

1990

Mario Jose Velasquez v. The State of Utah : Petition for Writ of Certiorari

Utah Supreme Court

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UTAH
DEPARTMENT
OF JUDICIAL
ADMINISTRATION
DOCKET NO. _____

900218-CA

IN THE SUPREME COURT OF THE STATE OF UTAH

MARIO JOSE VELASQUEZ,	:	
	:	
Petitioner,	:	
	:	
v.	:	
	:	Case No. <u>910195</u>
THE STATE OF UTAH,	:	Court of Appeals
	:	Case No. 900218-CA
Respondent.	:	Priority No. 13

PETITION FOR WRIT OF CERTIORARI TO
THE UTAH COURT OF APPEALS

This Petition for Writ of Certiorari arises out of an appeal from a judgment and conviction for Unlawful Possession of a Controlled Substance, a third degree felony, in violation of Utah Code Ann. section 58-37-8 (1990), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Leonard H. Russon, Judge, presiding.

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FILED

MAY 1 1991

CLERK SUPREME COURT,
UTAH

IN THE SUPREME COURT OF THE STATE OF UTAH

MARIO JOSE VELASQUEZ,	:	
Petitioner,	:	
V.	:	
THE STATE OF UTAH,	:	Case No. _____
Respondent.	:	Court of Appeals
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IN THE SUPREME COURT OF THE STATE OF UTAH

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Petitioner,	:	Supreme Court
v.	:	Case No. _____
STATE OF UTAH,	:	Court of Appeals
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	:	Priority No. 13

QUESTION PRESENTED FOR REVIEW

In pretext search cases, under Article I section 14 of the Utah Constitution, should courts consider the subjective intent of the searching officer?

OPINION AND ORDER OF THE COURT OF APPEALS

The Court of Appeals' decision and the trial court's ruling are in Appendix 1.

JURISDICTION OF THE UTAH SUPREME COURT

The Court of Appeals filed the Velasquez decision on April 1, 1991. This petition is timely under Utah Rule of Appellate Procedure 48(a).

This Court's statutory jurisdiction over this petition for certiorari is provided by Utah Code Ann. section 78-2-2(3)(a) and (5) (Supp. 1990).

CONTROLLING CONSTITUTIONAL PROVISION

The following constitutional provision is contained in the body of this petition:

Constitution of Utah, Article I section 14 (1953)

STATEMENT OF THE CASE

A. PROCEEDINGS BELOW

Mr. Velasquez was charged with two counts of possession of controlled substances (R. 8-9). After the trial court denied his motion to suppress the evidence seized by the police (R. 28-33), Mr. Velasquez entered a conditional no contest plea to one possession count, reserving the right to appeal the denial of the motion to suppress (R. 36-43).

The Court of Appeals affirmed the trial court's denial of the motion to dismiss.

B. FACTS

The issue before the trial court and the Court of Appeals was the pretextual nature of Officer Hedenstrom's conduct in stopping Mr. Velasquez and searching his car. See Appendix 2, containing the motion to suppress filed in the trial court, and the table of contents in Mr. Velasquez's opening brief in the Court of Appeals. In apparent reliance on State v. Sierra's rule that the subjective intent of the searching officer is not to be considered, 754 P.2d 972, 977-979 and n.3, the trial court and the Court of

Appeals did not consider the following evidence of Officer Hedenstrom's pretextual intent:

Officer Hedenstrom did not stop Mr. Velasquez's car when Officer Hedenstrom first noticed the mismatched license plates, as Mr. Velasquez was parking the car on State Street (T. 3-4).

Officer Hedenstrom explained why he did not cite Mr. Velasquez for the mismatched plates: "The rear plate was the correct plate." (T. 12). Officer Hedenstrom did not testify about when he ascertained that the rear plate was correct (for example, if he called in the registration after he noticed the car parking on 9th South and State Street, and before the stop).

Officer Hedenstrom indicated he decided to arrest Mr. Velasquez for "no license" and that the decision to arrest was within his discretion (T. 9-10). Prior to and during the search of the car, Mr. Velasquez apparently was not taken by Officer Mosier (who had a separate patrol car from Officer Hedenstrom) to the police station for "no license" but apparently was held until the search was complete--he was booked for "no license" and for possession of a controlled substance (T. 8-9).

Officer Hedenstrom produced no inventory policy and indicated that the inventory sheet was not produced with the police reports and that he did not have a copy of the inventory sheet (T. 11, 14). Officer Hedenstrom maintained that his performance of the impound-inventory search complied with department policy (T. 14), explaining that, as a matter of policy, impounded vehicles

are searched "for valuables and any evidence." (T. 6) (emphasis added).

REASON WHY QUESTION PRESENTED JUSTIFIES ISSUANCE OF THE WRIT

This Court should grant certiorari on the question, because Utah law in pretext cases, following confused federal precedent, is inconsistent. This Court should clarify that under Article I section 14 of the Utah Constitution,¹ evidence of the officer's subjective intent is relevant in pretext search cases.

A. PRETEXT CASE LAW IS CONFUSING.

The role of subjective intent of the officer in pretext cases involves a great deal of confusing case law and has spawned a fair amount of scholarly debate. Appendix 3 to this petition contains an article giving an overview of the case law and commentary, Burkoff, "The Pretext Search Doctrine Returns After Never Leaving," 66 U. Detroit L.Rev. 363 (1989), hereinafter "Burkoff article".²

1. Article I section 14 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 warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized."

2. See also LaFave, Search and Seizure, section 1.4, pages 80 through 97, and pages 12 through 14 of the supplement; section 5.2(e), pages 456 through 461 and pages 47 through 48 of the supplement; section 7.5(e), pages 141 through 145 and pages 15 and 16 of the supplement; Burkoff, "The Pretext Search Doctrine: Now You See It, Now You Don't," 17 U.Mich.J.L.Ref. 523 (1984); Burkoff, (footnote continued)

In State v. Sierra, 754 P.2d 972 (Utah Ct. App. 1990), the Utah Court of Appeals explicitly stated that the subjective intent of the officer is irrelevant, and repeatedly emphasized that the inquiry under the fourth amendment must be objective. Id. at 977-979 and n.3. The Sierra Court's objective assessment rule is an accurate quotation of Scott v. United States, 436 U.S. 128 (1978),

"Whether a Fourth Amendment violation has occurred 'turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time,' and not on the officer's actual state of mind at the time the challenged action was taken."
Maryland v. Macon, 472 U.S. 463, 105 S.Ct. 2778, 2783, 86 L.Ed.2d 370 (1985) (quoting Scott v. United States, 436 U.S. 128, 136 (1978)).

Sierra, 754 P.2d at 977.³

However, in federal cases prior to and subsequent to Scott, the United States Supreme Court has evaluated the subjective intent of the officer in determining whether a fourth amendment violation

(footnote 2 continued)

"Bad Faith Searches," 57 N.Y.U.L.Rev. 70 (1982); A. Eisemann Note, 63 B.U.L.Rev. 223 (1983); Haddad, "Pretextual Fourth Amendment Activity: Another Viewpoint," 18 U.Mich.J.L.Ref. 639 (1985); and Burkoff, "Rejoinder: Truth, Justice and the American Way--Or Professor Haddad's 'Hard Choices,'" 18 U.Mich.J.L.Ref. 695 (1985).

3. It is arguable that the objectivity rule in Scott is dicta, see Burkoff article at 366-368; Burkoff, "Bad Faith Searches," 57 N.Y.U.L.Rev. 70, 83-84 (1982); Burkoff, "The Pretext Search Doctrine: Now You See It, Now You Don't," 17 U.Mich.J.L.Ref. 523 (1984); and that the legal underpinnings of that dicta are wanting, see LaFave, Search and Seizure, section 1.4, pages 81-83; A. Eisemann Note, 63 B.U.L.Rev. 223, 242-244 (1983); Burkoff, "Bad Faith Searches," 57 N.Y.U.L.Rev. 70 (1982).

has occurred.⁴

But in other cases, the Court has repeated the Scott objective test relied on by the court in Sierra.⁵

Utah case law following the federal precedents is also confusing. It seems that while the Court of Appeals maintains that reference to the officer's subjective state of mind is inappropriate, in practice, the court has found reference to the officer's subjective state of mind helpful in assessing allegations of pretext stops.⁶

4. See e.g. Jones v. United States, 357 U.S. 493, 500 (1958); Abel v. United States, 362 U.S. 217, 226, 230 (1960); Ker v. California, 374 U.S. 23, 42-43 (1963); South Dakota v. Opperman, 428 U.S. 364, 376 (1976); Colorado v. Bannister, 449 U.S. 1, 4 n.4 (1980) (per curiam); Steagald v. United States, 451 U.S. 204, 215 (1981); Michigan v. Clifford, 464 U.S. 287, 292 (1984) (plurality opinion); Colorado v. Bertine, 479 U.S. 367, 371, 372 (1987); Maryland v. Garrison, 480 U.S. 79, 85, 87 (1987); O'Connor v. Ortega, 480 U.S. 709, 729 (1987) (plurality opinion). See also Burkoff article at 366-367, 394-408 (1989); Burkoff, "Bad Faith Searches," 57 N.Y.U.L.Rev. 70, 75-83 (1982); Burkoff, "The Pretext Search Doctrine: Now You See It, Now You Don't," 17 U.Mich.J.L.Ref. 523, 544-548 (1984); A. Eisemann Note, 63 B.U.L.Rev. 223, 242-244 (1983).

5. See e.g. United States v. Villamonte-Marquez, 462 U.S. 579, 584 n.3 (1983); Maryland v. Macon, 472 U.S. 463, 471 (1985). See also Burkoff article at 369-372; Burkoff, "The Pretext Search Doctrine: Now You See It, Now You Don't," 17 U.Mich.J.L.Ref. 523, 524-525, 528-532 (1984).

6. See e.g. State v. Marshall, 791 P.2d 880 (Utah Ct. App. 1990) ("Furthermore, unlike the officer in Sierra, Trooper Avery was not suspicious of Mr. Marshall for other reasons before the stop, had not followed him in order to find some reason to pull him over, and before the alleged violation occurred, had not radioed for help thereby indicating he intended to stop the vehicle."); State v. Sierra, 754 P.2d 972, 979-980 (Utah Ct. App. 1988) ("Our conclusion that a reasonable officer would not have stopped Sierra for traveling in the left lane is buttressed by the events preceding Officer Smith's seizure of Sierra's automobile. As previously
(footnote continued)

B. UNDER THE UTAH CONSTITUTION, THE SUBJECTIVE INTENT OF AN OFFICER SHOULD BE ONE FACTOR OPEN TO CONSIDERATION IN PRETEXT CASES.

