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Fourth Amendment--Eliminating the Inadvertent Discovery Requirement for Seizures Under the Plain View Doctrine

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FOURTH AMENDMENT—ELIMINATING THE INADVERTENT DISCOVERY REQUIREMENT FOR SEIZURES UNDER THE PLAIN VIEW DOCTRINE

Horton v. California, 110 S. Ct. 2301 (1990)

I. INTRODUCTION

In *Horton v. California*,[1] the United States Supreme Court held that inadvertent discovery is not required for a seizure of evidence under the plain view doctrine.[2] While supporting other limitations on the plain view doctrine, the Court concluded that the interests of law enforcement are better served without the inadvertency requirement.[3] In addition, the Court concluded that inadvertent discovery is not necessary for the protection of fourth amendment interests.[4]

Examining *Horton*, this Note concludes that the Supreme Court's holding correctly balanced the needs of law enforcement and the interests protected by the fourth amendment. This Note reasons that whether defined subjectively or objectively, the inadvertency requirement imposes substantial costs on effective law enforcement. This Note also asserts that the inadvertency requirement furthers no fourth amendment interest, as represented by the continued prohibition of general searches and seizures. Finally, this Note concludes that the Court's abolishment of the inadvertency requirement may permit abuse of the plain view doctrine through pretextual searches. However, concern over the limited possibility of pretextual activity is offset by the benefits created for law enforcement officials and the Court's continued protection of fourth amendment interests. The *Horton* Court thus correctly abolished the inadvertent discovery requirement.

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1 110 S. Ct. 2301 (1990).

2 *Id.* at 2308. *See infra* notes 5-21 and accompanying text for an explanation of the plain view doctrine.

3 *Id.* at 2308-09.

4 *Id.* at 2309-10.

II. THE PLAIN VIEW DOCTRINE

The fourth amendment of the United States Constitution protects against unreasonable searches and seizures.[5] By requiring a search warrant to include a particular description of the place to be searched, the fourth amendment protects the individual's interest in maintaining personal privacy.[6] Similarly, by requiring a particular description of the items to be seized, the fourth amendment protects the individual's interest in possessing personal property.[7] A search or seizure not meeting these requirements is presumed unreasonable.[8] However, there exist "a few specifically established and well-delineated exceptions" to the warrant requirement.[9] One of these exceptions, the plain view doctrine, allows the warrantless seizure of evidence observed by officers during lawful activity.[10]

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[5] The fourth amendment provides:

> 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.

U.S. CONST. amend. IV.

[6] Texas v. Brown, 460 U.S. 730, 747 (1983) (Stevens, J., concurring) (distinguishing between the interests protected by the prohibition of unreasonable searches and the interests protected by the prohibition of unreasonable seizures).

[7] *Id.*

[8] United States v. Place, 462 U.S. 696, 701 (1983).

[9] Katz v. United States, 389 U.S. 347, 357 (1967) (footnote omitted) (electronic surveillance of a telephone booth constituted a search and seizure within the meaning of the fourth amendment).

The Court has enumerated several exceptions to the *per se* rule against warrantless searches and seizures. *See, e.g.*, Oliver v. United States, 466 U.S. 170 (1984) (open fields); *Brown*, 460 U.S. at 735-36 (citing Warden v. Hayden, 387 U.S. 294 (1967)) (hot pursuit); United States v. Ross, 456 U.S. 798 (1982) (automobile search); New York v. Belton, 453 U.S. 454 (1981), United States v. Robinson, 414 U.S. 218 (1973), and Chimel v. California, 395 U.S. 752 (1969) (search of person and surrounding area incident to arrest); Almeida-Sanchez v. United States, 413 U.S. 266 (1973) (border searches); Terry v. Ohio, 392 U.S. 1 (1968) (stop and frisk); United States v. Jeffers, 342 U.S. 48, 51-52 (1951) (exigent circumstances); Zap v. United States, 328 U.S. 624 (1946) (consent searches); Hester v. United States, 265 U.S. 57 (1924) (abandoned property).

"For the most part, these exceptions are based upon a conclusion that under certain circumstances, the exigencies of a situation make immediate search and seizure without benefit of a warrant imperative." United States v. Hare, 589 F.2d 1291, 1293 (6th Cir. 1979).

[10] A series of cases established the plain view doctrine, culminating in Coolidge v. New Hampshire, 403 U.S. 443 (1971) (plurality opinion). *See* Stanley v. Georgia, 394 U.S. 557, 571 (1969) (Stewart, J., concurring); Ker v. California, 374 U.S. 23 (1963); McDonald v. United States, 335 U.S. 451, 461 (1948) (Burton, J., dissenting); Trupiano v. United States, 334 U.S. 669, 714-15 (1948) (Vinson, C.J., dissenting); United States v. Lefkowitz, 285 U.S. 452 (1927); Marron v. United States, 275 U.S. 192 (1927); United States v. Lee, 274 U.S. 559 (1927). *See also* Lewis & Mannle, *Warrantless Seizures and the "Plain View" Doctrine: Current Perspective*, 12 CRIM. L. BULL. 5, 7-17 (1976) [hereinafter Lewis & Mannle].

In *Coolidge v. New Hampshire*,[11] the Supreme Court announced the parameters of the plain view doctrine.[12] To permit the seizure of evidence under the plain view doctrine, the Court required the following conditions: (1) the officers' "initial intrusion" or occupancy of the viewing area must be lawful; (2) the incriminating character of the evidence viewed must be "immediately apparent" to the officers; and (3) the officers' discovery of the evidence must be "inadvertent."[13] Officers satisfy the first requirement if the entry to search is authorized by a warrant or one of the exceptions to the warrant requirement.[14] The second requirement is satisfied if the officer has probable cause to believe that the items observed are contraband or evidence of a crime.[15]

After *Coolidge*, however, debate continued over whether inadvertent discovery was necessary for a plain view seizure.[16] Forty-six

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11 403 U.S. 443 (plurality opinion).

12 *Id.* at 464-71 (plurality opinion).

13 *Brown*, 460 U.S. at 736-37 (plurality opinion) (summarizing the plain view doctrine after *Coolidge*) (citations omitted).

In *Coolidge*, officers acting under the authority of a warrant arrested the defendant and seized his automobile. 403 U.S. at 447-48 (plurality opinion). Subsequent searches of the car produced evidence used in the defendant's conviction. *Id.* at 448 (plurality opinion). On review, the Supreme Court invalidated the warrant because it had not been issued by a neutral judicial officer. The state then unsuccessfully argued that despite the invalid warrant, the search of the automobile was lawful under the plain view doctrine. *Id.* at 453, 464-73 (plurality opinion). In the plurality opinion in which Justices Douglas, Brennan, and Marshall joined, Justice Stewart established the conditions necessary for a plain view seizure, stating:

> 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. The doctrine serves to supplement the prior justification . . . and permits the warrantless seizure. Of course, the extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them; 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.

