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An Exception To An Exception: Officer Inadvertence As A Requirement To Plain View Seizures In The Computer Context

David C. Behar

NOTES

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DAVID C. BEHAR*

I. INTRODUCTION

> To give the police greater power than a magistrate is to take a long step down the totalitarian path. Perhaps such a step is desirable to cope with modern forms of lawlessness. But if it is taken, it should be the deliberate choice of the people through a constitutional amendment. Until the Fourth Amendment, which is closely allied with the Fifth, is rewritten, the person and the effects of the individual are beyond the reach of all government agencies until there are reasonable grounds to believe (probable cause) that a criminal venture has been launched or is about to be launched.
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> – Justice Douglas, *Terry v. Ohio*[1]

The Fourth Amendment of the United States Constitution provides the citizenry with one of the most important protections against govern-

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1. 392 U.S. 1, 38–39 (1968) (Douglas, J., dissenting).

mental intrusion.[2] Specifically, the Fourth Amendment provides that:

> "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 probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[3]

Despite the Fourth Amendment's simple wording, Fourth Amendment jurisprudence is anything but simple and consistent.[4] The Supreme Court justices have conflicting views including whether the Fourth Amendment requires warrants,[5] whether probable cause is a precondition to warrant issuance,[6] and whether the subjective intent of the officer should have a role in the Fourth Amendment inquiry.[7] To add to the Fourth Amendment's complexity, the Court has also carved a vast amount of exceptions to whether and when a warrant is required. These exceptions include warrantless detainee searches, warrantless arrests, warrantless searches incident to arrests, plain view seizures, searches and seizures justified by exigent circumstances, searches by consent, vehicle searches, container searches, inventory searches, searches at the border, searches at sea, administrative searches, and searches where the special needs of law enforcement make warrant requirements "impracticable."[8] With all of these exceptions, one must wonder whether Fourth Amendment protections are a rule or an exception itself.[9]

With all of these inconsistencies in mind, an interesting question is whether a factual scenario may require "an exception to an exception." For instance, what if the plain view doctrine enters a context that extends police authority to an unanticipated level? The computer realm is such a context and requires special attention. This paper proposes that

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2. Raphael Winick, *Searches and Seizures of Computers and Computer Data*, 8 HARV. J.L. & TECH. 75, 77 (1994).

3. U.S. CONST. amend. IV.

4. *See* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994) ("Warrants are not required — unless they are. All searches and seizures must be grounded in probable cause — but not on Tuesdays. And unlawfully seized evidence must be excluded whenever five votes say so.").

5. *See, e.g.*, California v. Acevedo, 500 U.S. 565, 581 (1991) (Scalia, J., concurring in judgment) ("The Fourth Amendment does not by its terms require a prior warrant for searches and seizures . . . ").

6. *See, e.g.*, Camara v. Mun. Court of S.F., 387 U.S. 523 (1967) ("[A]ppellant argues . . . that warrants should issue only when the [government] inspector possesses probable cause . . . .We disagree.").

7. *See e.g.*, Coolidge v. New Hampshire, 403 U.S. 443 (1971) (plurality opinion) (no majority as to whether officer inadvertence is a requirement to plain-view seizure).

8. The Georgetown Univ. Law Center, *Warrantless Searches and Seizures*, 35 GEO. L.J. ANN. REV. CRIM. PROC. 37, 37–38 (2006).

9. *See* Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101 (2008) (discussing the erosion of Fourth Amendment protections).

officer inadvertence be a requirement to a valid computer plain view seizure. In other words, if an officer intentionally deviates from warrant requirements and finds incriminating digital evidence, the evidence must be suppressed. To facilitate analysis, the paper will focus on the Tenth Circuit's controversial holding in *United States v. Carey*[10] where the court excluded digital evidence where the officer deliberately violated warrant requirements. The *Carey* holding should be the law with respect to computer searches, essentially creating a "computer exception" to plan view seizures. Given the Fourth Amendment jurisprudence inconsistencies, the Supreme Court has the ability to provide this "computer exception" to plain view seizures and should do so.

Applying the traditional plain view doctrine to the computer realm is dangerous because computer usage is widespread and computers hold a vast amount of data. According to a 2007 U.S. Census Bureau study, approximately 62 percent of households had a computer and approximately 55 percent of households had internet access as of 2003. The number of households with internet access has grown to 62 percent as of 2007.[11] Most people use computers for all of their private matters whether paying bills, writing personal emails, or storing photos of loved ones. With the increase in computer usage, if the Court applies its relaxed Fourth Amendment requirements in this realm, the Court will be providing the government with a snap shot of the citizenry's private life.

In *Carey*, the Tenth Circuit Court of Appeals determined that enough was enough and delivered a blow to police power in the realm of computer searches. The Court in *Carey* invalidated a computer search when the searching officer admitted that he intentionally deviated from a warrant, which authorized the search of Carey's computer for "names, telephone numbers, ledger receipts, addresses, and other documentary evidence pertaining to the sale and distribution of controlled substances."[12] The officer initially searched Carey's computer for drug related evidence. However he subsequently started to investigate for evidence of child pornography.[13] The officer found child pornography on Carey's computer and seized the photos by transferring them onto a floppy disk. The Government, opposing Carey's Motion to Suppress, argued that the plain view doctrine authorized the warrantless seizure even though the officer *intentionally* deviated from the original warrant

10. 172 F.3d 1268 (10th Cir. 1999).

11. *Computer and Internet use in the United States: October 2007*, U.S. Census Bureau, http://www.census.gov/population/www/socdemo/computer/2007.html (Appendix Table A) (last visited Jan. 14, 2011).

12. *Carey*, 172 F.3d at 1270.

13. *Id.* at 1271.

requirement.[14] The court in *Carey* determined that the officer's intent was counter to the Fourth Amendment's principles and suppressed the evidence.[15]

This note argues that the *Carey* holding should be the law when the plain view doctrine is applied to the computer context. The note begins by examining Fourth Amendment jurisprudence leading up to the *Carey* decision. Part II examines the deterioration of Fourth Amendment protections focusing on the Court's flawed reasoning. Part III examines the *Carey* decision in more detail. Part IV dispels criticisms of the *Carey* decision, specifically that *Carey* deviated from precedent and that the decision is dangerous. Part V briefly concludes.