In State v. Larocco, 794 P.2d 460 (Utah 1990), the Court explicitly held that under the Utah Constitution, "exclusion of illegally obtained evidence is a necessary consequence of police violations of article I section 14." Id. at 472 (emphasis added). But see Larocco at 473 (indicating that further development of the exclusionary rule under the State Constitution might lead to recognition of exceptions to the rule).

The necessary exclusion of evidence under the Utah Constitution is the reason that the federal Scott limitation of subjective intent evidence should be rejected. Under the federal fourth amendment Scott decision, the subjective intent of the officer is not entirely irrelevant, but is pertinent to determining whether exclusion of evidence is an appropriate remedy. The Scott Court stated,

(footnote 6 continued)

stated, Officer Smith was suspicious of Sierra before he observed Sierra commit any purported traffic violation. He had radioed for a computer check of the car's license plate but found it was not stolen. Nevertheless, he radioed for back-up assistance and exceeded the posted speed limit to catch Sierra."). See also Burkoff article at 375 and n.56 (citing four Utah cases in which "motivational evidence" is used in pretext cases); State v. Lovegren and Southern, 798 P.2d 767 (Utah Ct. App. 1990), at 768 and n.3 (examining the officer's actual purpose) and at 771 n.10 ("While the individual officer's own practice may well be probative of what the hypothetical reasonable officer would do under the circumstances, his characterization of his intent at the time is essentially irrelevant.") (emphasis added, citation omitted). But see State v. Smith, 781 P.2d 879, 883 (Utah Ct. App. 1989) (disregarding the motivation of the officer, apparently because a traffic violation was actually committed and a hypothetical officer would have made the stop).

This is not to say, of course, that the question of motive plays absolutely no part in the suppression inquiry. On occasion, the motive with which the officer conducts an illegal search may have some relevance in determining the propriety of applying the exclusionary rule. For example, in United States v. Janis, 428 U.S. 433, 458, 49 L.Ed.2d 1046, 96 S.Ct. 3021 (1976), we ruled that evidence unconstitutionally seized by state police could be introduced in federal civil tax proceedings because "the imposition of the exclusionary rule . . . is unlikely to provide significant, much less substantial, additional deterrence. It falls outside the offending officer's zone of primary interest." See also United States v. Ceccolini, 435 U.S. 268, 276-277, 55 L.Ed.2d 268, 98 S.Ct. 1054 (1978). This focus on intent, however, becomes relevant only after it has been determined that the Constitution was in fact violated. We also have little doubt that as a practical matter the judge's assessment of the motives of the officers may occasionally influence his judgment regarding the credibility of the officers' claims with respect to what information was or was not available to them at the time of the incident in question. But the assessment and use of motive in this limited manner is irrelevant to our analysis of the questions at issue in this case.

436 U.S. 128, 139 n.13.⁷

Because exclusion of evidence is a necessary consequence of an Article I section 14 violation, the Scott rule, limiting the relevance of the officer's subjective intent to the exclusion question, does not apply.

There are several reasons why this Court should explicitly hold that an officer's subjective intent is relevant to pretext cases under Article I section 14. Assuming that deterrence of

7. For criticism of this two-step approach, see Burkoff, "The Court that Swallowed the Fourth Amendment," 58 Ore.L.Rev. 151, 187-190 (1979).

police misconduct is one of the bases for the Utah exclusionary rule, see State v. Larocco, 794 P.2d 460, 473 (Utah 1990), a police officer's improper behavior should not be protected from scrutiny by reference to fiction (the hypothetical reasonable officer/objective test).

Such hypothetical justification might draw a court into the privacy violation. See State v. Arroyo, 796 P.2d 684, 689 (Utah 1990) (one purpose of the federal exclusionary rule is to "prevent making a court a 'party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions.'" (quoting Terry v. Ohio, 392 U.S. 1, 13 (1968))).

If evidence of the officer's state of mind is to be ignored in the application of the deterrent exclusionary rule, it seems that resort to less reliable and relevant criteria becomes necessary. Is the pretext inquiry logically focused on whether a traffic violation actually occurred?⁸ Is the pretext inquiry logically focused on whether the traffic violation is legally prohibited?⁹ Is the

8. Compare State v. Sierra, 754 P.2d at 979 ("[W]e are unable to assess whether Sierra even violated Utah's left-lane provisions. The trial judge did not find that Sierra had violated any traffic statutes.") with Sierra at 978-979 (recognizing that even actual traffic violations may be used as subterfuge justifications for pretextual stops).

9. Compare State v. Marshall, 791 P.2d 880, 883 (Utah Ct. App. 1990) ("Courts consistently have held that a police officer can stop a vehicle when he or she believes the vehicle's safety equipment is not functioning properly.") (emphasis added), with State v. Sierra, 754 P.2d 972, 978 (Utah Ct. App. 1988) ("The proper inquiry does not focus on whether the officer could validly have made the stop.") (emphasis in original).

pretext inquiry logically focused on the frequency with which similar stops have been made by the officer in question or other officers or by a hypothetical officer?¹⁰

C. THIS CASE PROVIDES AN APPROPRIATE FORUM FOR CLARIFICATION OF THE LAW.

In seeking to suppress the evidence seized in the search conducted by Officer Hedenstrom, Mr. Velasquez relied on Article I section 14 of the Utah Constitution and focused on the pretextual nature of Officer Hedenstrom's conduct (R. 25).¹¹ At the hearing on the motion to suppress, defense counsel referred State v. Sierra, 754 P.2d 972 (Utah Ct. App. 1988), providing the court with a copy of Sierra, and asking the court to read the cases prior to ruling on

10. See State v. Arroyo, 770 P.2d 153, 155 and n. 2 (noting that the officer in question and other officers do not frequently stop cars for the violation in question); Burkoff, "Bad Faith Searches," 57 N.Y.U.L.Rev. 70, 110 (1982) (noting that standard police practices may be unconstitutional, that there may be valid reasons to depart from standard police practices that have nothing to do with pretextual motivations).

11. Mr. Velasquez did not explicitly argue that the Court should clarify the law, recognizing the subjective intent of the officer as a pertinent consideration under Article I section 14. This is explained by the fact that this case was heard on March 20 and 22, 1990, before the filing of State v. Larocco, 794 P.2d 460 (Utah May 30, 1990). See State v. Hargraves, 153 Utah Adv. Rep. 33 (Utah Ct. App. 1991) (court addressed search and seizure issue for the first time on appeal because the case was heard prior to the filing of a determinative decision by this Court). See also State v. Jewett, 500 A.2d 533 (Vt. 1985) (appellate court will require rebriefing of state constitutional issues if they have not yet been raised adequately); State v. Earl, 716 P.2d 803, 806 (Utah 1986) (citing Jewett with approval on topic of state constitutional analysis).

the motion (T. 15). Defense counsel addressed the pretext issue as follows,

In addition to that, Judge, the other thing is to, and you will see that in the State v. Sierra, they have indicated, yes, a police officer may however stop an automobile for a traffic violation committed in the officer's presence. Well, it had two different plates on it, although it was properly registered.

But it goes on to say in Sierra on page 977: "It is impermissible for law enforcement officers to use a misdemeanor arrest as a pretext to search for evidence of a more serious crime."

It is our position that that is what occurred here, Judge, and the items that were found ought to be suppressed.

(T. 17-18).

The prosecutor acknowledged and disputed defense counsel's contention that the stop was pretextual and argued that the search was a proper inventory search (T. 15-16, 20).

The trial court apparently recognized the objective test discussed in Sierra, stating,

We have a car with different license plates. We have the officer not remembering if there was a registration or not. We have the defendant without a driver's license, and so what would the reasonable officer do if he pulls anyone over at that point? I haven't heard anything. If he hadn't had a registration, then it certainly would have been justified to impound the car. You don't know if it is stolen, or you don't know what the story is.

[the prosecutor]: Or if the driver was under arrest, Your Honor, and there was no one else there that could drive the car away.....

[the court]: The problem I have with that, is everyone that is driving a car without a driver's license arrested and taken to jail? That is kind of--Maybe they ought to be, but I am kind of shocked why--What's the circumstances here? There has to be something articulable.

(T. 20-21).


In apparent reliance on Sierra's ban of consideration of evidence of the officer's subjective intent, neither the trial court nor the Court of Appeals recognized evidence of Officer Hedenstrom's pretextual subjective intent. Officer Hedenstrom's claim that he stopped the car because it was improperly registered, as evidenced by the mismatched license plates, is undermined: Officer Hedenstrom did not approach Mr. Velasquez concerning the improper indicia of registration when he first observed it, when the car was in the process of parking on State Street (T. 3-4); and Officer Hedenstrom did not cite Mr. Velasquez for improper indicia of registration (T. 12).

Assuming, arguendo, that the stop was proper, the search was not a valid inventory search, because Officer Hedenstrom testified that one of his purposes in conducting the search was to gather evidence (T. 6). See State v. Hygh, 711 P.2d 264, 267-268 (Utah 1985) ("the inventory exception does not apply when the inventory is merely a 'pretext concealing an investigatory police motive.'").

CONCLUSION

Mr. Velasquez requests that this Court grant a writ of certiorari on the question.

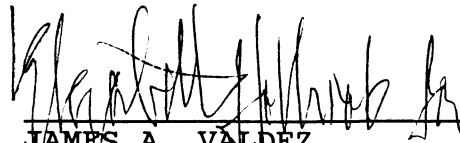
RESPECTFULLY SUBMITTED this 1 day of May, 1991.



JAMES A. VALDEZ
Attorney for Mr. Velasquez

CERTIFICATE OF DELIVERY

I, JAMES A. VALDEZ, hereby certify that ten copies of the foregoing will be delivered to the Utah Supreme Court, 332 State Capitol, Salt Lake City, Utah 84114, and four copies to the Attorney General's Office, 236 State Capitol, Salt Lake City, Utah 84114, this 1 day of May, 1991.



JAMES A. VALDEZ

DELIVERED by _____ this _____ day
of May, 1991.