Id. at 466 (plurality opinion).

The Court held the search in *Coolidge* was not "inadvertent" because "the police had ample opportunity to obtain a valid warrant; they knew the automobile's exact description and location well in advance; [and] they intended to seize it when they came upon Coolidge's property." *Id.* at 472 (plurality opinion).

14 *See* Washington v. Chrisman, 455 U.S. 1 (1982) (officer may accompany arrested person into private areas after arrest and seize items in plain view); Project, *Sixteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1985-1986*, 75 GEO. L.J. 713, 756 (1987). *See supra* note 9 for cases that establish exceptions to the warrant requirement.

15 Arizona v. Hicks, 480 U.S. 321, 326 (1987) (holding that to make a plain view seizure, an officer must have probable cause to believe the item seized constitutes evidence of a crime or contraband).

16 In *Brown*, the Supreme Court remained divided over the inadvertent discovery requirement. The plurality opinion stated "[w]hatever may be the final disposition of the 'inadvertence' element of 'plain view,' it clearly was no bar to the seizure here." *Brown*,

states, the District of Columbia, and twelve United States Courts of Appeal have adopted the inadvertency requirement.[17] On the other hand, some courts have refused to apply the doctrine, noting that only a plurality of four justices supported the inadvertent discovery requirement in *Coolidge*.[18] Sixteen years after *Coolidge*, in *Arizona v. Hicks*,[19] Justice White noted that the inadvertent discovery requirement still had not been adopted by a majority of the Supreme Court.[20] In *Horton*, a majority of the Court finally agreed on the necessity of the inadvertent discovery requirement.[21]

III. Facts of the Case

Returning home from the San Jose Coin Club's annual coin show on January 13, 1985, Erwin Paul Wallaker found two masked men in his garage.[22] One man carried a machine gun, and the other brandished an electrical shocking device known as a "stun gun."[23] The two men bound Wallaker and robbed him of the cash entrusted to him as the coin club's treasurer.[24] The men also took collector coins, jewelry, and three rings from Wallaker's fingers.[25] During the course of the robbery, Wallaker spoke with the two men.[26] Later, Wallaker identified Terry Brice Horton, a fellow coin collector with whom Wallaker had conversed on several occasions, as one of his assailants.[27] Horton's attendance at the coin show on the day of the robbery supported this identification, as did a witness who saw the robbers leaving the scene.[28]

Based on Wallaker's and the other witness' identification, Ser-

460 U.S. at 743 (plurality opinion). In concurring, Justice White stated, "I continue to disagree with the views of four Justices in *Coolidge v. New Hampshire*, that plain view seizures are valid only if the viewing is 'inadvertent.'" *Id.* at 744 (White, J., concurring) (citation omitted). On the other hand, Justice Powell believed that the plain view doctrine articulated in *Coolidge* should not be criticized after over a decade of acceptance. *Id.* at 746 (Powell, J., concurring).

17 Horton v. California, 110 S. Ct. 2301, 2312 (1990) (Brennan, J., dissenting). The appendices to *Horton* provide a complete list of the courts adopting the inadvertency requirement. *Id.* at 2314-16.

18 *See* North v. Superior Court, 8 Cal. 3d 301, 307-08, 502 P.2d 1305, 1308-09, 14 Cal. Rptr. 833, 836 (1972); State v. Pontier, 95 Idaho 707, 712, 518 P.2d 969, 974 (1974); State v. Romero, 660 P.2d 715, 718 n.3 (Utah 1983).

19 480 U.S. 321 (1987).

20 *Hicks*, 480 U.S. at 330 (White, J., concurring).

21 *Horton*, 110 S. Ct. at 2308.

22 *Id.* at 2304.

23 *Id.*

24 *Id.*

25 *Id.*

26 *Id.*

27 *Id.*

28 *Id.*

geant Gary LaRault, an experienced police officer, believed he had probable cause to search Horton's residence for both the robbery proceeds and the weapons used.[29] His affidavit requesting a warrant to search Horton's residence included a police report describing both the robbery proceeds and weapons.[30] The magistrate, however, issued a warrant authorizing a search only for the proceeds, including the three particularly described rings.[31]

On January 30, 1985, Sergeant LaRault searched Horton's house without finding the stolen rings or other robbery proceeds.[32] During the search, LaRault observed in plain view several weapons described in the police report.[33] He seized "an Uzi machine gun, a .38 caliber revolver, two stun guns, a handcuff key, a San Jose Coin Club advertising brochure, and a few items of clothing described by [Wallaker]."[34] The evidence seized was not discovered "inadvertently" because LaRault testified that he was searching not only for the robbery proceeds described in the warrant, but also for other evidence associated with the crime.[35]

Denying Horton's motion to suppress the evidence seized during the search of his home, the trial court convicted Horton of armed robbery.[36] The California Appellate Court affirmed the conviction.[37] Relying on the holding of the Supreme Court of California in *North v. Superior Court*,[38] the appellate court concluded that the plain view requirement of inadvertence announced in *Coolidge* was not binding because it appeared in a concurrence signed by only

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29 *Id.*

30 *Id.*

31 *Id.*

32 *Id.*

33 *Id.* at 2304-05.

34 *Id.* at 2305. "Although [LaRault] viewed other handguns and rifles, he did not sieze them because there was no probable cause to believe they were associated with criminal activity." *Id.* at 2305 n.1.

35 *Id.* at 2305.

36 *Id.* at 2304-05.

37 *Id.* at 2305.

38 8 Cal. 3d 301, 502 P.2d 1305, 104 Cal. Rptr. 833 (1972). In *North*, during an arrest, officers seized and later searched the defendant's car. *Id.* at 304-05, 502 P.2d at 1306, 104 Cal. Rptr. at 834. The officers recognized the automobile as incriminating evidence, but they did not obtain a warrant authorizing the seizure and search of the automobile. *Id.* at 305, 502 P.2d at 1306-07, 104 Cal. Rptr. at 834-35. In upholding the plain view seizure, the court reasoned:

> If the plurality opinion in *Coolidge* were entitled to binding effect as precedent, we would have difficulty distinguishing its holding from the instant case, for the discovery of petitioner's car was no more "inadvertent" than in *Coolidge*. However, that portion of Justice Stewart's plurality opinion which proposed the adoption of new restrictions to the "plain view" rule was signed by only four members of the court (Stewart, J., Douglas, J., Brennan, J., and Marshall, J.).