II. FOURTH AMENDMENT JURISPRUDENCE

A. *Warrant Requirement*

The Supreme Court has interpreted the Fourth Amendment to generally require that, prior to a search, a warrant must be issued that specifically describes the items to be searched and/or seized.[16] Specifically the Court has stated that it is a cardinal principle that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment–subject only to a few specifically established and well-delineated exceptions."[17]

Although warrantless searches are *per se* unreasonable, Fourth Amendment jurisprudence is one of the murkier areas of law.[18] To illustrate the murkiness, some members of the Supreme Court believe that the Fourth Amendment may not even require a warrant, but rather that the Fourth Amendment merely requires that a search and/or seizure be "reasonable."[19] Specifically, in *California v. Acevedo*, Justice Scalia states:

> The Fourth Amendment does not by its terms require a prior warrant for searches and seizures; it merely prohibits searches and seizures that are "unreasonable." What it explicitly states regarding warrants is by way of limitation upon their issuance rather than requirement of

14. *Id.* at 1272.

15. *Id.* at 1276.

16. Katz v. United States, 389 U.S. 347 (1967).

17. *Id.* at 357.

18. *See* California v. Acevedo, 500 U.S. 565, 583 (1991) (Scalia, J., concurring in judgment) ("I do not regard today's holding as some momentous departure [from Fourth Amendment precedent], but rather as merely the continuation of an inconsistent jurisprudence that has been with us for years.").

19. *Id.* at 581 ("The Fourth Amendment does not by its terms require a prior warrant for searches and seizures; it merely prohibits searches and seizures that are 'unreasonable.'").

> their use. For the warrant was a means of insulating officials from personal liability assessed by colonial juries. An officer who searched or seized without a warrant did so at his own risk; he would be liable for trespass, including exemplary damages, unless the jury found that his action was "reasonable." If, however, the officer acted pursuant to a proper warrant, he would be absolutely immune. By restricting the issuance of warrants, the Framers endeavored to preserve the jury's role in regulating searches and seizures.[20]

In other words, Justice Scalia believes that warrants are merely issued to protect the officers from liability, not to protect citizens from intrusion. However, Justice Scalia concedes that "although the Fourth Amendment does not explicitly impose the requirement of a warrant, it is of course textually possible to consider that implicit within the requirement of reasonableness."[21] As such, the Supreme Court is in agreement that the Fourth Amendment encompasses a warrant requirement subject to "exceptions."[22]

Some of the most common warrant exceptions include searches incident to arrests, plain view seizures, vehicle searches, container searches, and inventory searches.[23] However, one of the exceptions the government most often invokes is the "exigent circumstances" exception.[24] Even though "it is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable,"[25] there are certain circumstances where the "reasonableness" standard of the Fourth Amendment may in fact dispel the warrant requirement.[26] In other words, "warrants are generally required to search a person's home or his person unless 'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment."[27] An example of an exigent circumstance is a fireman or police

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20. *Id.* at 581–82 (internal citations omitted).

21. *Id.* at 582.

22. Katz v. United States, 389 U.S. 347, 357 (1967) (Fourth Amendment imposes presumptive warrant requirement); Johnson v. United States, 333 U.S. 10, 14–15 (1948) (Fourth Amendment requires warrant unless exception applies).

23. The Georgetown Univ. Law Center, *supra* note 8, at 37–38.

24. The Georgetown Univ. Law Center, *supra* note 8, at 72–83 (discussing the exception generally).

25. Payton v. New York, 445 U.S. 573, 586 (1980) (citing Coolidge v. New Hampshire, 403 U.S. 443 (1971)).

26. *See, e.g.*, Camara v. Mun. Court of S.F., 387 U.S. 523, 535 (1967) ("In determining whether a particular inspection is reasonable-and thus in determining whether there is probable cause to issue a warrant for that inspection-the need for the inspection must be weighed in terms of these reasonable goals of code enforcement.").

27. Mincey v. Arizona, 437 U.S. 385, 393–94 (1978) (citing McDonald v. United States, 335 U.S. 451, 456 (1948)).

officer responding to a burning building and entering the structure.[28] However, once the emergency ends, the need for a warrantless entry disappears and the warrant requirement is supposedly instilled again.[29] Although this is the general rule, the Supreme Court has determined the length of "exigency" liberally. For example, in the fire context, the government can investigate the building after the flame has been extinguished to discover the source of the fire and "officials need no warrant to remain in a building for a reasonable time to investigate the cause of a blaze after it has been extinguished."[30] If the warrantless entry into the structure was constitutional, then the seizure of illegal items in the dwelling is constitutional as well.[31]

Another example of an exigent circumstance is the warrantless entry onto private property for the purpose of preventing the imminent destruction of evidence.[32] In *Ker v. California*, undercover officers observed the defendant, a person known to be trafficking marijuana, contact another known drug dealer and the two went back to the defendant's apartment.[33] The officers then obtained a key to the apartment from the building manager and entered the premises for the purposes of making sure that no evidence was destroyed.[34] The officer noticed marijuana sitting on the kitchen table and placed the suspects under arrest.[35] The officer also seized the marijuana.[36] The Supreme Court held that the warrantless entry into the premises was reasonable because of the risk that the marijuana may in fact be destroyed.[37] The Court emphasized that marijuana is easily destroyed and that the suspects may in fact have been "onto" the investigation.[38] As such, the Court deemed the warrantless entry constitutional by relying on the exigent circumstances exception of preventing the destruction of evidence.[39]

In sum, although the general rule requires a search warrant, the Supreme Court has carved so many exceptions to the warrant requirement, including the "exigent circumstances" exception, that search war-

28. *See* Michigan v. Tyler, 436 U.S. 499, 509 (1978) ("A burning building clearly presents an exigency of sufficient proportions to render a warrantless entry 'reasonable.' Indeed, it would defy reason to suppose that firemen must secure a warrant or consent before entering a burning structure to put out the blaze.").

29. *Id.* at 509–10.

30. *Id.* at 510.

31. *Id.*

32. *See e.g.*, Ker v. California, 374 U.S. 23 (1963)

33. *Id.* at 24–31.

34. *Id.* at 28.

35. *Id.*

36. *Id.* at 28–29.

37. *Id.* at 40.