APPENDIX 1

Opinion of the Court of Appeals and
Ruling of the Trial Court

FILED

APR 1 1991

Mary Noonan

Mary T. Noonan
Clerk of the Court
Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

-----oo0oo-----

State of Utah,)	
)	MEMORANDUM DECISION
Plaintiff and Appellee,)	(Not For Publication)
)	
v.)	Case No. 900218-CA
)	
Mario Jose Valasquez,)	
)	F I L E D
Defendant and Appellant.)	(April 1, 1991)

Before Judges Orme, Garff, and Bench.

PER CURIAM:

Defendant appeals his conviction of possessing cocaine and heroin. He challenges denial of his motion to suppress evidence of the drugs seized in an inventory search of his vehicle, impounded for improper licensing and registration. He claims that the initial stop and subsequent inventory search were conducted as a pretext to search for drugs.

Although the denial of a pretrial motion to suppress is "fact-sensitive," State v. Smith, 781 P.2d 879, 880 (Utah Ct. App. 1989), defendant does not challenge the trial court's findings in its pretrial ruling. The arresting officer was the only witness to testify at the pretrial hearing. Consequently, we state the facts based upon the officer's testimony in the light most favorable to the trial court's ruling. State v. Booker, 709 P.2d 342, 345 (Utah 1985).

The officer testified that he first noted defendant's vehicle parked with different numbered license plates attached to the front and rear. A short time later, the officer observed defendant driving the same improperly licensed vehicle on the street. Because of the disparate license plates and apparent improper registration, the officer stopped defendant's vehicle. When requested by the officer, defendant could not produce a valid driver's license and said he did not have one. He did produce a copy of a prior traffic citation issued to a Jeff Martinez wherein he had been cited for driving without a driver's license. During this stop, the defendant gave different names to the officer. No evidence was offered at the hearing as to whether there was a valid registration card in the vehicle.

Based upon these events and defendant's admissions, the officer arrested defendant for driving without a license and giving false information to an officer. Because defendant was

alone, the car was on a public street and was improperly licensed, the automobile was impounded. The officer testified that police department procedures were followed in impounding the vehicle and conducting an inventory of its contents. During the inventory, an unlocked cash box was found on the floor by the driver's seat. The officer opened the box to ascertain its contents and found heroin and cocaine powder, along with drug paraphernalia. Defendant was booked for and charged with driving without a driver's license, giving false information to the police officer, and possessing the controlled substances.

Utah Code Ann. § 41-1-43(1) (1988) requires the issuance of "two identical registration plates" for every automobile. Plates issued for use on a vehicle may not be removed from the vehicle and used upon an other vehicle. Utah Code Ann. § 41-1-47 (1988) requires every automobile owner to attach one license plate to the front of the car and a matching license plate to the rear. The automobile driven by defendant at the time of the stop had different plates attached to the front and rear. Defendant clearly violated the law by operating this car on the public streets. The officer had both a right and duty to stop defendant's vehicle because of his significant registration violation. State v. Smith, 781 P.2d 879, 883 (Utah Ct. App. 1989).

The stop was a valid stop based upon objective facts and not a pretext based upon some subjective intent to search for drugs. The mere argument that he was stopped to search for drugs is speculation without support in the record. Defendant was stopped for violating the law in the officer's presence and there is no evidence that defendant was stopped for any other purpose.

When stopped, defendant could not produce a valid driver's license. He did produce a prior citation that he had previously been arrested for driving without a license. He also gave the officer different names. After defendant had given false information to the officer and had driven, even though recently ticketed for illegally driving, defendant's arrest was not an abuse of the officer's statutory discretion under Utah Code Ann. §§ 41-6-165 to -166 (1988), 77-7-2(1)(3) and 77-7-18 (1990). Obviously, defendant's prior ticket had not deterred him from driving without a license.

The impoundment of the vehicle was reasonably justified because defendant was alone, the vehicle had improperly registered license plates, and could not be left on the street. See State v. Hygh, 711 P.2d 264, 268 (Utah 1985).

Police are justified in inventorying such vehicles at the time of impoundment. South Dakota v. Opperman, 428 U.S. 364, 369 (1976); Cady v. Dombrowski, 413 U.S. 433, 441 (1973). Based upon the totality of the circumstances, the officer was justified in arresting defendant and impounding his car.

The officer testified that he followed departmental policy and procedures in the vehicle impoundment and in the subsequent inventory taken. Defendant produced no evidence to the contrary. Nor does defendant show that the departmental procedures followed by the officer in some manner offend either the federal or state constitutions. Defendant complains that the prosecution failed to introduce "documentation" to support the officer's testimony. Defendant does not say what "documentation" should have been produced or what its ultimate value was. Suffice it to say that defendant failed to challenge in any way the officer's testimony that he followed established policy. Having elicited unchallenged testimony of the officer's adherence to police department policy, the prosecutor was not required to produce at trial copies of the written policy or an inventory sheet. If defendant believes that these documents were of value to his defense, he should have asked for them and presented them to the trial court. Because defendant completely failed to factually challenge the officer's testimony, we see no need to remand the case for further findings, as the state suggests.

In State v. Sterger, 155 Utah Adv. Rep. 30, 32 (Utah Ct. App. 1991) this court approved the opening of closed containers in an inventory search when specifically required by search guidelines. In this case as in Sterger, evidence was uncontradicted that the officer followed standardized search procedures in conducting an inventory of the vehicle's contents.

We affirm the trial court's denial of defendant's motion to suppress. Defendant's conviction is affirmed.

ALL CONCUR:


Gregory K. Otme, Judge


Reginal W. Garff, Judge


Russell W. Bench, Judge

MAR 21 1990

SALT LAKE COUNTY

Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,	:	RULING ON MOTION TO SUPPRESS
Plaintiff,	:	CIVIL NO. 901900313 FS
vs.	:	
MARIO JOSE VELASQUEZ,	:	
Defendant.	:	

Defendant's Motion to Suppress came on for hearing on March 20, 1990. The defendant was present with counsel and interpreter, and the State was represented by its counsel. Evidence was received, the case argued, and authorities relied upon presented by both counsel. The Court took the matter under advisement.

The Court now rules as follows.

The only witness, the arresting officer, testified that the motor vehicle driven by the defendant had different license plates on the front and rear, therefore, he pulled it over. The driver could not produce a driver's license. He did produce a prior traffic citation wherein he had been cited for having no driver's license. During this stop, the defendant

gave different names to the officer. No evidence was offered as to whether or not there was a registration card in the vehicle.

Based upon the above, the officer arrested the defendant. Since he was alone, the automobile was impounded. Following police department procedures, an inventory was made of the automobile wherein a cash box was found on the floor by the driver's seat containing a substance believed to be a controlled substance, and paraphernalia in relationship to the same. Defendant was booked for driving without a driver's license, giving false information to the police officer, and possession of a controlled substance.

Defendant argues that the stop was a pretext to unreasonable search and seizure in violation of the Fourth Amendment to the Constitution of the United States and, therefore, the fruits of such illegal search should be suppressed.

The State argues that the stop was not a pretext for a search, but for violation of the law in the presence of the officer. The search that occurred was an inventory search in relationship to impounding the vehicle.

Section 41-1-43, Utah Code Ann., requires the issuance of "two identical registration plates" for every motor vehicle

other than a motorcycle, trailer, etc. The said Section further provides that the plates so issued may not be removed from the vehicle or used upon any other vehicle.

Section 41-1-48, Utah Code Ann., requires that every motor vehicle, except a motorcycle, trailer, etc., shall have attached to the front of the vehicle one license plate, and the other license plate to the rear.

The automobile driven by the defendant at the time of the stop had different license plates attached to the front and rear of the car. Therefore, operation of such car would be in violation of the law. The officer had a right, and a duty, to stop this motor vehicle because of this violation of law. Therefore, the stopping of this vehicle was a valid stop.

Upon further inquiry, the driver of the automobile could not produce a driver's license, but did produce a prior citation indicating he had previously been arrested for driving without a license. He also gave the officer different names.

Based upon all of the above, the officer was justified in arresting the defendant and booking him. The stopping of this vehicle was not a mere pretext to searching of the automobile. The stop was made for violation of the law in the presence of the officer. The subsequent arrest and booking were justified under the totality of the circumstances.

The impounding of the vehicle was justified since the defendant was alone and the vehicle could not be left on the streets. Police authorities are justified in making an inventory of such vehicles at the time of impounding. As stated in South Dakota v. Opperman, 428 U.S. 364, 49 L.Ed.2d 1000 (1976):

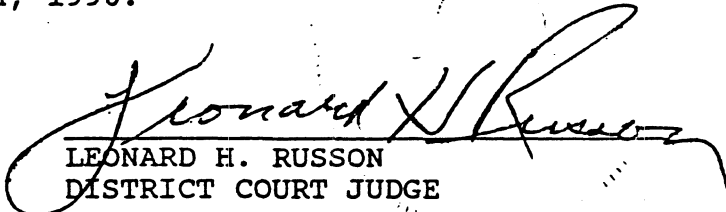
When vehicles are impounded, local police departments generally follow a routine practice of securing and inventorying the automobile's contents. These procedures developed in response to three distinct needs: the protection of the owner's property while it remains in police custody... the protection of the police against claims or disputes over lost or stolen property... and the protection of the police from potential danger.... The practice has been viewed as essential to respond to incidents of theft or vandalism.

The above court went on to state that such caretaking procedures have been uniformly upheld by state courts throughout the various jurisdictions, and that the majority of the federal courts of appeals have likewise "sustained inventory procedures as reasonable police intrusions." The United States Supreme Court upheld the police inventory of an impounded vehicle under the facts of that case.

We hold that the stop was valid, as was the arrest, and that the inventory by the police authorities of the automobile in this case was justified because the car was being impounded. The inventory was justified for the reasons stated above. The discovery of the suspected evidence was made during a legal search of this vehicle.

Based upon the above, defendant's Motion to Suppress the evidence taken during the inventory search is denied.

Dated this 21st day of March, 1990.