Id. at 307, 502 P.2d at 1308, 104 Cal. Rptr. at 836.

four of the nine United States Supreme Court Justices.[39] The California Supreme Court denied Horton's petition for review,[40] and the United States Supreme Court granted certiorari to decide whether a plain view seizure required inadvertent discovery.[41]

IV. Supreme Court Opinions

A. THE MAJORITY OPINION

Affirming the California Appellate Court decision, the United States Supreme Court held that inadvertent discovery was not necessary for the warrantless seizure of evidence under the plain view doctrine.[42] Writing for the majority,[43] Justice Stevens concluded that two flaws existed in the plurality opinion that established the plain view doctrine's inadvertent discovery requirement.[44] First, Justice Stevens reasoned that search and seizure rules based on the objective rather than the subjective state of mind of the officer better served the purposes of law enforcement.[45] Second, Justice Stevens viewed the fourth amendment's underlying purpose of preventing general searches as not mandating the plain view doctrine's inadvertent discovery requirement.[46]

1. Application of Objective Standards

The Court concluded that the subjective intentions of a police officer should not affect the propriety of a search under the plain view doctrine.[47] The fact that a police officer anticipates finding evidence that is not included in the list of items specifically described in the search warrant should not invalidate the seizure of the evidence.[48] Because additional items would only expand the area he or she may lawfully search, the Court concluded that a police officer has no motivation to omit items for which he or she believes he or she has probable cause to search.[49] Only a mistake or oversight could explain an officer's failure to include such items in a

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39 *Horton*, 110 S. Ct. at 2305.
40 *Id.*
41 *Id.*
42 *Id.* at 2304.
43 Justice Stevens was joined by Chief Justice Rehnquist, Justice White, Justice Blackman, Justice O'Connor, Justice Scalia, and Justice Kennedy. *Id.*
44 *Id.* at 2308.
45 *Id.* at 2308-09.
46 *Id.* at 2309.
47 *Id.*
48 *Id.*
49 *Id.*

warrant.[50]

In support of this reasoning, the majority referred to an example given by Justice White in his dissent in *Coolidge*.[51] In this example, Justice White asked the reader to suppose that officers obtained a warrant to search for a rifle.[52] While limiting their search to areas where a rifle might be found, the officers observed, in plain view, two photographs.[53] Justice White further asked the reader to suppose that the officers inadvertently found one photograph, but anticipated finding the other.[54] Justice White asserted that if the Court held inadvertent discovery to be a requirement for search and seizure under the plain view doctrine, then only one of the photographs could be seized.[55] However, Justice White concluded that in terms of the fourth amendment, the possessory right interfered with is the same if either photograph is seized.[56] The officers' judgment regarding the possibility of finding the first photograph is no more reliable than their judgment concerning the second photograph.[57] In addition, the danger of losing the evidence remains the same to each photograph if the officers must leave the premises to secure another warrant.[58]

2. *General Warrants Remain Unconstitutional*

The Court further concluded that abolishing the plain view doctrine's inadvertent discovery requirement would not convert specific warrants to general warrants.[59] Justice Stevens recognized that for a magistrate to issue a warrant, the fourth amendment required that the warrant "particularly describ[es] the place to be searched and the persons or things to be seized."[60] He argued that, by itself, this requirement sufficiently limited the scope and duration of the search.[61] Requiring that the evidence seized in plain view be discovered inadvertently served no further purpose.[62]

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50 *Id.* at 2309 n.9 (quoting Coolidge v. New Hampshire, 403 U.S. 443, 517 (1971) (White, J., dissenting)).

51 *Id.* at 2309 (quoting *Coolidge*, 403 U.S. at 517 (White, J., dissenting)).

52 *Id.*

53 *Id.*

54 *Id.*

55 *Id.*

56 *Id.*

57 *Id.*

58 *Id.*

59 *Id.*

60 *Id.* (citing Maryland v. Garrison, 480 U.S. 79, 84 (1987); Steele v. United States No. 1, 267 U.S. 498, 503 (1925)).

61 *Id.*

62 *Id.* at 2309-10.

As applied to the present case, the Court found that the officers limited their search of Horton's residence to areas in which the three rings and other items included in the warrant could have been found.[63] If the rings and other items included in the warrant had been found immediately, the search would have concluded and no general search for weapons could have taken place.[64]

The Court also reasoned that the inadvertent discovery requirement did not further the fourth amendment's purpose of protecting privacy rights.[65] The Court stated that the privacy interest was infringed when the items came into plain view during a search, whether or not the police anticipated seeing the items.[66] Once the suspect's privacy was invaded through the issuance of a warrant defining the scope of the search, inadvertent discovery should not be a requirement for the seizure of items subsequently found.[67] In the present case, the Court concluded that Horton's privacy and possessory rights were not violated, because the search was authorized by the warrant and the seizure was authorized under the plain view doctrine.[68]

B. THE DISSENTING OPINION

Writing in dissent,[69] Justice Brennan supported the position advanced by Justice Stewart in *Coolidge*.[70] Relying heavily on the language of the fourth amendment, Justice Brennan asserted that the fourth amendment was designed to protect equally the interests of privacy and possession.[71] Justice Brennan reasoned that the fourth amendment protected these interests by requiring a magistrate to determine the area to be searched and the items to be seized.[72] Justice Brennan concluded that the possessory interests were better protected by the magistrate than by officers in the performance of their duties.[73] He stated that just as the search of an area without a warrant was *per se* unreasonable, the seizure of items without a warrant was also *per se* unreasonable.[74]

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63 *Id.* at 2310.
64 *Id.*
65 *Id.*
66 *Id.*
67 *Id.*
68 *Id.* at 2311.
69 Justice Brennan was joined by Justice Marshall. *Id.* (Brennan, J., dissenting).
70 *Id.* (Brennan, J., dissenting).
71 *Id.* (Brennan, J., dissenting).
72 *Id.* (Brennan, J., dissenting).
73 *Id.* (Brennan, J., dissenting).
74 *Id.* (Brennan, J., dissenting).

Justice Brennan stated that in order to avoid the inconvenience of obtaining a warrant for newly discovered evidence, the plain view doctrine allowed the seizure of evidence not described particularly in the original warrant.[75] However, the rationale of avoiding the inconvenience of obtaining another warrant was not present when the officers anticipated finding the evidence, and thus the inadvertent discovery requirement should be upheld.[76] Justice Brennan further noted the wide acceptance by state courts and law enforcement agencies of the inadvertent discovery requirement.[77]

Justice Brennan then addressed what the majority believed were two flaws in the inadvertent discovery requirement of the plain view doctrine.[78] Justice Brennan concluded that possessory interests were invaded whenever an officer had probable cause to obtain a warrant, but seized items without obtaining the warrant.[79] By requiring seizure of items in plain view to be inadvertent, the officers would be more diligent in obtaining search warrants.[80] Justice Brennan also concluded that without the inadvertency requirement, officers would attempt to avoid the often time-consuming warrant application process.[81] For example, an officer having probable cause to search for a large number of items may obtain a warrant only for a few items.[82] Justice Brennan argued that the officer rationally may find the risk of immediately finding the items on the warrant and having to conclude his or her search outweighed by the time saved in the warrant application process.[83]