38. *Id.*

39. *Id.* at 40–41.

rants are seldom required. As is evident from the *Ker* decision, it is fairly simple to consider a situation an exigent circumstance. The officers in that case had probable cause to believe that the drugs were in the home,[40] but contrary to the Court's findings, there was not much evidence that the drugs were in fact going to be destroyed. The officers should have been required to obtain a search warrant from a magistrate, especially when taking into account that the defendant's home was being searched and the home is afforded the highest Fourth Amendment protections.[41]

B. *Probable Cause*

Just as the Supreme Court has relaxed the need for a warrant, in the rare case where a warrant is required, the Court has also relaxed probable cause requirements.[42] According to the Fourth Amendment's text, in order for a court to issue a warrant, the government must have probable cause that the items to be searched and/or seized are involved in criminal activity.[43] However, probable cause is not a clear cut determination, but rather a probability.[44] In *Brinegar v. United States*, the Court described probable cause accordingly:

> In dealing with probable cause . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.[45]

The widely accepted definition of probable cause is where "the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed.[46] In other words, the standard is not one of an officer, but rather a reasonable *person* observing the same facts as the officer.[47]

Although the text of the Fourth Amendment explicitly states that

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40. *Id.*

41. Payton v. New York, 445 U.S. 573, 585–86 (1980) ("[T]he 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" (quoting United States v. United States District Court, 407 U.S. 297, 313 (1972))).

42. *See e.g.*, Camara v. Mun. Court, 387 U.S. 523 (1967) (holding that that municipal health and safety inspectors need not have probable cause in order for the court to issue a search warrant authorizing dwelling inspections).

43. US CONST. amend. IV.

44. Brinegar v. United States, 338 U.S. 160 (1949).

45. *Id.* at 175.

46. Carroll v. United States, 267 U.S. 132, 162 (1925).

47. *Id.*

"no warrants shall issue, but upon probable cause,"[48] the Supreme Court has held in certain circumstances that warrants may be issued when the evidence suggests something less than the traditional definition of probable cause.[49] For instance, in *Camara v. Municipal Court,*[50] the Court held that municipal health and safety inspectors need not have probable cause in order for the court to issue a search warrant authorizing dwelling inspections.[51] The Court reasoned that in cases in which search warrants are required, probable cause is merely a standard establishing reasonableness.[52] The Court stated: "[T]o apply this standard [probable cause], it is obviously necessary first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen."[53] In other words, the Court in *Camara* dispelled the traditional probable cause standard and simply substituted a balancing test that requires that the governmental interest justify a search.[54] Applying this standard, the *Camara* Court held that inspection programs aimed at securing city-wide compliance with minimal physical standards for private property satisfy such a compelling governmental interest that they are *per se* reasonable, satisfying the Fourth Amendment's probable cause requirement.[55]

The Court's reasoning in *Camara* is flawed for many reasons. First, the Court arbitrarily changes the traditional definition of probable cause to mean one of reasonableness by balancing governmental interests against citizen privacy intrusion.[56] The Court starts with the premise that "it is obviously necessary first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen."[57] In other words, the Court makes the constitutional starting point from the government's perspective.[58] However the Fourth Amendment protects the private citizenry from government intrusion.[59] It would follow that the starting point should be on the infringement of the citizen's privacy, not on the

48. US CONST. amend. IV.

49. *See* Barry Jeffrey Stern, *Warrants Without Probable Cause*, 59 BROOK. L. REV. 1385 (1994).

50. 387 U.S. 523 (1967).

51. *Id.* at 534.

52. *Id.* ("[I]n cases in which the Fourth Amendment requires that a warrant to search be obtained, 'probable cause' is the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness.").

53. *Id.* at 534–35.

54. *Id.*

55. *Id.* at 535.

56. *Id.* at 534.

57. *Id.* at 534–35.

58. *Id.*

59. Winick, *supra* note 2, at 77.

governmental interest. The Fourth Amendment was not enacted to satisfy governmental interests, but rather to protect the citizens against such interests.[60] As such, the Court in *Camara* delivered one of the numerous blows to Fourth Amendment protections by diluting the definition of probable cause in the administrative search contexts.

Another example of the Supreme Court diluting the probable cause requirement is the case of *Terry v. Ohio*.[61] In *Terry*, a police officer noticed two men on a sidewalk whom the officer thought were "casing" out a jewelry store to rob it.[62] The officer relied on his hunch and, acting on his suspicions, he approached the men and asked them to identify themselves.[63] When the men mumbled something in response, the officer pat the men down, felt a pistol on each, and removed the guns.[64] The main issue at trial was whether the officer needed to have probable cause in order for the pat down.[65] The Court indicated that the officer's suspicion was not enough to establish probable cause, but nonetheless the search was deemed constitutional.[66] Once again, the Court relied on the "reasonableness" language in the Fourth Amendment to fashion a flexible standard.[67] The Court determined that a somewhat diluted form of probable cause can exist and labeled it as a "reasonable suspicion."[68] The test is whether a reasonable person in the officer's position would have had the suspicion that the suspects were armed based on the facts available.[69] If the answer was yes, then the stop and frisk was constitutional.[70] A close look at the test's language indicates that it is merely a watered down version of traditional probable cause. As mentioned previously, probable cause requires that "the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed.[71] The difference between traditional probable cause and the *Terry* reasonable suspicion standard is that in order to have probable cause, the likelihood of a crime being committed must be more likely

60. Winick, *supra* note 2, at 77.

61. 392 U.S. 1 (1968).

62. *Id.* at 5–7.

63. *Id.*

64. *Id.*

65. *Id.* at 16–27.

66. *Id.* at 29–30.

67. *Id.* at 30–31.

68. *Id.* at 35 (Douglas, J., dissenting) ("The opinion of the Court disclaims the existence of 'probable cause.' ").

69. *Id.* at 21 (majority opinion).

70. *Id.*

71. Carroll v. United States, 267 U.S. 132, 162 (1925).

than not,[72] while under the *Terry* standard, all that is needed is a suspicion that a crime is being committed,[73] which is a lower standard than a probability. *Terry* is perhaps the most controversial case in the realm of probable cause dilution. As illustrated by *Camara* and *Terry,* the murkiness of Fourth Amendment jurisprudence extends into the realm of what probable cause is, and whether it is even required in certain circumstances.