LEONARD H. RUSSON
DISTRICT COURT JUDGE

APPENDIX 2

Motion to Suppress and
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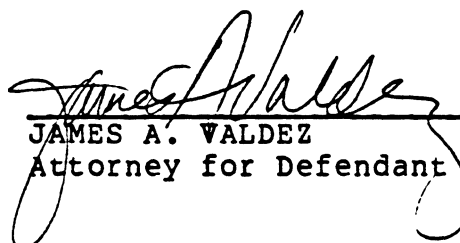
IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR STATE LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,	:	MOTION TO SUPPRESS
Plaintiff	:	
v.	:	
MARIO JOSE VELASQUEZ,	:	Case No. 901900313FS
Defendant	:	JUDGE LEONARD H. RUSSON

The defendant, MARIO JOSE VELASQUEZ, by and through his attorney of record, JAMES A. VALDEZ, hereby moves the Court to suppress all evidence taken from the defendant in violation of the Fourth Amendment of the United States Constitution and Article I, Section 14 of the Utah Constitution and the following grounds:

- 1) Search of the vehicle should have been conducted pursuant search warrant.
- 2) No probable cause to stop.
- 3) There was a pretext stop and subsequent to arrest there was no crime in the presence of the officer for which defendant should of been arrested.

DATED this _____ day of March, 1990.



JAMES A. VALDEZ
Attorney for Defendant

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APPENDIX 3

"Burkoff Article"
(Burkoff, "The Pretext Search
Doctrine Returns After Never Leaving,"
66 U. Detroit L.Rev. 363 (1989))

The Pretext Search Doctrine Returns After Never Leaving

JOHN M. BURKOFF*

DEDICATION

This Article is dedicated to the memory of G. Mennen Williams.

I was Justice Williams' law clerk from 1973 to 1975. Not only did I come to admire and to respect him, but my wife, Nancy, and I grew to love him. Justice Williams and his wife, Nancy, treated us like family.

I arrived for my clerkship in May of 1973. Like many, if not most, newly-minted Michigan Law School graduates, I was cocky, self-satisfied, and smug. I thought I knew it all. How quickly I learned otherwise. If for that alone, I had Justice Williams to thank for my brief (if evanescent) exposure to humility.

But he truly taught me so much more. He taught me about law and lawyers (and life) in a way that cold reported decisions, musty casebooks, and my Michigan Law School professors did not—and could not. Justice Williams taught me by example. He neither lectured nor hectored me. He showed me. He showed me patience. He showed me how to exercise the public trust responsibly. He showed me tolerance. He showed me love. He showed me how not to become distracted from the constant struggle to search for the truth in the law.

This Article is about truth. It is about the importance of recognizing that constitutional doctrine must be crafted in such a way that it beatifies the truth, rather than ignoring it for short-term, result-oriented reasons, however instantly appealing. It will come as no surprise to those who knew us both, that as close as Justice Williams and I became, we did not agree on everything. (Sometimes, he was wrong.) But I know that, whether or not he would have agreed with my conclusions in this Article—and we would have had some lively discussions about those conclusions—he would have encouraged and applauded my attempt to preserve the truth.

Rest in peace, Governor. We miss you.

* Professor of Law, University of Pittsburgh. A.B. 1970, J.D. 1973, University of Michigan; LL.M. 1976, Harvard University. The author gratefully acknowledges the research assistance of Barbara Moravitz, Class of 1989.

*Oh, what a tangled web we weave,
When first we practice to deceive! ***

I. INTRODUCTION

Chief Justice (then-Justice) Rehnquist once candidly observed that "the decisions of this Court dealing with the constitutionality of warrantless searches . . . suggest that this branch of the law is something less than a seamless web."¹ There are, however, few fourth amendment webs less seamless—more tangled—than the decisional law and underlying doctrine relating to pretextual fourth amendment activity.

By "pretextual fourth amendment activity," I am referring to searches or seizures (including arrests) that are undertaken by law enforcement officers for reasons that do not constitute a proper legal justification for such activity.² Such conduct is commonly called a "pretext," a "sham," or a "subterfuge," but the common thread is that it can be established that it was undertaken for illegitimate reasons. Although it might seem to the reader who is first encountering this branch of the law a bit strange, if not wholly perverse, to be informed that some commentators and judges consider such unjustified (by definition) fourth amendment activity to be nonetheless constitutional under the fourth amendment, that is indeed the case.³ Under this view of fourth amendment pretext doctrine, no cognizable constitutional problem exists when the problematic activity of law enforcement officers can be described as if it was within the boundaries of the law, although it can otherwise be conclusively demonstrated that such a rationalized justification is a fiction, *i.e.*, that it does not in fact reflect the officers' true reasons for so acting.

This author most assuredly does *not* share the point of view that the Constitution, current fourth amendment cases, or fourth amendment doctrine countenance or command legitimizing such a fiction.⁴ Most federal and state court judges, likewise, do not share the point of view that pretexts are constitutionally irrelevant.⁵

** Scott, *Marmion*, introduction, canto VI, stanza 17 (1808).

"I will not practice to deceive./ Yet, to avoid deceit, I mean to learn." Shakespeare, *King John*, act I, sc. 1, lines 214-15.

1. *Cady v. Dombrowski*, 413 U.S. 433, 440 (1973).

2. See Burkoff, *Bad Faith Searches*, 47 N.Y.U. L. Rev. 70, 71 n.5, 101 n.160 (1982) [hereinafter Burkoff, *Bad Faith Searches*].

3. See *infra* text accompanying notes 62-85, 102, 121. Since such commentators and judges have found the activity so described not to be constitutionally objectionable, they have accordingly found such cases to be inappropriate for application of the exclusionary rule.

4. See *infra* text accompanying notes 39-45.

5. See *infra* note 56 and text accompanying note 124.

The Supreme Court had a golden opportunity during its 1986-1987 Term to make clear what its position actually is with respect to the constitutionality of pretexts. Questions relating to the appropriate constitutional significance of fourth amendment pretextual activity were squarely before the Court in the case of *Missouri v. Blair*.⁶ Certiorari was granted, briefs were filed, oral argument was heard; months passed while the parties waited for the Court's decision and, ultimately, the Court decided not to decide; it dismissed the writ of certiorari as improvidently granted without a single word of explanation.

It is truly unfortunate that the *Blair* case was not decided by the Supreme Court. The facts in *Blair* posed pretext conundra in a clear-cut fashion.⁷ Nonetheless, the argument in *Blair* may well have had a significant effect on the Court. In four other important cases decided after *Blair* was argued to the Court, the Supreme Court handed down decisions where fourth amendment doctrine relating to pretextual activity was also applied or discussed.⁸ These four cases—cases which reflect the Court's views on all of the important legal points relating to pretexts that were argued but not decided in *Blair*—make clear what has all too often not been clear to some judges and commentators during the past decade, namely that: (1) the Supreme Court recognizes that a finding of unconstitutionality is compelled where evidence is seized on the basis of pretextual fourth amendment activity; (2) the Supreme Court recognizes that pretexts exist when law enforcement officers actually act pretextually even when they could have acted lawfully (but in fact did not); and, (3) the Supreme Court recognizes that the improper motivation of searching or arresting law enforcement officers—their "bad faith" or the absence thereof—is relevant to fourth amendment pretext analysis.

This Article expands upon these points. It also makes the case for the continuing recognition and application of a vital, nonfictive pretext search doctrine. This approach to fourth amendment decision-making will "insure[] that every time a defendant can demonstrate a pretext search or arrest, a court will deal with the pretextual activity under the law, and not simply ignore it."⁹

6. *State v. Blair*, 691 S.W.2d 259 (Mo. 1985) (en banc), cert. granted sub nom. *Missouri v. Blair*, 474 U.S. 1049 (1986), cert. dismissed, 480 U.S. 689 (1987).

7. For a discussion of the *Blair* case, see *infra* text accompanying notes 86-143.

8. See *infra* text accompanying notes 144-204.

9. Burkoff, *Rejoinder: Truth, Justice, and the American Way—Or Professor Haddad's 'Hard Choices'*, 18 U. MICH. J. L. REF. 695, 703 (1985) [hereinafter Burkoff, *Rejoinder*] (footnote omitted).

II. THE PRETEXT SEARCH DOCTRINE CONTROVERSY

A. *Scott and Its Progeny*

In 1978, the Supreme Court decided what has, however inappropriately, become the seminal case on pretexts: *Scott v. United States*.¹⁰ In *Scott*, then-Justice Rehnquist offhandedly observed for a majority of the Court that the issue whether a fourth amendment violation exists in a given case of questioned law enforcement search or seizure activity should be resolved exclusively by using, in his words, "a standard of objective reasonableness without regard to the underlying intent or motivation of the officers involved."¹¹ Such an objective test is appropriate, Rehnquist opined, because "the fact that the officer does not have the state of mind which is hypothesized by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action."¹²

Justice Rehnquist did not explain *why* this remarkable proposition—that law enforcement officers' intent or motivation is irrelevant—should be the case or why application of such an "objective" test was deemed to be compelled, necessary, or even desirable, as a test for fourth amendment analysis. The *Scott* "objective" test language simply appeared as if *deus ex machina*. Indeed, it is questionable, to put it mildly, whether the handful of prior Supreme Court decisions expressly relied upon by Justice Rehnquist to support his application of an "objective test" actually stood for the supportive propositions for which they were cited as precedential authority.¹³ As Professor Wayne LaFare commented in analyzing this authority, "Justice Rehnquist is certainly correct in stating [in *Scott*] that the Court has 'not examined this exact question at great length in any of our prior opinions,' but it may nonetheless be fairly said that he has presented a somewhat skewed picture of what the Court had had to say on this subject."¹⁴ Just as important, Rehnquist failed to mention, let alone discuss, any of a number of prior Supreme Court opinions that had treated law enforcement officers' improper motives for engaging in search or seizure activity as not only relevant but, in some cases, dispositive of the question of the conduct's fourth amendment constitutionality.¹⁵

10. 436 U.S. 128 (1978).

11. *Id.* at 138 (footnote omitted).

12. *Id.*

13. For criticism of Justice Rehnquist's use of this precedent, see Burkoff, *Bad Faith Searches*, *supra* note 2, at 75-76 n 22.