Justice Brennan also disagreed with the majority's assertion that because the scope and duration of the search was limited by the items specified in the warrant, no additional interest was protected by the inadvertent discovery requirement.[84] While conceding that the inadvertency requirement furthered no privacy interest, Justice Brennan concluded that it did protect possessory interests.[85] Justice Brennan cited *Illinois v. Andreas* for the proposition that once an item is observed during a plain view search, the owner loses his or her privacy interest, but still retains his or her interest in possessing the

75 *Id.* at 2312 (Brennan, J., dissenting) (citing Coolidge v. New Hampshire, 403 U.S. 443, 470 (1971)).
76 *Id.* (Brennan, J., dissenting) (citing *Coolidge*, 403 U.S. at 470).
77 *Id.* (Brennan, J., dissenting).
78 *Id.* (Brennan, J., dissenting).
79 *Id.* at 2313 (Brennan, J., dissenting).
80 *Id.* (Brennan, J., dissenting).
81 *Id.* (Brennan, J., dissenting).
82 *Id.* (Brennan, J., dissenting).
83 *Id.* (Brennan, J., dissenting).
84 *Id.* (Brennan, J., dissenting).
85 *Id.* (Brennan, J., dissenting).

item.[86]

Finally, Justice Brennan concluded that the majority's decision would have limited impact and did not extend to permit pretextual searches.[87] Justice Brennan reasoned that officers should not be able to deliberately avoid the fourth amendment warrant requirements by obtaining a warrant to search for items from one crime, with the intention of seizing items in plain view from another crime, or using the "hot pursuit" exception to the warrant requirement to seize items in plain view.[88] Justice Brennan supported this point by noting that the state courts which had rejected the inadvertent discovery requirement had not held the fourth amendment to allow pretextual searches.[89]

V. ANALYSIS

The resolution of fourth amendment issues requires the striking of a balance between the need for effective law enforcement and the need for protection against unreasonable searches and seizures. The Court in *Horton* properly balanced these interests by eliminating the plain view doctrine's cumbersome and unnecessary inadvertent discovery requirement. In so doing, the Court advanced the interests of effective law enforcement by eliminating a confusing, impossible to define standard. More importantly, the Court's elimination of the inadvertent discovery requirement does not diminish the fourth amendment's purpose of protecting against unreasonable searches and seizures. One could argue that the abolition of the inadvertency requirement by *Horton* allows abuse of the plain view doctrine through pretextual searches. However, the possibility of abuse is severely limited by the plain view doctrine's other requirements. Thus, the Court correctly abolished the inadvertent discovery requirement to the plain view doctrine.

A. THE POSITIVE EFFECT ON LAW ENFORCEMENT

In announcing the inadvertent discovery requirement to the plain view doctrine in *Coolidge*, Justice Stewart failed to define what

86 *Id.* (Brennan, J., dissenting) (citing Illinois v. Andreas, 463 U.S. 765, 771 (1983)).

87 *Id.* (Brennan, J., dissenting). Pretextual searches and seizures objectively appear reasonable, but actually are conducted for reasons different than those underlying the creation of the fourth amendment power which authorizes the activity. *See* Haddad, *Pretextual Fourth Amendment Activity: Another Viewpoint*, 18 U. MICH. J.L. REF. 639, 641-43 (1985) [hereinafter Haddad]. *See infra* notes 122-134 and accompanying text for a complete discussion of the impact of the elimination of the inadvertent discovery requirement on pretextual activity.

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

89 *Id.* at 2314 (Brennan, J., dissenting).

level of expectation on the part of the seizing officer constitutes "inadvertency."[90] While the majority of courts accepted the inadvertency requirement,[91] judges and commentators continued to struggle over whether the level of expectation necessary for inadvertency should be defined by the subjective mind of the officer or by the existence of objective probable cause.[92] In *Horton*, Justice Stevens correctly concluded that the elimination of the inadvertent discovery requirement to the plain view doctrine would facilitate fair law enforcement.[93] While he demonstrated the costs imposed on law enforcement by a subjective standard, Justice Stevens failed to address the effects of applying an objective standard of inadvertency.[94] However, whether defined subjectively or objectively, the

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90 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." *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 244 (1971) [hereinafter *The Supreme Court, 1970 Term*].

In establishing the inadvertent discovery requirement, Justice Stewart stated:

> The rationale of the exception to the warrant requirement . . . is that a plain-view seizure will not turn an initially valid (and therefore limited) search into a "general" one, while the inconvenience of procuring a warrant to cover an inadvertent discovery is great. But where the discovery is anticipated, where 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 searches as '*per se* unreasonable' in the absence of 'exigent circumstances.'

Coolidge v. New Hampshire, 403 U.S. 443, 469-71 (1971) (plurality opinion).

91 The appendices to *Horton* provide a complete list of courts accepting the inadvertent discovery requirement. 110 S. Ct. at 2314-16.

92 One commentator offered two possible interpretations of the inadvertency standard announced by Justice Stewart in *Coolidge*:

> If the Rule is taken to mean that a plain-view discovery will be held invalid, because not inadvertent, only when the police have probable cause to believe that the evidence would be found, it will be of limited effect. . . .
>
> The inadvertence requirement will be far more significant if it is interpreted as requiring the invalidation of discoveries when the police have an expectation that evidence will be discovered on the premises but lack probable cause to search.

The Supreme Court, 1970 Term, supra note 90, at 244-45. *See also* 2 W. LAFAVE, SEARCH AND SEIZURE § 4.11(d), at 351 (2d ed. 1987) [hereinafter W. LAFAVE]; Comment, *Criminal Procedure—"Inadvertence": The Increasingly Vestigial Prong of the Plain View Doctrine*, 10 MEM. ST. U.L. REV. 399, 401 (1980) [hereinafter Comment, *Criminal Procedure—"Inadvertance"*]; Note, *Look But Don't Touch—The Limits on the Plain View Doctrine Following Arizona v. Hicks*, 10 GEO. MASON U.L. REV. 533, 536 (1988).

93 *Horton*, 110 S. Ct. at 2308-09.

94 Justice Stevens concluded that, "evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend on the subjective state of mind of the officer." *Id.* at 2308-09. However, in demonstrating the problems associated with the inadvertent discovery requirement, Justice Stevens failed to state clearly if the same problems would result from the application of an objective probable cause standard of inadvertency. Justice Stevens appears to address the subjective mind of the officer in stating:

> if he or she has a valid warrant to search for one item and merely a suspicion concerning the second, whether or not it amounts to probable cause, we fail to see, why

inadvertent discovery requirement imposes substantial costs on law enforcement, and thus was correctly abolished.