C. *Warrant Particularity and the Plain View Doctrine*

The Fourth Amendment requires that warrants "particularly describe the place to be searched and the persons or things to be seized."[74] The purpose of the particularly requirement is to make sure that "nothing is left to the discretion of the officer executing the warrant."[75] In fact, the Supreme Court has gone as far as to explicitly dictate that the Fourth Amendment exists because officers, although perhaps well-meaning, may not have sufficient self-restraint to honor the privacy of the citizenry.[76] In *Marron v. United States,* the Court stated: "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."[77]

Additionally, the particularity requirement protects the citizen's privacy interests against "the wide ranging exploratory searches the Framers intended to prohibit."[78] It prohibits law enforcement from seizing one thing under a warrant describing a different item.[79] In order to comply with the particularity requirement, the warrant must describe the place to be searched and the items to be seized in sufficient detail to enable the executing officer to locate and identify it with reasonable effort.[80] In sum, due to the Framers' dislike of general searches, the

72. Brinegar v. United States, 338 U.S. 160, 175 (1949).

73. Terry v. Ohio, 392 U.S. 1, 21 (1968).

74. US CONST. amend. IV.

75. Marron v. United States, 275 U.S. 192, 196 (1927).

76. *See* United States v. United States District Court, 407 U.S. 297, 316–17 (1972) ("Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillances may be conducted solely within the discretion of the Executive Branch.").

77. *Marron,* 275 U.S. at 196.

78. Maryland v. Garrison, 480 U.S. 79, 84 (1987).

79. *Marron,* 275 U.S. at 196.

80. United States v. Hargus, 128 F.3d 1358, 1362 ("[A] warrant's description of things to be seized is sufficiently particular if it allows the searcher to reasonably ascertain and identify the things authorized to be seized." (quoting United States v. Finnigin, 113 F.3d 1182, 1187 (10th Cir. 1997))).

particularity requirement is meant to provide a judicial check on officer discretion.[81]

Although the courts have traditionally been concerned with officer discretion, the plain view doctrine facilitates such discretion. The plain view doctrine allows police officers to use evidence found while executing a warrant, even though the evidence is not within the warrant's scope.[82] To satisfy the plain view doctrine (1) the officer must not violate the Fourth Amendment in arriving at the vantage point from which he plainly views the evidence, (2) the object's incriminating nature must be immediately apparent to the officer, and (3) the officer must have a legal right of access to the object.[83] One of the major issues is what the definition of "immediately apparent" means in the second prong.[84]

Early cases alluded to officer inadvertence as a requirement of the plain view doctrine.[85] In other words, the officer must have found the evidence unintentionally.[86] According to the *Coolidge* Court, inadvertence is essential to meet the rationale of the plain view exception because "where the discovery [of evidence] is anticipated . . . . [t]he requirement of a warrant to seize imposes no inconvenience whatever" on the government.[87] In other words, because the government subjectively knows what they are looking for, there is no reason that they could not attain a warrant.[88] Although this logic is sound, a majority of the Court did not join the inadvertence requirement view and the requirement is not binding precedent.[89]

D. *The Demise of Officer Inadvertence*

Being that a majority did not join the inadvertence requirement and it is not binding precedent, the Court subsequently held in *Horton v. California* that "even though inadvertence is a characteristic of most

81. *Garrison*, 480 U.S. at 84 (the particularity requirement protects the citizen's privacy interests against "the wide ranging exploratory searches the Framers intended to prohibit.").

82. *See* Coolidge v. New Hampshire, 403 U.S. 443 (1971) (plain view doctrine allows for warrantless seizure).

83. Horton v. California, 496 U.S. 128, 136–37 (1990).

84. *See* Arizona v. Hicks, 480 U.S. 321 (1987) (serial numbers of suspected stolen stereo were "immediately apparent" when the officer did not have to lift up the equipment to read them).

85. *See, e.g., Coolidge*, 403 U.S. at 466 ("[T]he 'plain view' doctrine has been applied where a police officer is not searching for evidence against the accused, but nonetheless *inadvertently* comes across an incriminating object."(emphasis added) (citing Harris v. United States, 390 U.S. 234 (1968))).

86. *Id.* at 469.

87. *Id.* at 470–71.

88. *Id.*

89. *See* Texas v. Brown, 460 U.S. 730, 737 (1983) ("While the lower courts generally have applied the *Coolidge* plurality's discussion of 'plain view,' it has never been expressly adopted by a majority of this Court.").

legitimate 'plain-view' seizures, it is not necessarily a condition."[90] The Court offered two reasons why the subjective intent of the officer should not matter: (1) "evenhanded law enforcement is best achieved by the application of objective standards of conduct"[91] and (2) the inadvertence requirement is not necessary to prevent the police from converting warrants into general warrants "because that interest is 'already served by the requirements that no warrant issue unless it 'particularly describ[es] the place to be searched and the persons or things to be seized.'"[92]

However, the Court's reasoning is flawed. As to the first reason regarding police evenhandedness, the Constitution is not focused on police evenhandedness, but rather the right to be free from unreasonable searches and seizures.[93] In other words, the Court is viewing the problem from the wrong perspective yet again. The Court is reasoning that the inadvertence requirement will result in inconsistent police work and therefore should be barred. However, the Constitution is not concerned with consistent police work, but rather protecting citizens from the police in general.[94]

As to the second reason, the Court's reliance on the warrant being particular is ironic. If an officer is allowed to intentionally deviate from the particularity of the warrant itself, what good is the particularity anyway? To illustrate, if a warrant reads that the police are allowed to search a specified area for a gun it is technically particular. However, in practice, if the officer sees the gun's handle exposed, but decides to ignore that fact to search for any other contraband, how is this any different than a general search? The "particularity" of the warrant is not particular in practice.

The *Horton* dissent correctly points out that "[i]n eschewing the inadvertent discovery requirement, the majority ignores the Fourth Amendment's express command that warrants particularly describe not only the *places* to be searched, but also the *things* to be seized."[95] To illustrate, the dissent formulates a persuasive example:

> For example, the warrant application process can often be time consuming, especially when the police attempt to seize a large number of items. An officer interested in conducting a search as soon as possible might decide to save time by listing only one or two hard-to-find items, such as the stolen rings in this case, confident that he will find in plain view all of the other evidence he is looking for before he

90. Horton v. California, 496 U.S. 128, 130 (1990).
91. *Id.* at 138.
92. *Id.* at 139.
93. Winick, *supra* note 2, at 77.
94. Winick, *supra* note 2, at 77.
95. *Horton*, 496 U.S. at 142 (Brennan, J., dissenting).