14. W. LAFARE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 1.4(a), at 82 (2d ed. 1987).

15. See, e.g., *South Dakota v. Opperman*, 428 U.S. 364, 376 (1976); *Brown v. Illinois*, 422 U.S. 590, 611 (1975) (Powell, J., concurring); *Wainwright v. City of New Orleans*, 392 U.S. 598, 606-07 (1968) (Warren, C.J., dissenting); *Abel v.*

Nonetheless, whatever the legitimacy of its parentage, there is no denying the fact that the Supreme Court ruled in *Scott* that analysis of fourth amendment issues should be conducted "objectively." The question then arises: what does this mean with respect to pretexts? If, indeed, the constitutionality of *all* fourth amendment activity must be evaluated exclusively "objectively," i.e., in the *Scott* Court's words, "without regard to the underlying intent or motivation of the officers involved," it is problematic whether pretextual fourth amendment activity can ever be proved. How do you demonstrate a "pretext" "objectively?" More to the point, the question arises whether such pretexts are indeed unconstitutional in any event.¹⁶ From this perspective, the putative use of an objective test for fourth amendment analysis and the law relating to pretexts are directly and inextricably related. As I have elaborated upon elsewhere,¹⁷ if evidence of a searching or arresting officer's pretextual motives is treated as irrelevant and, hence, inadmissible at suppression hearings (when it is otherwise available), it will be almost impossible to prove the officer's lack of lawful justification to search or arrest where, as is common, "the state is able to contrive an appropriate legal justification to account for the appearance (but not the reality) of a questioned search."¹⁸

It is possible to avoid reaching this unhappy (to me) conclusion by recognizing that the *Scott* Court simply did not—or at least did not mean to—apply its supposed objective test to the issue of pretextual fourth amendment activity.¹⁹ After all, the objective test language in *Scott* was *obiter dictum*. The *Scott* case focused upon the constitutionality of the conduct of FBI agents who monitored a court-approved wiretap. The authorizing court order relied upon by the agents specifically required that the interception of conversations be "minimized" so as to include only those conversations law-

United States, 362 U.S. 217, 226, 230 (1960); *Jones v. United States*, 357 U.S. 493, 500 (1958) (Clark, J., dissenting); *United States v. Rabinowitz*, 339 U.S. 56, 82 (1950) (Frankfurter, J., dissenting); *United States v. Lefkowitz*, 285 U.S. 452, 467 (1932). See also *United States v. Ceccolini*, 435 U.S. 268, 276 n.4 (1978). See the discussion of these cases in Burkoff, *Bad Faith Searches*, *supra* note 2, at 75-81; W. LAFARE, *supra* note 14, at § 1.4.

16. For the position that they are not unconstitutional, see Haddad, *Pretextual Fourth Amendment Activity: Another Viewpoint*, 18 U. MICH. J. L. REF. 639 (1985). See *infra* text accompanying notes 62-85 for a discussion of Haddad's position.

17. See Burkoff, *The Pretext Search Doctrine: Now You See It, Now You Don't*, 17 U. MICH. J. L. REF. 523, 525-26 (1984) [hereinafter Burkoff, *Pretext Search Doctrine*]; Burkoff, *Bad Faith Searches*, *supra* note 2, at 81-82; Burkoff, *The Court That Devoured the Fourth Amendment: The Triumph of an Inconsistent Exclusionary Doctrine*, 58 OR. L. REV. 151, 190 (1979) [hereinafter Burkoff, *Inconsistent Exclusionary Doctrine*].

18. Burkoff, *Pretext Search Doctrine*, *supra* note 17, at 548.

19. I have argued just this point. See Burkoff, *Bad Faith Searches*, *supra* note 2, at 83-84, 98-100.

fully subject to interception under the federal wiretap statute.²⁰ The FBI agents did not, however, use any selectivity in their interception of conversations; instead, they simply recorded every single call made over the subject telephone during the interception period including personal calls, calls concerning employment opportunities, and calls to the weather service.²¹

Defendant Scott claimed that this absence of minimization was unconstitutional. The Supreme Court, however, upheld the constitutionality of this activity despite the absence of apparent minimization because the agents never reached the point where it was necessary to minimize their interception of calls:

In a case such as this, involving a wide-ranging conspiracy with a large number of participants, even a seasoned listener would have been hard pressed to determine with any precision the relevancy of many of the calls before they were completed. A large number were ambiguous in nature, making characterization virtually impossible until the completion of these calls. And some of the nonpertinent conversations were one-time conversations. *Since these calls did not give the agents an opportunity to develop a category of innocent calls which should not have been intercepted, their interception cannot be viewed as a violation of the minimization requirements.*²²

In essence, the FBI agents in *Scott* never had the opportunity to act upon their arguable intent to act in bad faith—to ignore the minimization requirement—since none of the calls actually intercepted were “non-interceptible” under the Supreme Court’s reading of the law. Hence, the language in *Scott* about “objective reasonableness” and “underlying intent or motivation” is simply unnecessary to the decision. The *Scott* Court “merely held that improper intent *that is not acted upon* does not render unconstitutional an otherwise constitutional search. Since in pretext cases the searching officer has by definition acted on his unlawful intent, this reading of *Scott* harmonizes the case with the Court’s continuing concern about pretexts.”²³

20. *Scott v. United States*, 436 U.S. 128, 130 (1978).

21. *United States v. Scott*, 331 F. Supp. 233, 247 (D.D.C. 1971). “[T]he monitoring agents made no attempt to comply with the minimization order of the Court but listened to and recorded all calls over the [subject] telephone. They showed no regard for the right of privacy and did nothing to avoid unnecessary intrusion.” *Scott v. United States*, Nos. 74-2097, 74-2098 (D.D.C. Nov. 12, 1974) quoted in *Scott v. United States*, 436 U.S. 128, 144 (1978) (Brennan, J., dissenting) (bracketed material in original).

22. 436 U.S. at 142 (footnote omitted, emphasis added).

23. Burkoff, *Bad Faith Searches*, *supra* note 2, at 83-84 (footnotes omitted, emphasis added). See also Burkoff, *Pretext Search Doctrine*, *supra* note 17, at 525-27; Note, *Addressing the Pretext Problem: The Role of Subjective Motivation in Establishing Fourth Amendment Violations*, 63 B.U.L. REV. 223, 241 (1983).

As convenient as this *obiter dictum* conclusion is for those of us who would like to reconcile the *Scott* objective test language with prior (and subsequent) Supreme Court decisional law stating or implying that pretextual searches and arrests are unconstitutional,²⁴ the Supreme Court subsequently applied *Scott* as if it were not *obiter dictum* in its 1983 decision in *United States v. Villamonte-Marquez*.²⁵ The *Villamonte-Marquez* case involved the suspicionless boarding of a vessel, the *Henry Morgan II*, by customs officers. Then-Justice Rehnquist, the author of the *Scott* majority opinion, concluded for the majority in *Villamonte-Marquez* that such random, suspicionless stops and boardings of vessels “with ready access to the open sea” are constitutional despite the absence of particularized antecedent justification, at least when they are made by federal agents armed with the statutory authority to enforce federal vessel documentation laws.²⁶ The defendants in *Villamonte-Marquez*, all of whom were ultimately convicted of various narcotics offenses after the boarding officers discovered marijuana aboard the *Henry Morgan II*, argued that the search of their ship was pretextual, and that it was not in fact made to enforce the vessel documentation laws whose existence gave rise to the legal and constitutional authority to search without any antecedent justification. Rather, defendants flatly contended, “[t]he *Henry Morgan II* was boarded by the officers of a law enforcement patrol formed for the specific criminal investigatory purpose of locating boats loaded with marijuana.”²⁷

There was, moreover, a good deal of evidence on the record before the Supreme Court establishing that defendants’ pretext argument had some merit to it. Not the least of the evidence marshalled by defendants was the fact that a state police narcotics investigator who boarded the *Henry Morgan II* with the federal customs agents *conceded* the truth of defendants’ claim, that the officers were boarding all of the ships at anchor in the ship channel *looking for narcotics*.²⁸ Justice Rehnquist was not, however, interested in the merit—or lack thereof—of this contention. Rather, he summarily rejected the pretext argument itself as untenable, ruling in a cursory footnote that:

Respondents . . . contend . . . that because the customs of-

24. See, e.g., *United States v. Lefkowitz*, 285 U.S. 452, 467 (1921) (“An arrest may not be used as a pretext to search for evidence.”); cases cited in *supra* note 14 and *infra* notes 144-204.

25. 462 U.S. 579 (1983).

26. I criticized this conclusion as a matter of fourth amendment doctrine without regard to the pretext issue in Burkoff, *When Is A Search Not A ‘Search?’ Fourth Amendment Doublethink*, 15 U. TOR. L. REV. 515, 541-46 (1984).

27. Brief for the Respondents at 6, *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983).

28. *Id.* at 9. See also Burkoff, *Pretext Search Doctrine*, *supra* note 17, at 530-32.

ficers 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 marijuana, 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.²⁹

In other words, a majority of the *Villamonte-Marquez* Court held that because the *Scott* decision dictated the use of an objective test to gauge the validity of fourth amendment activity, the admittedly unlawful³⁰ (subjective) motive of the boarding officers in *Villamonte-Marquez* to undertake a pretextual search was simply irrelevant to the constitutional analysis because a document search of the vessel *could have* lawfully been made under federal regulations. Applied in this manner, the *Scott* language made it totally impossible for the *Villamonte-Marquez* defendants to present a cognizable case of pretext, as the true reasons the vessel search was undertaken were treated as wholly irrelevant—the truth was less important to the Court than the fictive objective appearance of the activity as it *could have* been interpreted when viewed in the most charitable, if inaccurate, possible light.³¹

Professor LaFave has noted that the Supreme Court has also relied upon *Scott* in one case besides *Villamonte-Marquez*,³² the 1985 decision of *Maryland v. Macon*.³³ This is nominally true since the *Scott* decision was cited in *Macon*, but *Macon* is not a case that deals with pretext issues. In *Macon*, the Supreme Court ruled that a plainclothes, undercover detective who purchased two obscene magazines with a marked fifty dollar bill, left the store and then immediately returned to retrieve the bill (without, it might be pointed out for the record, returning the change for the fifty dollars he had previously received) was not subject to any fourth amendment restrictions on his conduct as he had not "seized" the magazines within the meaning of the term "seizure" in the fourth amendment. The reason there was no "seizure," Justice O'Connor stated for the

29. 462 U.S. at 584 n.3 (citation omitted).

30. Normally, fourth amendment activity must be supported by probable cause. *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985). Hence, a search for marijuana ordinarily would require the existence of probable cause which, as the Supreme Court acknowledged, did not exist in the *Villamonte-Marquez* case. The parties further agreed that not even the lesser antecedent justification of "reasonable suspicion" existed as justification for the search of the *Henry Morgan II*.

