guzman*, 864 F.2d 1512, 1514 (10th Cir. 1988) (officer admitted under oath that he stopped the defendant's car to investigate whether he was transporting contraband, not for a seat belt violation); *United States v. Causey*, 834 F.2d 1179, 1180 (5th Cir. 1987) (officer testified that the only reason he arrested the defendant on an outstanding petty theft warrant was so that he could interrogate him about a bank robbery); *United States v. Smith*, 799 F.2d 704, 706 (11th Cir. 1986) (officer testified that he stopped the defendants' car to search it for contraband and not because it "weaved").

269. *Horton v. California* typifies this type of seizure. Recall that in *Horton*, police investigating a robbery seized weapons that they had expected to find in Horton's home, but the warrant only authorized them to seize the proceeds from the robbery. *Horton v. California*, 110 S. Ct. 2301, 2304 (1990); see also *State v. Hamilton*, 573 A.2d 1197 (Conn. 1990) (holding that a set of van keys which had not been included in a warrant authorizing a search for narcotics could not be seized under the plain view doctrine because its discovery had not been inadvertent); *Hewell v. State*, 471 N.E.2d 1235 (Ind. Ct. App. 1984) (holding that silver items not described with particularity in a warrant could not be seized under the plain view doctrine because they had not been discovered inadvertently); *State v. White*, 361 S.E.2d 301 (N.C. Ct. App. 1987) (holding that stolen property which had been omitted from a warrant authorizing a search for other stolen property had not been inadvertently found and could not be seized under the plain view doctrine); *Fritz v. State*, 730 P.2d 530 (Okla. Crim. App. 1986) (holding that credit cards which had not been included in a warrant that authorized a search for other proceeds from the robbery could not be seized under the plain view doctrine because they had not been inadvertently found); *State v. Albright*, 418 N.W.2d 292 (S.D. 1988) (holding that stolen property which had been omitted from a warrant authorizing a search for other stolen property could not be seized under the plain view doctrine).

270. See, e.g., *People v. Williams*, 243 Cal. Rptr. 914, 915 (Ct. App. 1988) (stolen property seized in plain view during a search for narcotics); *People v. Miller*, 242 Cal. Rptr. 179, 180 (Ct. App. 1987) (narcotics seized during a search for evidence of counterfeiting); *People v. Albritton*, 187 Cal. Rptr. 652, 653 (Ct. App. 1982) (stolen vehicles seized during a search for narcotics); *Lockhart v. State*, 305 S.E.2d 22 (Ga. Ct. App. 1983) (marijuana seized during a search for untaxed whiskey).

for it.²⁷¹ Or the police may have included the item in their affidavits,²⁷² but the magistrate may have inadvertently omitted the item from the warrant. In such cases, the police have made a good faith attempt to adhere to the warrant process. Seizures of this type of evidence ought to raise a rebuttable presumption that police conducted a constitutional search, and the inadvertence discovery requirement should not bar admission of the evidence. If the police can present a copy of a police affidavit, submitted as part of a search warrant application, which includes the evidence seized in plain view,²⁷³ then the affidavit is dispositive objective proof that the police followed the warrant process and did not use plain view as a pretext. In such a case, the presumption that the police lawfully seized the evidence should be conclusory as a matter of law.

However, if the police officer's affidavit omitted the item seized in plain view,²⁷⁴ then the court should permit the defendant to use that affidavit as objective, prima facie evidence that the police lacked probable cause to search for that item and intentionally used the plain view doctrine as a pretext to circumvent the warrant requirement. The police, in turn, could meet this contention by producing objective evidence, such as police reports²⁷⁵ or written transcripts from conversations with informants,²⁷⁶ indicating that they had probable cause to search for the item, but accidentally omitted the item from their affidavit. If police successfully produce such objective evidence, then the search should be constitutional. This new rule applied to *Horton* and *Coolidge*, would admit the evidence seized in both cases, because the evidence seized in plain view linked the suspects to the crime targeted by the warrant, and the police included the evidence seized in plain view in their applications for search warrants.²⁷⁷

271. See, e.g., *Hamilton*, 573 A.2d at 1197; *Hewell*, 471 N.E.2d 1235 (Ind. Ct. App. 1984); *White*, 361 S.E.2d at 301; *Fritz*, 730 P.2d at 530; *Albright*, 418 N.W.2d at 292.