> discovers the listed items. Because rings could be located almost anywhere inside or outside a house, it is unlikely that a warrant to search for and seize the rings would restrict the scope of the search. An officer might rationally find the risk of immediately discovering the items listed in the warrant–thereby forcing him to conclude the search immediately-outweighed by the time saved in the application process.[96]

The dissent's hypothetical correctly illustrates the danger associated with expelling the *Coolidge* inadvertence requirement to the plain view doctrine.

In sum, the Court has slowly chipped away at Fourth Amendment protections. The Court has created numerous exceptions to the warrant requirements. The Court has changed the definition of probable cause and even gone as far as eliminating it for certain searches. The Court has manufactured the plain view doctrine and has even allowed officers to blatantly testify that they ignored the limits of the warrant reasoning that this leads to "even handed law enforcement."[97] The Court's manipulation of the Fourth Amendment, one of the most important protections against government intrusion, has provided the landscape for the *Carey* decision.

III. UNITED STATES V. CAREY

A. *The Facts and Carey's Motion to Suppress*

Patrick J. Carey was charged with one count of possessing a computer hard drive that contained three or more images of child pornography produced with materials shipped in interstate commerce in violation of 18 U.S.C. § 2252A(a)(5)(B).[98] Following a conditional plea of guilty, he appealed an order of the district court denying his motion to suppress contraband seized from his computer asserting that it was seized as the result of a general, warrantless search.[99]

Defendant Carey had been under police surveillance for suspected

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96. *Id.* at 146.

97. *Id.* at 139 (majority opinion).

98. The statute provides that "any person who . . . knowingly possesses, or knowingly accesses with intent to view, any book, magazine, periodical, film, videotape, computer disk, or any other material that contains an image of child pornography that has been mailed, or shipped or transported using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, or that was produced using materials that have been mailed, or shipped or transported in or affecting interstate or foreign commerce by any means, including by computer; shall be punished as provided in subsection (b)" 18 U.S.C. § 2252A(a)(5)(B) (1994 & Supp. 1996) (1998 modification by removing "three or more images" and replacing "an image").

99. United States v. Carey, 172 F.3d 1268, 1270 (10th Cir. 1999).

sale and possession of cocaine.[100] Undercover agents had executed controlled buys at Carey's residence, and six weeks after the last purchase, police obtained an arrest warrant.[101] During the course of the arrest, officers observed in plain view a "bong," which is used to smoke marijuana, and what appeared to be marijuana in defendant's apartment.[102]

The officer then asked Carey for consent to search his apartment for more contraband.[103] The officer informed Carey that if Carey declined to consent, the officer would get a search warrant.[104] After much discussion with the officer, Carey verbally consented to the search and subsequently signed a formal consent form at the police station.[105] Carey was concerned that officers would "trash" his apartment so Carey gave them instructions on how to find narcotic related contraband.[106]

The written consent form authorized Sergeant William Reece "to have conducted a complete search of the premises and property located at 3225 Canterbury # 10, Manhattan, KS 66503."[107] It further provided, "I do freely and voluntarily consent and agree that any property under my control . . . may be removed by the officers . . . if said property shall be essential in the proof of the commission of any crime in violation of the Laws of the United States . . . . "[108] With this consent, police returned to Carey's apartment that night and found cocaine, marijuana, and hallucinogenic mushrooms.[109] Additionally, the officer confiscated two computers believing that they will be subject to forfeiture or that they would contain evidence of drug dealing.[110]

The officers took the computers to the police station and obtained a warrant, which allowed the officers to search files on the computers for "names, telephone numbers, ledger receipts, addresses, and other documentary evidence pertaining to the sale and distribution of controlled substances."[111] Detective Lewis and a computer technician searched the computer by viewing the computer hard drives.[112] They downloaded directories onto floppy disks and subsequently printed them.[113] Among

100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*

the directories were numerous files labeled "JPG"[114] with sexually suggestive titles.[115] Lewis inserted the disks into another computer and began searching the files from Carey's computers.[116] Lewis searched by entering key words such as, "money, accounts, people, so forth" to find "text-based" files that contained these words.[117] This search did not produce any files related to drugs.[118]

Although the search did not produce any files related to drugs, Detective Lewis continued to search the directories and came across some files that he "was not familiar with."[119] He was unable to view these files on the computer he was using so he downloaded them to a disk and viewed them on another computer.[120] He then was "immediately" able to view what he later described as a "JPG file."[121] When he opened the file he discovered that it contained child pornography.[122]

Lewis downloaded approximately two hundred and forty-four image files.[123] These files were transferred to nineteen disks, and only portions of the disks were viewed to determine that they contained child pornography.[124] Even though none of the disks were viewed in their entirety to determine whether or not they contained child pornography, Lewis looked at approximately "five to seven" files on each disk.[125] After viewing the contents of the nineteen disks, he returned to Carey's computers to continue his original task of looking for evidence of drug dealing.[126]

Carey moved to suppress the JPG files containing child pornography.[127] During the hearing, Lewis stated that although the JPG file discovery was inadvertent, when he saw the first picture containing child pornography, he developed probable cause to believe the same kind of material was present on the other image files.[128] Lewis was then asked

114. *Id.* at 1271 n.2 ("Detective Lewis later testified at the time he discovered the first JPG or image file, he did not know what it was nor had he ever experienced an occasion in which the label 'JPG' was used by drug dealers to disguise text files. He stated, however, image files could contain evidence pertinent to a drug investigation such as pictures of 'a hydroponic growth system and how it's set up to operate.'").

115. *Id.* at 1270.