31. Indeed, Justice Rehnquist ignored even the questionable objective appearance of this activity. The record was replete with objective evidence of pretext, wholly aside from the Louisiana state policeman's subjective concession of pretext. See Burkoff, *Pretext Search Doctrine*, *supra* note 17, at 530-32.

32. W. LaFAVE, *supra* note 14, § 1.4, at 81 n.2.

33. 472 U.S. 463 (1985).

majority, was that the seller had "voluntarily transferred any possessory interest he may have had in the magazines to the purchaser upon the receipt of the funds."³⁴ Defendant Macon argued, however, that this transfer of funds was not what it appeared to be, *i.e.*, it was not really a bona fide commercial transaction. The undercover agent clearly neither intended—nor permitted—the buyer to keep the fifty dollars he had tendered; hence, defendant urged, the agent's act of obtaining the magazines at issue should be treated not as a purchase, but as an involuntary "seizure" that must be justified under the fourth amendment.³⁵ The *Macon* majority disagreed with this contention, ruling in response that:

This argument cannot withstand scrutiny. Whether a Fourth Amendment violation has occurred "turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time," *Scott v. United States*, . . . and not on the officer's actual state of mind at the time the challenged action was taken. . . . Objectively viewed, the transaction was a sale in the ordinary course of business. The sale is not retrospectively transformed into a warrantless seizure by virtue of the officer's subjective intent to retrieve the purchase money to use as evidence.³⁶

As in *Villamonte-Marquez*, the *Scott* language was used by the *Macon* Court to render the true reasons why the conduct in question took place (criminal investigation not ordinary commercial

34. *Id.* at 469.

35. Brief for the Respondent at 10-11, *Maryland v. Macon*, 472 U.S. 463 (1985). *Amicus Curiae* American Civil Liberties Union made the argument most clearly:

As no appreciable time had lapsed between the officer's "purchase" of the magazines and his recapture of the money, it borders on sophistry to assert, as [the state of Maryland] does . . . that once [Defendant], on his employer's behalf, had voluntarily surrendered possession of the magazines in exchange for their purchase price, he had relinquished all interest in the merchandise, retaining an interest only in the money. Hypertechnical applications of principles of property law may not be used to defeat close scrutiny of police conduct in obtaining evidence.

Brief *Amicus Curiae* for the American Civil Liberties Union at 6 (citations omitted), *Maryland v. Macon*, 472 U.S. 463 (1985). Defendant was attempting to establish this point in order to be able to make the further argument that since this transaction was indeed a "seizure," the law enforcement officer needed a warrant to make it.

36. *Macon*, 472 U.S. at 471 (citations omitted). Justice O'Connor added, however, that the recapture of the \$50 bill may well have been an unconstitutional seizure. Nonetheless, she stated that "[a]ssuming, *arguendo*, that the retrieval of the money incident to the arrest was wrongful, the proper remedy is restitution or suppression of the \$50 bill as evidence of the purchase, not exclusion from evidence of the previously purchased magazines." *Id.*

purchase) irrelevant. That is not to say, however, unlike in *Villamonte-Marquez*, that if the true reason for the acquisition of the magazines in *Macon* was considered (they were actually "seized" as part of a criminal investigation), rather than the operative "fiction" that was used (this was simply an ordinary commercial transaction), the seizure was pretextual or otherwise unconstitutional. Rather, if the Court had assessed this transaction on the basis of the actual facts, objective and subjective, it would have been forced to address the then-dispositive issue whether a warrantless "seizure" of obscene materials in this fashion was justified in these circumstances. If it was, there was no pretext. Hence, the application of the *Scott* language in *Macon*, unlike the application of *Scott* in *Villamonte-Marquez*, does no damage to the concern for the deterrence of pretextual fourth amendment activity since the undercover officer in *Macon* was not necessarily acting for improper reasons.³⁷

Accordingly, the only Supreme Court decision that truly threatens the proposition that pretextual fourth amendment activity is inappropriate and unconstitutional is *Villamonte-Marquez*. But, although the Court has not applied the *Scott* objective test language directly in any case other than *Villamonte-Marquez*, *Villamonte-Marquez* is, nonetheless, not the Court's last, only, or most important word on this subject.³⁸

B. Pretext Commentary

1. My Position

In a number of articles published since the *Scott* decision was handed down,³⁹ I have, in Professor LaFave's words, "sounded the alarm,"⁴⁰ trying to make two basic and independent points about that decision's supposed adoption of an "objective" fourth amendment test and the impact of such a test upon the proof—and relevance—of pretextual search and seizure activity. First, I have argued that Supreme Court decisions handed down before and after the *Scott* decision have neither uniformly adopted nor applied an objective fourth amendment test as was seemingly dictated in *Scott*, despite the fact that the isolated opinion of *Villamonte-Marquez*⁴¹ states—or implies—the contrary. That is simply to say that the case law is decidedly ambiguous and inconsistent on this subject. In-

37. See *supra* text accompanying note 2.

38. See *infra* text accompanying notes 144-207.

39. Burkoff, *Inconsistent Exclusionary Doctrine*, *supra* note 17, at 181-90; Burkoff, *Pretext Searches*, 9 SEARCH & SEIZURE L. REP. 25 (1982); Burkoff, *Bad Faith Searches*, *supra* note 2; Burkoff, *Pretext Search Doctrine*, *supra* note 17; Burkoff, *Rejoinder*, *supra* note 9.

40. See W. LAFAVE, *supra* note 14, § 1.4(a), at 83.

41. For a discussion of *United States v. Villamonte-Marquez*, see *supra* text accompanying notes 25-31.

deed, a number of Supreme Court decisions have been handed down since *Scott*—and continue to come down—which, unlike *Scott*, clearly apply fourth amendment doctrine in ways that are far from objective, treating the subjective motives of law enforcement officers engaged in searches and seizures as important, if not dispositive, constitutional considerations, particularly as they relate to claims of pretextual activity.⁴²

Second, I have also argued that, assuming that pretexts are unconstitutional, the availability of an inquiry into the motives of searching or arresting law enforcement officers is not only desirable, but critically necessary in order to insure that law enforcement officers generally will be deterred, through the application of the exclusionary rule, from engaging in pretextual fourth amendment activity. By advocating the continued use of such a subjective "bad faith" test,⁴³ it is important to point out that I do not urge its use as a replacement for an objective test. To the contrary, I firmly believe that its most beneficial—even necessary—use is exactly as it is being used today in most state courts across the country⁴⁴—as a vital supplement to the objective test.⁴⁵

2. Professor LaFave's Position

Professor LaFave has responded to these arguments by agreeing with me that given the facts in *Scott* set forth in the lower court opinion and the prior decisions which were not discussed in the majority opinion, the *Scott* decision "can hardly be read as a definitive analysis settling that in all circumstances fourth amendment suppression issues are to be resolved without assaying 'the underlying intent or motivation of the officers involved.'"⁴⁶ LaFave nonetheless argues that such a reading of *Scott*, although not legally compelled, "is precisely what the rule ought to be."⁴⁷ The reason that

42. See *infra* text accompanying notes 144-204.

43. See Burkoff, *Bad Faith Searches*, *supra* note 2. But see W. LAFAVE, *supra* note 14, § 1.4, at 80 (calling the phrase "bad faith" a somewhat inaccurate characterization, but nonetheless using it as the title of the appropriate subsection of his treatise).

44. See *infra* text accompanying note 56.

45. The protocol for assessing fourth amendment pretexts should be as follows:

Initially, a court should determine whether a search is objectively constitutional or unconstitutional. If the search is objectively unconstitutional, a court need proceed no further. If, however, the search is objectively constitutional, the court must next determine (if the issue is raised) whether the search was a "bad faith" search.

Burkoff, *Bad Faith Searches*, *supra* note 2, at 116. See also Burkoff, *Rejoinder*, *supra* note 9, at 696, 703.

46. W. LAFAVE, *supra* note 14, § 1.4(a), at 83 (emphasis original).

47. *Id.*

such an objective approach is the appropriate analysis in pretext cases, LaFave contends, is that

the proper basis of concern is not with *why* the officer deviated from the usual practice in this case but simply that he *did* deviate. It is the *fact* of the departure from the accepted way of handling such cases which makes the officer's conduct arbitrary, and it is the arbitrariness which in this context constitutes the Fourth Amendment violation.⁴⁸

Moreover, LaFave argues that "[u]nderlying the *Scott* rule . . . is the sound notion . . . that 'sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources.'"⁴⁹

However, LaFave's analysis does not, unlike the Supreme Court in *Villamonte-Marquez*, treat fourth amendment pretextual activity as constitutionally irrelevant. Far from it. Rather, LaFave's point is that pretexts *are* unconstitutional, but that the existence of such unconstitutional pretextual activity should be assessed (exclusively) objectively. Accordingly, to assess constitutionality in a case of questionable conduct, LaFave has proposed that the question that should be asked and answered by the appropriate court is whether "the Fourth Amendment activity 'was carried out in accordance with standard procedures in the local police department.'"⁵⁰

I have criticized LaFave's analysis on this point at length elsewhere.⁵¹ Suffice it to say that I agree that the use of LaFave's objective approach is a sensible *first step* to take in determining whether law enforcement officers have committed a fourth amendment violation.⁵² What is difficult to understand is why such an objective approach should also be the final—and exclusive—step in a pretext analysis.

The argument that subjective inquiries into law enforcement officers' motives are difficult or fruitless⁵³ totally begs the question whether they are nonetheless constitutionally appropriate or even necessary.⁵⁴ Indeed, as Professor James Haddad pointed out, "The

48. *Id.* § 1.4(e), at 94 (emphasis in original).

49. *Id.* at 96 (quoting *Massachusetts v. Painten*, 389 U.S. 560, 565 (1968) (White, J., dissenting from dismissal of writ of certiorari as improvidently granted)).

50. *Id.* (quoting *South Dakota v. Opperman*, 428 U.S. 364, 374-75 (1976) (emphasis in original)).

51. Burkoff, *Bad Faith Searches*, *supra* note 2, at 107-11. See also Haddad, *supra* note 16, at 650-51.

52. See *supra* note 45 and text accompanying notes 43-45.

53. See *supra* text accompanying note 49; W. LaFAVE, *supra* note 14, § 1.4(e), at 96 ("there is no reason to believe that courts can with any degree of success determine in which instances the police had an ulterior motive."); Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 436-37 (1974).