The Court in *Horton* correctly refused to apply a *subjective* standard of inadvertency. The subjective approach to inadvertency allows the admission of evidence seized under the plain view doctrine if the officer did not either anticipate or subjectively possess probable cause to search for the item. This approach imposes intolerable costs on law enforcement by arbitrarily excluding evidence, penalizing officers for not seeking broader warrants, and creating further evidentiary problems at trial.

Justice Stevens effectively demonstrated the subjective standard's arbitrary exclusion of evidence through an example given by Justice White in *Coolidge*.[95] Suppose while searching for a rifle listed in the warrant, an officer finds two incriminating photographs. If the officer anticipated finding one photograph and not the other, under a subjective standard of inadvertency the officer could seize only the photograph he or she did not anticipate finding. However, the danger to the evidence and the inconvenience to law enforcement are equal if an officer must obtain another warrant for seizure. The subjective standard of inadvertency undermines effective law enforcement by arbitrarily excluding incriminating evidence.

Furthermore, the subjective standard actually penalizes officers who seek narrow warrants. For example, suppose an officer believes probable cause exists to search for an item, but in good faith decides not to include the item in his or her request for a warrant because he or she is unsure of the likelihood of finding the item. If later found in plain view during the course of the search, the item is excluded because the officer anticipated its discovery. Thus, under the subjective standard, incriminating evidence is suppressed when an officer requests a narrow warrant in an effort to limit the invasiveness of the search.

Finally, an application of the subjective standard of inadvertency causes problems in evidentiary hearings. An officer's degree of expectation that evidence will be found can vary from a "hunch" to "practical certainty." In attempting to determine whether an of-

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that suspicion should immunize the second item from seizure if it is found during a lawful search for the first.

Id. at 2309. Also, Justice White's example in *Coolidge*, which is referred to by Justice Stevens, appears to address the subjective mind of the officer. *Id.* at 2309 (citing *Coolidge*, 403 U.S. at 516 (White, J., dissenting)). In distinguishing between two photographs, Justice White asks the reader to "assume also that the discovery of one photograph was inadvertent but the finding of the other was anticipated." *Coolidge*, 403 U.S. at 516 (White, J., dissenting).

95 *Horton*, 110 S. Ct. at 2309 (citing *Coolidge*, 403 U.S. at 517 (White, J., dissenting)).

ficer anticipated or subjectively possessed probable cause, a court effectively would be trying to label a concept that is impossible to define. Litigation would arise over the credibility of the officer's testimony that he or she did not believe probable cause existed to search for the items seized under the plain view doctrine. Furthermore, if multiple officers were involved in the search, issues would be raised over which officer's beliefs should be determinative.[96]

The application of an *objective* probable cause standard of inadvertency also imposes substantial burdens on law enforcement. For discovery to be sufficiently inadvertent to authorize a plain view seizure under the objective standard, probable cause must not objectively exist to search for items not listed on the warrant for seizure. The more accepted and reasonable view of *Coolidge* applies this objective definition of inadvertency.[97] Under *Coolidge*, when the evidence in plain view is not inadvertently discovered, the evidence is left vulnerable to disturbance while the officer returns for a warrant to seize the evidence. The most reasonable explanation for such a result is that probable cause must have objectively existed to search for the unlisted items, and thus the officer could have obtained a warrant for these items before commencing the search. However, if the officer only subjectively believed probable cause existed, a warrant could not have been obtained before the search commenced; thus, the evidence should not remain in danger of disturbance while the warrant is obtained.[98] While at first glance an

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[96] The Solicitor General pointed out several problems caused by the "subjective probable cause" test.

> First, in a case involving several officers, it would raise a question of which officer's subjective beliefs should be consulted. Second, it would likely give rise to litigation over the bona fides of the officer's testimony as to his beliefs, as well as challenges to the reasonableness of those beliefs. Third, it would still penalize the cautious officer who, while believing that he had probable cause to search for particular items, decided not to request authorization to search for those items because he regarded the likelihood that those items would be found on the premises to present a close question.

Amicus Curiae Brief of the Solicitor General for Respondent at 22 n.8, Horton v. California, 110 S. Ct. 2301 (1990) (No. 88-7164) [hereinafter Solicitor General's Brief].

[97] Federal and state courts which apply the inadvertent discovery requirement generally adopt the probable cause standard of inadvertency. *See* Moylan, *The Plain View Doctrine: Unexpected Child of the Great "Search Incident" Geography Battle*, 26 MERCER L. REV. 1047, 1083 & n.170 (1975)); Comment, *"Plain View"—Anything But Plain: Coolidge Divides the Lower Courts*, 7 LOY. L.A.L. REV. 489, 511 (1974); Note, *State v. White: The "Inadvertency Requirement of the Plain View Doctrine in North Carolina*, 67 N.C.L. REV. 1245, 1255 (1989) (citing Comment, *Criminal Procedure—"Inadvertence," supra* note 92, at 402).

[98] Lewis & Mannle, *supra* note 10, at 19.

The reasoning behind interpreting *Coolidge* as applying an objective probable cause standard can be summarized as follows:

> If the 'inadvertent discovery' limitation is to make any sense at all, however, it must at least mean that a discovery of objects not named in the warrant is always inadver-

objective standard of inadvertency appears reasonable, the application of the objective standard also imposes substantial costs on law enforcement. It suppresses evidence because of mistake or oversight, penalizes officers who do not request broad warrants, and creates evidentiary problems at trial.

First, Justice Stevens pointed out that the objective inadvertent discovery requirement suppresses evidence because of mistake or oversight. Justice Stevens reasoned that an officer with probable cause to search for an item possessed no motivation for omitting that item from his or her search warrant request.[99] If probable cause to search for an item objectively existed, upon application by an officer, the item would be included in the warrant. The probable explanation for the failure to include such an item was either the officer's mistake in recognizing that probable cause existed to search for the item or an oversight in the warrant application process.[100] However, under the objective standard of inadvertency, the evidence is excluded because probable cause did exist to search for the item. Thus, the objective standard of inadvertency causes a severe injustice by suppressing incriminating evidence as a result of mistake or oversight.[101]

In *Horton*, Justice Brennan disagreed with Justice Stevens on the deterrent effect of the inadvertency requirement on unreasonable searches and seizures.[102] Justice Brennan argued that absent the inadvertent discovery requirement, officers would be motivated to

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tent, without regard to the personal hopes or expectations of the executing officers, if there were not sufficient grounds to justify the issuance of a warrant which also named those objects which must be seized. In light of the fact that Justice Stewart is not prepared to require the police to return to the magistrate for a second warrant when the discovery was 'inadvertent,' the only plausible explanation for requiring such action in the remaining cases (without regard to the risk that the evidence may be lost in the interim) is because the police could have (and thus, apparently, should have) included the discovered object in the first warrant.