116. *Id.* at 1271.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

why he did not obtain a search warrant and his response was "that question did arise, [a]nd my captain took care of that through the county attorney's office."[129] Although no warrant was obtained, the officer continued the search because he believed that he "had to search these files as well as any other files contained [in the computer]."[130]

The officer subsequently changed his story when he was questioned by the government.[131] Lewis stated that he did not know the file contents until he actually opened each file.[132] In other words, he said that he did not believe he was required to have a search warrant to open each JPG file.[133] However, after viewing a copy of the hard disk directory, Lewis admitted there was a "phalanx"[134] of JPG files listed on the hard drive's directory.[135] He nevertheless claimed that he "wasn't conducting a search for child pornography, that happened to be what these turned out to be."[136] The Court denied the motion without any findings stating: "[a]t this point, the Court feels that the. . .Defendant's Motion to Suppress. . .would be-should be denied. And that will be the order of the Court, realizing that they are close questions."[137]

On appeal, Carey asserted that the computer searches transformed the warrant into a "general warrant" and resulted in an illegal search of his computer files.[138] He asserted that despite the specificity of the search warrant, the police opened files not pertaining to the sale or distribution of drugs and that the files should be suppressed.[139] The government responded that the plain view doctrine authorized the police search and they analogized a computer search to searching a file cabinet for documents and finding child pornography.[140] The *Carey* Court sided with the defendant and reversed the lower court's ruling.[141]

B. *Holding and Rationale*

The *Carey* court held that the search was beyond the scope of the warrant when the officer began searching the JPG files with the intent of

129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.* at 1271 n.3 (The JPG files on the directory had sexually explicit names, many containing the word "young" or "teen." The detective testified that drug dealers often use various tactics to conceal drug dealing evidence).
136. *Id.* at 1271.
137. *Id.*
138. *Id.* at 1271–72.
139. *Id.* at 1272.
140. *Id.*
141. *Id.* at 1276.

discovering evidence of child pornography.[142] The court dispelled the government's filing cabinet analogy by distinguishing computers from filing cabinets.[143] The court stated that because computers have the potential to store vast quantities of information, they are tempting targets for search, making a file cabinet analogy overly simplistic.[144] As such, the court reasoned that after the officer discovered the first image of child pornography, the proper recourse should have been to postpone the search and obtain a warrant to continue searching for child pornography.[145]

The court emphasized that the officer's intent played a role in the decision.[146] The court articulated that "the plain view doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges."[147] The Court determined that the officer turned the specific search for evidence of drug trafficking into a general search because

> In his own words . . . his [the officer's] suspicions changed immediately upon opening the first JPG file. After viewing the contents of the first file, he then had "probable cause" to believe the remaining JPG files contained similar erotic material. Thus, because of the officer's own admission, it is plainly evident each time he opened a subsequent JPG file, he expected to find child pornography and not material related to drugs. Armed with this knowledge, he still continued to open every JPG file to confirm his expectations. Under these circumstances, we cannot say the contents of each of those files were inadvertently discovered. Moreover, Detective Lewis made clear as he opened each of the JPG files he was not looking for evidence of drug trafficking. He had temporarily abandoned that search to look for more child pornography, and only "went back" to searching for drug-related documents after conducting a five hour search of the child pornography files.[148]

The *Carey* court explained that one of the operative facts was that each of the files labeled "JPG" featured sexually explicit titles.[149] This titling was important because after the officer opened the first file with the

142. *Id.* at 1272–74.

143. *Id.* at 1275 ("[B]ecause this case involves images stored in a computer, the file cabinet analogy may be inadequate.").

144. *Id.*

145. *Id.* at 1275–76.

146. *Id.* at 1275 ("Even if we employ the file cabinet theory, the testimony of Detective Lewis makes the analogy inapposite because *he stated he knew, or at least had probable cause to know*, each drawer was properly labeled and its contents were clearly described in the label.") (emphasis added).

147. *Id.* (citing Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971)).

148. *Carey*, 172 F.3d at 1273.

149. *Id.* at 1274.

sexually explicit label and found child pornography, the officer knew what the titles meant – sexually explicit material.[150] Thus, when he subsequently opened more files, he knew that he was not going to find items related to drug activity.[151] As such, the Court determined that the officer's intent was to expand the specific warrant into a general one.

In response to the court's decision, the government filed a petition for rehearing.[152] The court denied the petition and stated as follows:

> Because the government contends we failed to properly follow *Horton v. California*, we recognize inadvertance is not a Fourth Amendment requirement. We note, however, "inadvertance is a characteristic of most legitimate 'plain-view' seizures." As such, the fact that Detective Lewis did not inadvertently come across the pornographic files is certainly relevant to our inquiry. Our holding is based, however, on the fact that Detective Lewis impermissibly expanded the scope of his search when he abandoned the search for drug-related evidence to search for evidence of child pornography. The petition for rehearing is denied.[153]

Recognizing that the facts in this case involved a "close call," the court explicitly limited the holding to the facts of the case: "[W]e are quick to note these results are predicated only upon the particular facts of this case, and a search of computer files based on different facts might produce a different result."[154]

IV. CRITICISMS AND APPLYING CAREY

A. *Response to Criticisms of the* Carey *Decision*

Critics claim that the *Carey* decision is contrary to both Supreme Court and Tenth Circuit precedent.[155] Particularly, critics assert that Carey is in conflict with the Supreme Court decision in *Horton v. California*, and the Tenth Circuit decision in *United States v. Botero-Ospina*.[156] However, *Carey* is distinguishable from these cases.

In *Horton*, the police were investigating an armed robbery.[157] During their investigation, the police sought a search warrant to search the

150. *Id.*
151. *Id.*
152. *Id.* at 1277–78.
153. *Id.* (citations omitted).
154. *Id.* at 1276.
155. Jim Dowell, *Criminal Procedure: Tenth Circuit Erroneously Allows Officers' Intentions to Define Reasonable Searches:* United States v. Carey, 54 OKLA. L. REV. 665, 676 (2001) ("[The] holding in *Carey* is clearly contrary to both Supreme Court and Tenth Circuit precedent.").
156. *Id.* at n.96.
157. Horton v. California, 496 U.S. 128, 130–31 (1990).

petitioner's home.[158] Although the officer's affidavit for the search warrant referred to police reports that mentioned weapons and proceeds, the Magistrate only authorized a search for proceeds from the robbery.[159] Specifically, some of the items stolen were distinct rings.[160] Pursuant to the warrant, officers searched the petitioner's residence, but they did not find the stolen property.[161] However, officers discovered the weapons used in the robbery in plain view and seized them.[162] The officer admitted that he intentionally searched for evidence other than the rings that would link the petitioner to the crime.[163] Thus, the officer's weapon discovery was not "inadvertent."[164] The *Horton* Court determined that inadvertence was not a prerequisite to the plain view seizure and affirmed the lower court's conviction.[165]