272. See *Horton*, 110 S. Ct. at 2304; *Albright*, 418 N.W.2d at 294.

273. See *Horton*, 110 S. Ct. at 2304; *Albright*, 418 N.W.2d at 294.

274. *Hamilton*, 573 A.2d at 1205-06 (narcotics suppressed because keys used to open van in which narcotics were stored had been omitted from the investigating officers' warrant request); *Hewell*, 471 N.E.2d at 1235 (stolen property suppressed because it had not been included in the police officer's affidavit, which requested a search for other stolen property); *White*, 361 S.E.2d at 301 (stolen property suppressed where police had omitted those items from their search warrant request); *Fritz*, 730 P.2d at 530 (credit cards suppressed because they were omitted from an officer's request to search for stolen property).

275. *White*, 361 S.E.2d at 307 (stolen property was included in police reports but omitted from an affidavit due to police oversight).

276. *Hamilton*, 573 A.2d at 1205-06 (informant stated that the defendant had used his van keys to open a van in which narcotics was stored).

277. E.g., *Horton*, 110 S. Ct. at 2304; *Coolidge v. New Hampshire*, 403 U.S. 443, 446 (1971).

On the other hand, when one police agency, department, or division assists another in executing a single search warrant, and the assisting officer seizes evidence in plain view which falls within the sphere of his law enforcement responsibilities but is unrelated to the crime targeted by the warrant,²⁷⁸ there should be a rebuttable presumption that the assisting agency, department, or division used the warrant and the plain view doctrine as a pretext to evade the warrant requirement. In this case, the burden should fall upon the agency that discovered the unrelated evidence to prove that it was not engaged in an independent investigation of the suspect. This proof should also be non-testimonial, objective evidence, such as the absence of the suspects' name on the agency's master computer files. Despite its objective nature, evidence of police policy authorizing interagency cooperation in the execution of search warrants is irrelevant because it can often be the means by which the agencies coordinate their efforts to avoid the judicial process mandated by the Fourth Amendment. Thus, unless the agency tenders valid, objective evidence of good faith, application of the inadvertence requirement should result in suppression of the seized evidence.

If the assisting agency can prove that it was not conducting its own independent investigation of a suspect, then a police policy that standardizes cooperation between the departments should be objective proof that the assisting agency acted in good faith. This presumption should be a rebuttable one, overcome if the defendant presents objective evidence, such as police reports or transcripts of informants' conversations, that the assisting agency independently investigated the suspect for unrelated crimes.

Although the inadvertence requirement is necessary to deter police discretion, its formulation in *Coolidge v. New Hampshire*²⁷⁹ was inflexible and overreaching. Even though the officers in *Coolidge* had not attempted to evade the warrant requirement,²⁸⁰ the Court held that the police could not seize *Coolidge's* car under the plain view doctrine.²⁸¹ By focusing on police discretion, *Coolidge* addressed an issue that its facts did not present. It failed to accommodate cases such

278. *E.g.*, *People v. Williams*, 243 Cal. Rptr. 914, 915 (Ct. App. 1988) (burglary detectives seized stolen property during a search for narcotics); *People v. Miller*, 242 Cal. Rptr. 179, 180 (Ct. App. 1987) (city narcotics officers seize narcotics during a search for evidence of counterfeiting); *People v. Albritton*, 187 Cal. Rptr. 652, 653 (Ct. App. 1982) (officer assigned to auto theft detail seizes stolen vehicles during a search for narcotics).

279. 403 U.S. 443 (1971).

280. *Id.* at 447. Although the police in *Coolidge* obtained a warrant to search *Coolidge's* car, the warrant was later declared invalid because it had been issued by the attorney general in charge of the investigation, not by a neutral and detached magistrate. *Id.* at 450-53.

281. *Id.* at 464.

as *Horton v. California*, where police genuinely attempted to adhere to the warrant process, but human carelessness caused the process to break down.²⁸² The model proposed by this Comment would remedy this deficiency by reformulating the inadvertence requirement. In its modified form, the inadvertence requirement would bar the admission of evidence when police use the plain view doctrine as a pretext to exercise their own discretion, but would admit evidence when the warrant process fails because of innocent human oversight. It permits police to pool their resources to fight crime but prohibits them from circumventing the Fourth Amendment's warrant requirement. Such a modified inadvertence requirement strikes the delicate balance between crime control and privacy rights.

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282. *Horton v. California*, 110 S. Ct. 2301, 2304 (1990). Although the police in *Horton* requested permission to search for both the weapons and proceeds from the robbery in their affidavit for a search warrant, the magistrate only authorized them to search for the proceeds. *Id.* at 2304. In concluding that the police had probable cause to seize the weapons, which they discovered in plain view, the Court implied that the weapons had been omitted from the warrant due to an oversight of the magistrate. *Id.* at 2310-11.