W. LAFAVE, *supra* note 92, § 4.11(d), at 351-52 (footnotes omitted). *See also The Supreme Court, 1970 Term*, *supra* note 90, at 244-46.

99 *Horton*, 110 S. Ct. at 2309 (citing *Coolidge*, 403 U.S. at 517 (White, J., dissenting)).

100 In his *Coolidge* dissent, Justice White similarly reasoned:

If the police have probable cause to search for a photograph as well as a rifle and they proceed to seek a warrant, they could have no possible motive for deliberately including the rifle but omitting the photograph. Quite the contrary is true. Only oversight or careless mistake would explain the omission in the warrant application if the police were convinced they had probable cause to search for the photograph.

403 U.S. at 517 (White, J., dissenting).

101 One commentator has asserted that courts often do not exclude evidence which was not listed in a warrant because of a mistake or oversight. Instead, courts "regularly characterize as 'inadvertent' the discovery of items as to which it appears the police could have made a probable cause showing in advance had it occurred to them to do so." W. LAFAVE, *supra* note 92, § 4.11(d), at 354-55 (footnote omitted).

102 *Horton*, 110 S. Ct. at 2312-13 (Brennan, J., dissenting).

omit from a warrant items which they had probable cause to search for in order to avoid an often time-consuming warrant process.[103] However, while in some circumstances the officers could be motivated to avoid a time-consuming warrant process, as later discussed, Justice Brennan failed to demonstrate the diminishing of any fourth amendment interest.[104]

The objective standard of inadvertency also penalizes officers for requesting authority for an intrusion narrower in scope than the constitutional limits. For example, suppose an officer subjectively believes that probable cause does not exist to search for an item, and thus does not include the item in his or her warrant request. While searching for items in a warrant, the officer observes the unlisted item in plain view and seizes it. Under the objective standard of inadvertency, if the court later determines that probable cause existed to search for the unlisted item, then the evidence is excluded.

Thus, under the objective standard of inadvertency, officers would be more likely to name more items in their warrant requests, because if probable cause is later found for a seized, but unlisted item, it will be excluded. By naming numerous items in a request, the warrant process becomes more and more complicated and time-consuming. In addition, the scope of the search is expanded to include places where the additional items may be located, resulting in further invasion of the suspect's privacy. Thus, the objective standard of inadvertency penalizes an officer for avoiding warrants which expand the search to the outer constitutional limits.

Finally, the objective probable cause standard for inadvertency causes evidentiary problems in exclusionary hearings.[105] Under this standard, officers in effect argue that probable cause did not exist for items not included in the warrant but seized under the plain view doctrine. At the same time, the defendant argues that the officers had probable cause and a warrant could have been obtained. By encouraging officers to suppress facts which would result in a finding of objective probable cause, the objective probable cause standard for inadvertency fails to encourage an accurate fact-finding process.[106]

The preceding examination of the practical effects of both the subjective and objective definitions of inadvertency exhibits the re-

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

104 *See infra* notes 107-121 and accompanying text for an explanation of the inadvertent discovery requirement's protection of fourth amendment interests.

105 W. LAFAVE, *supra* note 92, § 4.11(d), at 353-54.

106 *Id.* at 354 (citing *The Supreme Court, 1970 Term*, *supra* note 90, at 245).

quirement's inherent costs on the law enforcement process. The abolition of the inadvertent discovery requirement eliminates arbitrary exclusion of evidence, the suppression of incriminating evidence because of mistake or oversight, the penalizing of law enforcement officers for requesting narrow warrants, and inaccurate fact-finding in evidentiary hearings. Thus, in *Horton*, Justice Stevens correctly assessed these costs, and by eliminating the inadvertency requirement to the plain view doctrine, removed an unnecessary burden on effective law enforcement.

B. QUIETING THE CONCERN FOR A DIMINISHED FOURTH AMENDMENT

The Court's abolition of the plain view doctrine's inadvertent discovery requirement in *Horton* raises concern over the fourth amendment's prohibition of general searches and seizures.[107] By requiring that a warrant specify the place to be searched, the fourth amendment protects privacy interests. Similarly, the fourth amendment protects possessory interests by requiring that a warrant specifically describe the items to be seized.[108] In *Horton*, Justice Stevens correctly concluded that the plain view doctrine without the inadvertency requirement protected fourth amendment interests through the continued prohibition of general searches.[109] Justice Stevens effectively demonstrated that the inadvertency requirement was not necessary to protect privacy interests, although he failed to sufficiently address the effect of the inadvertency requirement on possessory interests. Nevertheless, an examination of the plain view doctrine reveals that the inadvertency requirement does not further any privacy or possessory interest. Thus, in *Horton*, the Court correctly abolished this unneeded limitation on the plain view doctrine.

As pointed out by Justice Stevens[110] and conceded by Justice

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107 *See* Payton v. New York, 445 U.S. 573, 583 (1980) ("It is familiar history that indiscriminate searches and seizures conducted under the authority of 'general warrants' were the immediate evils that motiviated the framing and adoption of the Fourth Amendment."); Warden v. Hayden, 387 U.S. 294, 312 (1967) (Fortas, J., concurring) ("The very purpose of the Fourth Amendment was to outlaw such [general] searches . . . ."); Standford v. Texas, 379 U.S. 476, 481 (1965) (framers' intent was that people should be secure "from intrusion and seizure by officers acting under the unbridled authority of a general warrant").

108 *See* 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.").

109 Horton v. California, 110 S. Ct. 2301, 2309 (1990).

110 *Id.* at 2310.

Brennan,[111] the inadvertency requirement provides no protection of privacy interests.[112] As Justice Stevens demonstrated, privacy interests are protected by other limitations on the scope of a plain view search. Under the plain view doctrine, a warrant specifically describing the place to be searched and the items to be seized authorizes the invasion of privacy.[113] The scope of the invasion or search is limited to areas where the items listed in the warrant could be found, and the search must conclude upon the location of the listed items.[114] If, during the course of the search, officers observe an item not listed in the warrant, no further privacy interest is invaded through its seizure.[115] For example, in *Horton*, the search was limited to areas in which the robbery proceeds could be located and, upon location of the robbery proceeds, the search would conclude. After the officers entered Horton's home under a warrant to search for the robbery proceeds, no further privacy interest was invaded by the officer's observation of the robbery weapons.

In establishing the plain view doctrine in *Coolidge*, Justice Stewart recognized an invasion of possessory interests by plain view seizures, but concluded the interests of law enforcement outweighed this "minor peril to Fourth Amendment protections . . . ."[116] Justice Stewart adopted the inadvertency requirement to prevent any further invasion of possessory interests through general searches.[117] In *Horton*, Justice Brennan correctly argued that the Court abolished the inadvertency requirement without discussing the impact on possessory interests.[118] However, both Justice Stew-

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111 "It is true that the inadvertent discovery requirement furthers no privacy interests." *Id.* at 2313 (Brennan, J., dissenting).