54. "If justice requires [a] fact to be ascertained, the difficulty of doing so is no ground for refusing to try." O.W. HOLMES, *THE COMMON LAW* 48 (1881).

worst that one could say [about a subjective inquiry] is that under such an approach, because of the difficulty of proof, the prosecution would sometimes benefit from evidence discovered through pretextual fourth amendment activity."⁵⁵ How different is this difficulty of proof from the difficulty the defense ordinarily has on every suppression motion? Moreover, the fruitlessness argument is simply, soundly, and empirically disproved by the scores of federal and state court decisions in which such motivational evidence has been found to be readily available (and, accordingly, where a finding of pretext has been treated as dispositive of the constitutionality of the search).⁵⁶

55. Haddad, *supra* note 16, at 685. Haddad adds:

The typical criticism of Professor Burkoff's approach is quite unsophisticated. Ignoring the many areas of constitutional law analysis where the Court has assigned motive a role, or where the Court has denied it a role only after extensive discussion, the critics often dismiss, in a sentence or two, the [subjective] methodology of resolving pretextual fourth amendment claims. . . . But if constitutional law sometimes makes motive determinative of outcome—even in contexts where the search for motive is more difficult than in the pretextual search context—difficulty of ascertainment cannot suffice to defeat the use of motive in pretextual search analysis.

Id. at 681-82 (footnotes omitted).

56. See, e.g., *United States v. Smith*, 802 F.2d 1119, 1124 (9th Cir. 1986) (citations omitted) ("Whether an arrest is a mere pretext to search turns on the motivation or primary purpose of the arresting officers. . . . Courts have found improper motivation where the defendant is arrested for a minor offense so as to allow police to search for evidence of some other unrelated offense for which police lack probable cause to arrest or search.").

For some of the many recently reported decisions suppressing evidence based upon a finding of pretext, see, e.g., *United States v. Miller*, 821 F.2d 546 (11th Cir. 1987); *United States v. Merchant*, 760 F.2d 963 (9th Cir. 1985), *cert. granted*, 478 U.S. 1003 (1986), *cert. dismissed*, 480 U.S. 615 (1987); *United States v. Johnson*, 722 F.2d 525 (9th Cir. 1983); *United States v. Prim*, 698 F.2d 972 (9th Cir. 1983); *United States v. Ospina*, 618 F. Supp. 1486 (E.D.N.Y. 1985); *United States v. Millo*, 588 F. Supp. 45 (W.D.N.Y. 1984); *United States v. Abbott*, 584 F. Supp. 442 (W.D. Pa.), *aff'd*, 749 F.2d 28 (3d Cir. 1984); *United States v. Belcher*, 577 F. Supp. 1241 (E.D. Va. 1983); *United States v. Nelson*, 511 F. Supp. 77 (W.D. Tex. 1980); *United States v. Keller*, 499 F. Supp. 415 (N.D. Ill. 1980); *United States v. Sanford*, 493 F. Supp. 78 (D.D.C. 1980); *Spann v. State*, 494 So. 2d 716 (Ala. Crim. App. 1985), *aff'd on other grounds*, 494 So. 2d 719 (Ala. 1986); *Guzman v. State*, 283 Ark. 112, 672 S.W.2d 656 (1984); *People v. Howard*, 162 Cal. App. 3d 8, 208 Cal. Rptr. 353 (1984); *People v. Dickson*, 144 Cal. App. 3d 1046, 192 Cal. Rptr. 897 (1983); *People v. Albritton*, 138 Cal. App. 3d 79, 187 Cal. Rptr. 652 (1982); *People v. Reynolds*, 672 P.2d 529 (Colo. 1983); *State v. Miller*, 420 A.2d 181 (Del. Super. Ct. 1980); *Nealy v. State*, 400 So. 2d 95 (Fla. Dist. Ct. App. 1981), *aff'd on other grounds*, 419 So. 2d 336 (Fla. 1982); *Williams v. State*, 157 Ga. App. 476, 277 S.E.2d 923, *cert. denied*, 454 U.S. 823 (1981); *Gaston v. State*, 155 Ga. App. 337, 270 S.E.2d 877 (1980); *State v. Knight*, 63 Haw. 90, 621 P.2d 370 (1980); *People v. Reincke*, 84 Ill. App. 3d 222, 405 N.E.2d 430 (1980); *State v. Killcrease*, 379 So. 2d 737 (La. 1980); *State v. Harris*, 504 So. 2d 156, (La. Ct. App. 1987); *Smith v. State*, 48 Md. App. 425, 427 A.2d 1064 (1981); *Manalansan v. State*, 45 Md. App. 667, 415 A.2d 308

Furthermore, LaFave's argument that *only* the objective "fact" of a law enforcement officer's arbitrary deviation from the "usual practice" or "standard procedures" should be relevant to fourth amendment pretext analysis raises more problems than it resolves. Not only do a police department's usual practices or standard procedures (where they exist) have no constitutional status *per se*, they may indeed be unconstitutional.⁵⁷ Nor is a concern about law enforcement arbitrariness the only doctrinal concern the Supreme Court must consider in fourth amendment cases. When a law enforcement officer acts pretextually, the Court must be equally or more concerned about the simple fact that it has failed to get the message across to the officer that he or she needed a lawful justification for acting before fourth amendment activity could be undertaken. In other words, not only has the law enforcement officer who acts pretextually acted arbitrarily,⁵⁸ he or she has also acted (by definition) for reasons which he or she should have known do not justify such conduct. Such illegal conduct should—must—be deterred.

The Supreme Court has made it crystal clear on many occasions

(1980); *People v. Siegel*, 95 Mich. App. 594, 291 N.W.2d 134 (1980); *State v. Blair*, 691 S.W.2d 259 (Mo. 1985), *cert. granted*, 474 U.S. 1049 (1986), *cert. dismissed*, 480 U.S. 698 (1987); *State v. Carlson*, 198 Mont. 113, 644 P.2d 498 (1982); *Hatley v. State*, 100 Nev. 214, 678 P.2d 1160 (1984); *State v. Sidebotham*, 124 N.H. 682, 474 A.2d 1377 (1984); *People v. Pace*, 65 N.Y.2d 684, 481 N.E.2d 250, 491 N.Y.S.2d 618 (1985); *People v. Llopis*, 125 A.D.2d 416, 509 N.Y.S.2d 135, (N.Y. App. Div. 1986); *People v. Auletta*, 88 A.D.2d 867, 452 N.Y.S.2d 32 (Sup. Ct. 1982); *People v. Castro*, 125 Misc. 2d 15, 479 N.Y.S.2d 414 (Sup. Ct. 1984); *People v. Griffin*, 116 Misc. 2d 751, 456 N.Y.S.2d 334 (Sup. Ct. 1982); *State v. Hall*, 52 N.C. App. 492, 279 S.E.2d 111, *cert. denied*, 304 N.C. 198, 215 S.E.2d 104 (1981); *Commonwealth v. Landamus*, 333 Pa. Super. 382, 482 A.2d 619 (1984); *Commonwealth v. Corbin*, 322 Pa. Super. 271, 469 A.2d 615 (1983); *State v. Crabtree*, 655 S.W.2d 173 (Tenn. Crim. App. 1983); *Black v. State*, 739 S.W.2d 240 (Tex. Crim. App. 1987); *King v. State*, 733 S.W.2d 704 (Tex. App. 1987); *Webb v. State*, 695 S.W.2d 676 (Tex. Crim. App. 1985), *aff'd on other grounds*, 739 S.W.2d 802 (Tex. Crim. App. 1987) (en banc); *Meeks v. State*, 692 S.W.2d 504 (Tex. Crim. App. 1985); *McMillan v. State*, 609 S.W.2d 784 (Tex. Crim. App. 1980); *State v. Rice*, 717 P.2d 695 (Utah 1986); *State v. Sierra*, 754 P.2d 972 (Utah Ct. App. 1988); *State v. Hygh*, 711 P.2d 264 (Utah 1985); *State v. Harris*, 671 P.2d 175 (Utah 1983); *Hart v. Commonwealth*, 221 Va. 283, 269 S.E.2d 806 (1980); *State v. Loewen*, 97 Wash. 2d 562, 647 P.2d 489 (1982); *State v. Houser*, 95 Wash. 2d 143, 622 P.2d 1218 (1980); *State v. Simpson*, 95 Wash. 2d 170, 622 P.2d 1199 (1980); *State v. Daugherty*, 94 Wash. 2d 263, 616 P.2d 649 (1980), *cert. denied*, 450 U.S. 958 (1981); *Brown v. State*, 738 P.2d 1092 (Wyo. 1987). See also citations collected at Burkoff, *Bad Faith Searches*, *supra* note 2, at 113 n.213.

Some state and federal courts have, ironically, adopted Professor LaFave's rationale for rejecting the use of a subjective pretext test, i.e. this type of analysis is fruitless, when pretextual fourth amendment activity was already established on the record!

57. See Burkoff, *Bad Faith Searches*, *supra* note 2, at 107-11.

58. Moreover, an arbitrary search (in the sense of one deviating from usual practices) may not be unconstitutional. See, e.g., *United States v. Caceres*, 440 U.S. 741, 755-57 (1979); Burkoff, *Bad Faith Searches*, *supra* note 2, at 110.

in the recent past that its principal or only reason for applying an exclusionary rule to remedy fourth amendment violations is the general deterrence of police officers.⁵⁹ Only the use of a subjective pretext test serves to deter those police officers who have no intention of following the law, but are nonetheless "savvy" enough to make their conduct appear (objectively) as if it is lawful. These are the police officers, for example, who stop cars or boats to look for narcotics and who later sit in court while a prosecutor argues a fiction, namely that such stops were lawful because the stops were in fact regulatory, undertaken in order to enforce the traffic or registration, not narcotics, laws. Only "[t]he use of a subjective pretext analysis carries with it a simple and understandable, if not classic, general deterrent message: to search, you must act for the reasons that justify the search."⁶⁰

An example I have used before may be useful to illustrate this point:

We do not want to deter the searching police officer who honestly and forthrightly acts to search for drugs on the basis of his recognition of the odor of marijuana. We do, however, want to deter the searching police officer who searches for wholly improper reasons using a search for drugs as a pretext. Since the objective conduct and circumstances might well appear exactly the same in both cases, the only way to assess accurately when an improper search has occurred and thus the only way to deter police officers from engaging in such improper activities is to focus on the searching officer's subjective intent. Such a subjective focus to exclusionary doctrine should serve to "instruct" the police generally that such an improper intent is just that—improper—and will accordingly, result in rendering a search unconstitutional no matter how pristine it might otherwise objectively, fortuitously appear.⁶¹

3. Professor Haddad's Position

Professor James Haddad takes a completely different approach to the subject of pretexts.⁶² He argues, contrary to my and to Professor LaFave's position, that there is absolutely no ambiguity in Supreme Court decisions relating to pretextual fourth amendment

59. See, e.g., *United States v. Leon*, 468 U.S. 897, *reh'g denied*, 468 U.S. 1250 (1984); *Stone v. Powell*, 428 U.S. 465 (1976); *United States v. Janis*, 428 U.S. 433, *reh'g denied*, 429 U.S. 874 (1976); *United States v. Calandra*, 404 U.S. 338 (1974).