In *United States v. Botero-Ospina,*[166] a police officer pulled over the petitioner for allegedly swerving on the highway.[167] The deputy asked the petitioner for his driver's license and registration.[168] The deputy discovered that the vehicle was registered in New Jersey to another man.[169] The deputy then questioned the petitioner on where he had been and the petitioner said that he was coming from "Garfield," a town that the officer had never heard of before.[170] The officer then asked the petitioner for permission to search the vehicle and the petitioner said "sure."[171] The officer then discovered drugs in the vehicle and placed the petitioner under arrest.[172] The petitioner moved to suppress the cocaine arguing that the stop was unconstitutional because it was pretextual.[173] The Court denied the motion stating that the officer's subjective motives were irrelevant and the stop was proper as long as the officer had objective criteria for pulling over the vehicle.[174]

Carey is distinguishable from *Horton* because searching a home is distinct from searching a computer. The main difference between a

158. *Id.*
159. *Id.* at 131.
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.* at 142.
166. 71 F.3d 783 (10th Cir. 1995).
167. *Id.*
168. *Id.* at 785.
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.* at 787.

computer and a home is that a computer can hold enormous amounts of data.[175] People use computers to store almost everything imaginable including images, movies, documents, emails and personal records in quantities that surpass what a home may hold.[176] In essence, in today's age, a search of someone's computer is in turn a search of their entire life. Because of this difference, computer searches require a different Fourth Amendment analysis.[177] Thus, because *Carey* involved a computer search, *Carey's* facts are distinguishable from *Horton* and the two cases are not in direct conflict.

Carey is also distinguishable from *Botero-Ospina*. The issue in *Botero-Ospina* was not whether the search was constitutional, but rather whether the stop was constitutional.[178] In fact, the petitioner consented to the search of the vehicle, and the search's constitutionality was never at issue.[179] Although both *Carey* and *Botero-Ospina* question whether an officer's subjective intent is relevant, the differences between searches and seizures distinguish the two cases. For instance, in order for an officer to stop a vehicle, or seize it, all that the officer needs is a "reasonable suspicion" that the vehicle is violating traffic laws.[180] However, this lower standard does not apply to the searching of someone's dwelling or computer because warrants are required, which require probable cause.[181] In essence, although *Botero-Ospina* determines whether an officer's subjective intent is relevant, the fact that it involves a seizure as opposed to a search is distinguishable from the *Carey* facts and the two cases are not in conflict.

Aside from the *Carey* decision not following precedent, critics also claim that *Carey's* officer inadvertence requirement poses a danger to the criminal justice system as a whole.[182] Particularly, critics claim that a subjective analysis (1) provides officers with an incentive to lie and (2) rewards law enforcement for using untrained officers.[183] However, many empirical studies illustrate that officer perjury is common, especially when officers are trying to avoid suppression of evidence.[184] As one scholar articulated:

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175. *See* RayMing Chang, *Why the Plain View Doctrine Should not Apply to Digital Evidence*, 12 SUFFOLK J. TRIAL & APP. ADVOC. 31, 35 (2007).

176. *Id.*

177. *See* Orin S. Kerr, *Searches and Seizures in a Digital World*, 119 HARV. L. REV. 531 (2005).

178. *Botero-Ospina*, 71 F.3d at 785.

179. *Id.*

180. *See id.*

181. US CONST. amend. IV.

182. Dowell, *supra* note 155, at 676.

183. *Id.*

184. *See* Morgan Cloud, *The Dirty Little Secret*, 43 EMORY L.J. 1311, 1312 (1994).

> Police officers can be expected to omit, redact, and even lie on their police reports, sworn or unsworn; they will conceal or misrepresent to cover up corruption and brutality; they are trained to deceive citizens during investigations as part of good police practice; they will obscure facts, and even lie, to cover up the misconduct of fellow officers. Additionally, command practice and policy gives officers every incentive to lie to cover for lack of productivity or to aggrandize themselves for recognition and promotion. And yes, police officers will commit perjury in our courts of law.[185]

In other words, the *Carey* decision provides no additional *incentive* to fabricate; rather it provides another *opportunity* to do so. But doesn't every constitutional protection provide government officials with opportunities to lie?[186] In other words, whenever an officer testifies on behalf of the prosecution the officer both has an incentive and opportunity to frame the facts in their favor. At times their jobs may depend on it.[187]

Critics concede that officers may have incentives to lie about objective facts as well. However, the critics claim that lies about objective facts "can often be independently verified or disproved, whereas an officer's subjective intent or expectations cannot be proven unless the officer has communicated those thoughts to another individual who is willing to testify."[188] The critic's solution seems to allow officers to blatantly testify that they intentionally ignored the confines of a warrant. Although this testimony would not be a fabrication, is the citizenry better off? Perhaps the more reasonable approach would be to have the officer cross–examined concerning his subjective intent and let the fact finder decide whether or not he intended to deviate from the warrant's authority.

Critics also claim that the *Carey* decision awards law enforcement for using untrained officers:

> An untrained officer might not know that certain types of evidence will usually only be found in certain types of computer files. The officer can then truthfully testify that he intended to search for and expected to find that evidence every time he opened a computer file. Even if a reasonable person would have known that the evidence could not be found in the files the officer searched, a court relying on the searching officer's subjective intent or expectations might find

185. David N. Dorfman, *Proving the Lie: Litigating Police Credibility*, 26 AM. J. CRIM. L. 455, 460–61 (1999).

186. *Id.* at 461 ([L]ies under oath . . . often involv[e] the tailoring of testimony to meet constitutional requirements).

187. *Id.* at 461 ("[C]ommand practice and policy gives officers every incentive to lie to cover for lack of productivity or to aggrandize themselves for recognition and promotion.").