112 On the other hand, as the Solicitor General argued, the inadvertent discovery requirement could actually lead to greater invasions of privacy. Under the inadvertency rule, after observing incriminating evidence not listed in a warrant, officers would be forced to remain on the premises until a warrant for the discovered items was obtained. Thus, the officers stay is extended and the invasion of privacy increased. Solicitor General's Brief, *supra* note 96, at 19-20.

113 Exceptions to the warrant requirement, such as an arrest, also authorize the invasion of privacy. *See supra* note 9 for a list of exceptions to the warrant requirement.

114 In the case of arrest, officers are limited to the areas in which the suspect could be located, and the search terminates on his or her location.

115 *Horton*, 110 S. Ct. at 2306 (citing Arizona v. Hicks, 480 U.S. 321, 325 (1987); Illinois v. Andreas, 463 U.S. 765, 771 (1983)).

116 Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971) (plurality opinion).

117 "The Warrant clause of the Fourth Amendment categorically prohibits the issuance of any warrant except one 'particularly describing the place to be searched and the persons or things to be seized.' The manifest purpose of this particularity requirement was to prevent general searches." Maryland v. Garrison, 480 U.S. 79, 84 (1987).

118 "The Court today eliminates a rule designed to further possessory interests on the ground that it fails to further privacy interests." *Horton*, 110 S. Ct. at 2313 (Brennan, J., dissenting).

art and Justice Brennan were incorrect in their assertions that the inadvertency requirement was required for the prohibition of general searches and the protection of possessory interests.[119]

The requirement that the incriminating value of the items seized be immediately apparent serves to prohibit general seizures and protect the suspect's possessory interests. In conducting a search, officers remain unable to seize random items; they may only seize an item about which probable cause exists to believe it constitutes evidence of a crime or contraband.[120] In *Horton* for example, the plain view seizure was upheld only because the incriminating character of the weapons was immediately apparent. Thus, the inadvertency requirement is not necessary to prohibit general searches under the plain view doctrine.

Furthermore, any protection of possessory interests provided by the inadvertent discovery requirement is arbitrary and inefficient, because the possessory interests invaded by a plain view seizure are the same whether or not the discovery was inadvertent. For example, if the police seize two photographs under the plain view doctrine, one which they intended to seize and the other which they did not, the owner's interest in retaining possession is the same with each photograph. However, the inadvertent discovery requirement protects only the photograph the officers did not anticipate finding.

On the other hand, the plain view doctrine without the inadvertency requirement is consistent with limitations governing the seizure of publicly located items. If probable cause exists to believe a publicly located item is associated with a crime, then an officer may seize that item.[121] While only a search involves privacy interests, a public seizure and a plain view seizure during a search involve the same possessory interests. Under the plain view doctrine, the intrusion on privacy interests is authorized by a warrant or exigent circumstances, and the invasion of possessory interests authorized by the incriminating character of the evidence. By abolishing the inadvertency requirement, the Court in *Horton* allows the plain view seizures under circumstances consistent with the rules governing public seizures.

Despite the assertions of Justice Brennan in *Horton* and Justice

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119 *Id.* (Brennan, J., dissenting).

120 Arizona v. Hicks, 480 U.S. 321, 326 (1987).

121 In Texas v. Brown, Justice Stevens commented:

> [I]f an officer has probable cause to believe that a publicly situated item is associated with criminal activity, the interest in possession is outweighed by the risk that such an item might disappear or be put to its intended use before a warrant could be obtained. The officer may therefore seize it without a warrant.

Texas v. Brown, 460 U.S. 730, 748 (1982) (Stevens, J., concurring) (citations omitted).

Stewart in *Coolidge*, the inadvertency requirement furthers no fourth amendment interest. Justice Stevens effectively demonstrated that the remaining requirements of the plain view doctrine effectively protect privacy interests through the continued prohibition of general searches. After *Horton*, the plain view doctrine also continues to protect possessory interests by prohibiting general seizures. Thus, the abolition of the inadvertency requirement eliminated an unnecessary restriction on plain view searches.

C. THE STATUS OF PRETEXTUAL SEARCHES AFTER *HORTON*

The abolition of the inadvertent discovery requirement arguably permits abuse of the plain view doctrine through pretextual activity. Nevertheless, because such abuse is limited by the plain view doctrine's other requirements and law enforcement substantially benefits, the Court correctly abolished the inadvertency requirement in *Horton*. Pretextual issues arise when the officer conducts a search or seizure for reasons different than those underlying the creation of the fourth amendment power authorizing the search or seizure.[122] For example, an officer obtains a warrant to search a suspect's home for evidence related to Crime A, when the officer's actual motivation for the search is to make a plain view seizure of evidence related to Crime B.[123] Similarly, in hopes of making a plain view seizure, an officer times his arrest in order to gain access to an area for which he does not have probable cause to search.[124] In both these examples, the officer uses a justified intrusion as a subterfuge to make a plain view search and seizure. The plain view doctrine unequivocally was not created to allow an officer to intentionally circumvent the fourth amendment requirement that a warrant specifically describe the items to be seized.

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122 *See* Haddad, *supra* note 87, at 641-43.

123 In *Horton*, Justice Brennan referred to a similar example of pretextual activity:

> For example, if an officer enters a house pursuant to a warrant to search for evidence of one crime when he is really interested only in seizing evidence related to another crime, for which he does not have a warrant, his search is "pretextual" and the fruits of that search should be suppressed.

110 S. Ct. at 2313-14 (Brennan, J., dissenting) (citing State v. Kelsey, 592 S.W.2d 509 (Mo. Ct. App. 1979)). Justice Brennan explained the *Kelsey* holding in a parenthetical following his citation of the case; he wrote that the

> evidence [was] suppressed because [the] officers, who had ample opportunity to obtain warrant relating to murder investigation, entered the premises instead pursuant to a warrant relating to a drug investigation, and searched only the hiding place of the murder weapon, rather than conducting a "top to bottom" search for drugs.

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

124 *Id.* at 1214 (Brennan, J., dissenting) (stating examples of pretextual activity).

In *United States v. Scott*[125] and *United States v. Villamonte-Marquez*,[126] the Court decided to evaluate fourth amendment issues under objective standards. Unfortunately, these decisions made the constitutional status of pretextual searches and seizures unclear. In *Scott*, while conducting a wiretapping, officers intercepted all calls despite a court order to monitor only those calls of evidentiary value.[127] The Court upheld the searches "under a standard of objective reasonableness without regard to the underlying intent or motivation of the officers involved."[128] In *Villamonte-Marquez*, under authorization of a statute which allows officers to board vessels for document-inspection, officers boarded a vessel "without any suspicion of wrongdoing."[129] Although noting the possibility of pretext, the Court dismissed this argument by relying on their rejection in *Scott* of a "subjective" approach to fourth amendment issues.[130] Through the abolition of the inadvertency requirement in *Horton*, the Court continued to evaluate the lawfulness of searches and seizures without regard to the officer's intent.

Justice Stevens failed to comment on the effect of the abolition of the inadvertency requirement on pretextual searches. The facts of *Horton* did not confront the Court with a pretextual search. In the affidavit requesting the search warrant, the seizing officer attempted to comply with the fourth amendment's warrant requirements by referring to a police report that described the robbery weapons. As probable cause existed to search for both the weapons and the proceeds, the omission of weapons from the warrant can be explained only as a mistake or oversight. Thus, while holding that inadvertent discovery is not necessary to make a plain view seizure, the Court in *Horton* did not explicitly hold that pretextual searches are constitutional.

However, absent a return to subjective standards, the abolition of the inadvertency requirement in *Horton* allows abuse of the plain view doctrine through pretextual searches. The seizures of items in

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125 436 U.S. 128 (1978).

126 462 U.S. 579 (1983).

127 *Scott*, 436 U.S. at 131-32.

128 *Id.* at 138.

129 *Villamonte-Marquez*, 462 U.S. at 581.

130 *Id.* at 584 n.3. The court stated in *Villamonte-Marquez*:

> Respondents, however, contend in the alternative that because the customs officers were accompanied by a Louisiana state policeman, and were following an informant's tip that a vessel in the ship channel was thought to be carrying marihuana, they may not rely on the statute authorizing boarding for inspection of the vessel's documentation. This line of reasoning was rejected in a similar situation in Scott v. United States, and we again reject it.

Id. (citation omitted).

the above examples of pretextual activity meet the two requirements of the plain view doctrine remaining after *Horton*. First, the officer legally entered the suspect's premises, either through the warrant to search for items related to crime A or to arrest the suspect. Second, in both examples, the incriminating character of the seized items was immediately apparent. Thus, although conducted for reasons contrary to the creation of the plain view doctrine, after *Horton*, the seizures in the above examples of pretextual activity would not be found unlawful.

In his dissent, Justice Brennan incorrectly concluded that pretextual searches remain unconstitutional after *Horton*.[131] Justice Brennan gave examples of pretextual activity similar to the above examples and asserted that "[s]uch conduct would be a deliberate attempt to circumvent the constitutional requirement of a warrant 'particularly describing the place to be searched, and the persons or things to be seized,' and cannot be condoned."[132] However, Justice Brennan made this assertion without demonstrating how the plain view doctrine as applied in *Horton* would prevent pretextual searches.

In support of his conclusion, Justice Brennan cited two states which did not accept the plain view doctrine's inadvertency requirement, but continued to view pretextual searches as unconstitutional.[133] However, the cases to which Justice Brennan refers not only do not involve pretextual activity, but they also fail to demonstrate how the plain view doctrine will prohibit the above examples of pretextual activity.[134]

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131 Horton v. California, 110 S. Ct. 2301, 2313-14 (1990) (Brennan, J., dissenting). Commentators have disputed whether the Court has ever held pretextual activity in itself unconstitutional. One commentator has argued that, in cases before and after *Scott* and *Villamonte*, the Court acknowledged that pretextual searches are unconstitutional. Burkoff, *The Pretext Search Doctrine: Now You See it, Now You Don't*, 17 U. MICH. J.L. REF. 523, 544-48 (1984). On the other hand, another commentator has argued:

> In fact, unlike the lower courts, the Supreme Court has never ordered lower court exclusion of evidence because on a particular occasion an officer, although acting within the fourth amendment, was improperly motivated. Frequently, however, the Court has expanded fourth amendment limitations upon police in part to reduce the opportunity and incentive for officers to engage in pretextual fourth amendment activity.

Haddad, *supra* note 87, at 653.

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

133 *Id.* at 2314 (Brennan, J., dissenting) (citing State v. Bussard, 760 P.2d 1197, 1204, n.2 (Idaho App. 1988); State v. Kelly, 718 P.2d 385, 389 n.1 (Utah 1986)).

134 In State v. Bussard, the court allowed a plain view seizure only when the evidence was discovered during permissible police behavior. *Bussard*, 760 P.2d at 1204. The court stated that this requirement had been improperly referred to as the inadvertent discovery requirement. *Id.* at 1204 n.2. The court concluded that taken together, *Coolidge* and *Brown* "make it clear that the police may not use the warrant as a pretext to look

Thus, while not holding pretextual searches constitutional, absent a return to subjective standards, the Court in *Horton* appears to allow abuse of the plain view doctrine through pretextual activity. However, such abuse will be limited severely by the plain view doctrine's requirements that the initial intrusion be lawful and that the incriminating character of the evidence viewed be immediately apparent.

VI. CONCLUSION

By abolishing the inadvertent discovery requirement, the Court in *Horton* removed an unnecessary limitation on the plain view doctrine. Although failing to address all the possible alternatives, the Court correctly concluded that the abolition of the inadvertency requirement enhances effective law enforcement. Also, the plain view doctrine after *Horton* continues to protect fourth amendment interests through the prohibition of general searches and seizures. Finally, while not holding pretextual searches constitutional, the Court's abolition of the inadvertency requirement permits limited abuse of the plain view doctrine through pretextual activity. However, the Court correctly abolished the inadvertent discovery requirement considering the substantial enhancement of law enforcement and the continued protection of fourth amendment interests.

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for additional items in places or at times unrelated to the search authorized by the warrant." *Id.* However, in *Bussard*, the facts did not confront the court with a pretextual issue, and the court failed to demonstrate how pretextual activity will be prohibited without the inadvertent discovery requirement.

In State v. Kelly, the Supreme Court of Utah noted that they previously failed to adopt the inadvertency requirement. *Kelly*, 718 P.2d at 389 n.1 (citing State v. Romero, 660 P.2d 715, 718 n.3 (Utah 1983)). However, the court further stated, "the plain view exception may not be used merely as a pretext for a warrantless search, *i.e.*, where officers know in advance that an item will be present and use that knowledge as justification for a warrantless search and seizure." *Id.* The court demonstrated the effects of this requirement by referring to a case in which officers knew illegal drugs were growing on the suspect's premises, but did not observe the drugs until entering the premises without a warrant. *Id.* at 389-90 n.1 (citing State v. Harris, 671 P.2d 175 (Utah 1983)). The plain view seizure was disallowed "because the evidence was not discovered incident to a prior justified intrusion, but was instead the result of an uninvited entry by which the officers achieved 'plain view.' " *Id.* (quoting *Harris*, 671 P.2d at 181). In Justice Brennan's examples of pretextual activity, a warrant or arrest justifies the intrusion, and thus the requirements for plain view seizures announced in *Kelly* fail to prohibit such pretextual activity.