188. Dowell, *supra* note 155, at 676.

the evidence admissible because the officer's intent was proper.[189] This argument assumes that law enforcement would rather use an inexperienced officer to stumble through a complex search all to avoid obtaining a warrant. However, obtaining a warrant is not the time consuming inconvenience it once was.[190] Specifically, in 1977 Congress amended Rule 41 of the Federal Rules of Criminal Procedure in order to allow magistrates to issue warrants over the telephone.[191] The purpose of the amendment was to expedite the issuance process in order to curtail warrantless searches.[192]

Under the rule, to obtain a search warrant, officers simply telephones a magistrate and then writes out their own "duplicate original warrant" describing the circumstances of the time and place and why the officer believes that there is probable cause.[193] The officer then reads the duplicate original warrant verbatim, and under oath, into the telephone and the magistrate records the conversation.[194] If the magistrate determines that the facts and circumstances amount to probable cause, then the officer signs the original duplicate warrant and the warrant is considered issued.[195] The San Diego District Attorney's Office estimated that ninety-five percent of telephonic warrant requests were processed in less than forty-five minutes.[196]

In *Carey*, Detective Lewis communicated warrant concerns to his captain.[197] In light of Rule 41 of the Federal Rules of Criminal Procedure, an officer in a similar situation can simply "phone a friend" and have a warrant issued likely in less than forty-five minutes.[198] With this expedited process, it is highly unlikely that law enforcement will purposefully hire an incompetent officer in order to comply with the *Carey* inadvertence requirement. As such, the critic's argument is flawed.

B. *Why the Carey Inadvertence Requirement Should Apply to Plain View Computer Searches*

Because computer files can be *anywhere* on a computer, computer

189. *Id.*

190. *See* Justin H. Smith, *Press One for Warrant: Reinventing the Fourth Amendment's Search Warrant Requirement Through Electronic Procedures*, 55 VAND. L. REV. 1591, 1606–14 (2002).

191. *See* FED. R. CRIM. P. 41(c)(2) (1977).

192. *See* FED. R. CRIM. P. 41(c)(2), Notes of Advisory Committee on Rules, 1977 Amendment, reprinted in 19 U.S.C. App., at 1672-73, 1674 (Supp. III 1979) (citations omitted).

193. FED. R. CRIM. P. 41(c)(2)(B) (1977).

194. FED. R. CRIM. P. 41(c)(2)(D) (1977).

195. *Id.*

196. Bryan D. Lane, *Telephonic Search Warrants Under the Oregon Constitution: A call for the Limitation of Exigent Circumstances*, 24 WILLAMETE L. REV. 967, 982 (1988).

197. United States v. Carey, 172 F.3d 1268, 1271 (10th Cir. 1999).

198. Lane, *supra* note 196, at 982.

searches call for officer inadvertence as a plain view doctrine requirement. Under the plain view doctrine, a police officer may search any area where the items listed on the warrant may reasonably be.[199] In other words, if the warrant allows for search of a shot gun, the officers may not open a cabinet that cannot physically contain a shot gun. However, with a computer search, officers are simply looking for files. Files can be *anywhere* on a computer.[200] This in turn creates a general search of the entire computer.[201] In essence, not having officer inadvertence in plain view computer cases will in fact result in a general search of virtually everything a person owns. This is very distinct from a home because under the traditional plain view doctrine a home is more likely to have limits to a search. In the shot gun hypothetical the cupboard will be off limits. This allows the warrant to retain some particularity. In cases similar to *Carey*, finding evidence of drug distribution on a computer opens up the entire computer to the search, thus resulting in a general search. The *Carey* inadvertence requirement will curtail this concern.

Some scholars have argued that in light of computer searches the plain view doctrine should simply be abolished.[202] Although abolishing the plain view doctrine will solve the problems associated with computer searches, it is a radical step. The plain view doctrine does serve a purpose. The Court in *Coolidge* aptly stated as follows:

> Where, once an otherwise lawful search is in progress, the police inadvertently come upon a piece of evidence, it would often be a needless inconvenience, and sometimes dangerous-to the evidence or to the police themselves–to require them to ignore it until they have obtained a warrant particularly describing it.[203]

In other words, when officers simply "stumble" upon evidence while conducting a legal search, it seems preposterous for them not to seize it. Instead of abolishing the plain view doctrine in computer searches, the more prudent course of action would simply be to curtail its scope. Applying *Carey's* officer inadvertence requirement to computer searches will accomplish this goal without completely eliminating the plain view doctrine in the realm of computers. Applying *Carey* is a preferable alternative to eliminating the plain view doctrine altogether and it will keep Fourth Amendment jurisprudence somewhat

199. Horton v. California, 496 U.S. 128, 146 (1990) (Brennan, J., dissenting) (because rings may be found anywhere in a house, it allows for search of the entire house).

200. Kerr, *supra* note 177, at 35.

201. United States v. Payton 573 F. 3d 859, 864 (9th Cir. 2009).

202. Kerr, *supra* note 177, 577–78.

203. Coolidge v. New Hampshire, 403 U.S. 443, 467–68 (1971).

consistent.[204]

Additionally, applying the *Carey* standard specifically to the computer realm will minimally impact the underlying concerns that fueled *Horton*. As mentioned in Part II, *Horton* dispelled officer inadvertence for the sake of "police evenhandedness."[205] If Carey is applied exclusively to the computer realm, the impact will only be in one very specific area of searches. In other words, every other type of search (car, dwelling, etc. . .) will still be subject to the objective analysis resulting in a minimal impact on police evenhandedness. On the other hand, the increase in citizenry protection will be great. The risk of transmuting a particularized computer search into a general one will be reduced tremendously. In *Carey*, for instance, the officer would have had to obtain a warrant after he realized that the first file contained child pornography. The second warrant would have permitted officers to search the computer for child pornography resulting in a particular warrant in compliance with Fourth Amendment requirements.

In essence, the *Carey* doctrine should be seen as a type of "exception" to the plain view exception. As mentioned in Part II, the Court has no problem carving exceptions regarding Fourth Amendment requirements. The Court has enacted numerous exceptions including exceptions to warrant requirements, and even exceptions as to what probable cause is and when it is required.[206] There is no reason why the Court cannot carve an exception to the plain view doctrine when computers are concerned. The only difference in requiring officer inadvertence in computer searches is that this exception will be in *favor* of protections, not *at the expense* of them.

V. CONCLUSION

The *Carey* court recognized the unique dangers associated with computer searches. The court determined that existing reasoning did not serve the Fourth Amendment adequately while implicitly recognizing that computers require additional Fourth Amendment protections. Although the Framers could not have anticipated such a change in technology, the *Carey* decision accurately depicts the purpose of the Fourth Amendment: to protect the citizenry from unreasonable searches and seizures. The Supreme Court should follow the *Carey* decision and put a stop to the Fourth Amendment's deterioration.

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204. A difficult task to say the least.
205. Horton v. California, 496 U.S. 128, 128 (1990).
206. *See* Part II.