60. Burkoff, *Rejoinder*, *supra* note 9, at 702.

61. Burkoff, *Bad Faith Searches*, *supra* note 2, at 111-12.

62. See generally Haddad, *supra* note 16; Haddad, *Well-Delineated Exceptions, Claims of Sham, and Fourfold Probable Cause*, 68 J. CRIM. L. & CRIMINOLOGY 198, 204-14 (1977).

activity. Rather, Haddad claims that what he calls "the hard-choice approach . . . is the only approach to the pretext problem that the Supreme Court has used consistently."⁶³ By the "hard-choice approach," Haddad is referring to his theory that

the Supreme Court has consistently taken into account the possibility of pretextual fourth amendment activity in determining whether to expand a particular fourth amendment limitation upon police conduct. Sometimes it has left police practices untouched, sometimes it has narrowed the scope of police practices; always it has considered governmental and individual interests and not just pretext possibilities.⁶⁴

To clarify his point, Haddad contrasts his "hard-choice" approach to what he calls the "case-by-case" approach to pretexts wherein "courts examine pretext claims on a case-by-case basis, excluding the product of the fourth amendment activity if they find that officers exercised the [search or seizure] power pretextually."⁶⁵ In contrast to the case-by-case approach, Haddad argues that the Supreme Court should—and does—simply craft its fourth amendment doctrine in the form of general rules, forged with the recognition that pretexts should be deterred thereby. Since, accordingly, pretexts are *only* to be considered by the Supreme Court in the crafting of general rules, when a pretext is apparent on the facts of a particular case, lower courts must, Haddad counsels, *grit their teeth* and simply ignore it.⁶⁶

Haddad further subdivides the case-by-case approach to pretexts into two sub-categories: my approach, described previously,⁶⁷ which he titles the "individual motivation" approach,⁶⁸ and

63. Haddad, *supra* note 16, at 653 (footnote omitted).

64. *Id.* at 673.

65. *Id.* at 649.

66. This is no overstatement. *See, e.g.*, Haddad, *supra* note 16, at 692:

After courts have reexamined various fourth amendment rules under the hard-choice approach, eliminating some, narrowing some, and leaving some unmodified, possibilities for pretextual use will remain. Courts have eliminated roving patrol license check stops, for example. They could limit the power to enter a suspect's home under the authority of a dated warrant. But we know that they will not prevent the police from stopping speeding motorists. Because this is so, *under the hard-choice approach the police will always have an opportunity to stop speeding motorists in the hope of observing evidence of a robbery in plain view. The hard-choice approach says "so be it."* *Id.* (footnotes omitted, emphasis added).

67. *See supra* text accompanying notes 39-45.

68. Haddad, *supra* note 16, at 681 *passim*. Professor Haddad concedes, as he must, that this approach is not just mine, indeed that "[m]any lower courts have adopted this motivation approach." *Id.* at 649 (footnote omitted). *See also id.* at 693 ("I must acknowledge that hundreds of opinions from other courts agree with [Professor Burkoff's] basic approach.").

LaFave's approach,⁶⁹ which ignominiously untitled, Haddad accurately describes as focusing upon "whether the police departed from standard procedures."⁷⁰ Professor Haddad generously contributes to my continuing legal education by spending fifty-four pages dissecting, explaining, and criticizing my approach,⁷¹ but simply dismisses LaFave's approach out-of-hand, in his words, "because I am not sure how it would operate."⁷²

I have very briefly responded to Professor Haddad's criticisms elsewhere.⁷³ I think he was wrong in 1985 when he argued that no prior Supreme Court decision had ever recognized the existence of a pretext search doctrine, or at least a doctrine which could be applied in individual cases.⁷⁴ More important, whatever the true import of Supreme Court precedents, I thought then and think now that he is dead wrong when he argues that use of my subjective pretext analysis is inappropriate as a matter of sensible fourth amendment policy. Haddad summarized his complaints about my approach as follows:

The individual motivation methodology punishes the prosecution where an officer has acted within the letter of the law to further the laudable goal of obtaining incriminating evidence. More importantly, an individual motivation methodology shifts the focus away from the most important issues: the existence and scope of fourth amendment limitations. Unlike the hard-choice approach, it tends to inhibit critical reassessment and deserved expansion of fourth amendment limitations.⁷⁵

I have three problems with this analysis. First, a law enforcement officer who is acting pretextually simply is *not* acting "within the letter of the law,"⁷⁶ a point that Haddad ultimately is moved to

69. *See supra* text accompanying notes 46-61.

70. Haddad, *supra* note 16, at 650 (footnote omitted). As noted previously, because LaFave feels that the *Scott* decision provides the language, if not the analysis, which underlies his approach, it is typically referred to as the "objective" analysis in contrast to my "subjective" analysis.

71. Haddad, *supra* note 16. (Authorial aside: I am teasing, of course, Jim, and appreciate the many kind comments you also had to offer about my work.)

72. *Id.* at 650 (footnote omitted). Haddad does, however, seemingly associate himself with my criticisms of LaFave's approach. *See id.* at 650 n.43, 675-76, 681-85.

73. *See Burkoff, Rejoinder, supra* note 9. Professor LaFave has merely consigned Haddad to citation in a footnote. *See W. LaFave, supra* note 14, § 1.4(a), at 81 n.3.

74. *See Burkoff, Rejoinder, supra* note 9, at 695-99.

75. Haddad, *supra* note 16, at 681.

76. For example, in *South Dakota v. Opperman*, 428 U.S. 364 (1976), the Supreme Court held constitutional suspicionless automobile inventory searches that are not "a pretext concealing an investigatory police motive." *Id.* at 376. Hence, if a law enforcement officer undertakes an automobile inventory search as a

concede.⁷⁷ Second, unless we are to stand the Constitution on its head, it is obviously *not* "laudable" for a law enforcement officer to attempt to obtain incriminating evidence by pretextual, *i.e.*, constitutionally unjustified, means. To hold otherwise is essentially to argue that the Bill of Rights and interpretive judicial decisions need not be followed because good ends justify bad (unconstitutional) means.⁷⁸ Nor are all police investigatory ends good ones. Treating pretexts as if they were "laudable" would often serve to "cover up" discriminatory police activity.⁷⁹

Finally, Haddad's criticisms of the subjective approach to pretexts are off base. Haddad essentially compares and contrasts all of his approach and only part of mine, neglecting the fact that my subjective approach is designed—and has often been used⁸⁰—not to supplant his desired "hard-choice" reassessment of fourth amendment doctrine, but rather to supplement it.⁸¹ In fairness, Haddad does ultimately acknowledge that "[o]f course, the Court could still reexamine various fourth amendment doctrines while simultaneously retaining an individual motivation approach."⁸² He nonetheless ultimately dismisses this possibility because, in his words: "I believe, however, that the availability of an individual motivation approach serves as a 'crutch.' It allows the Court to justify a particular police practice by declaring . . . that the Court will deal with abuses of the power on a case-by-case basis."⁸³

pretext concealing an investigatory motive, that clearly is not an act undertaken "within the letter of the law." See Burkoff, *Rejoinder*, *supra* note 9, at 699-700.

77. As Haddad generously concludes his article, "Professor Burkoff's articles have made me realize that to assert that . . . an improperly motivated officer acts within the boundaries of an established fourth amendment doctrine begs the question." Haddad, *supra* note 16, at 693.

78. "Law enforcement officers cannot break down doors without probable cause, rummage through homes indiscriminately, or arrest anyone they want without sufficient justification at law—even if they are honestly looking for criminal evidence in the process." Burkoff, *Rejoinder*, *supra* note 9, at 700.

79. See, e.g., *People v. Castro*, 125 Misc. 2d 15, 479 N.Y.S.2d 414, 416 (Sup. Ct. 1984) ("it appears that members of the squad patrolling in minority neighborhoods may use the pretext of [investigating] possible taxi crime as an excuse for stopping gypsy cabs and searching the passengers with the hope of finding guns or other contraband").

80. See *supra* citations at note 56.

81. See *supra* text accompanying notes 43-45, and text accompanying note 52.

82. Haddad, *supra* note 16, at 688.

83. *Id.* at 688-89 (citations omitted). Haddad adds: "The more 'outrageous' the pretextual use of a power, the more likely a defense lawyer will argue pretext and will fail to argue that a court should narrow the underlying power." *Id.* at 689. It is difficult to understand why, however, the reasonably capable defense attorney would not—and should not be able to—make *both* arguments. Under Professor Haddad's analysis, *only* the latter argument would be available to defense counsel who, arguing at the suppression court level, would be unlikely (to put it mildly) to hinge his or her whole defense on attempting to convince a suppression court to establish a new constitutional rule.

This is an odd argument. If Haddad is arguing that the availability of such a case-by-case approach (mine or LaFave's) has in fact served as a "crutch" for the Supreme Court in the past, then he is effectively confessing error as to his earlier argument that Supreme Court precedent reveals the prior, unequivocal rejection of that approach.⁸⁴ If Haddad is arguing instead that the adoption of such a case-by-case approach *would serve* as a "crutch" if and when it is ever used, it is difficult to imagine why that would—or should—be so. Since there is no dispute over the fact that the subjective proof of pretext can be exceedingly difficult for defense counsel to make, it is hard to imagine why the Supreme Court would rely on that unlikely possibility as a rationale for otherwise crafting the main body of its fourth amendment law so as to ignore the threat of pretextual activity altogether. Indeed, as I have argued elsewhere, "[t]he fact that pretexts are difficult for defense counsel to establish except in exceptional cases should give the Supreme Court additional incentive to make 'hard choices' as to the desirable scope of fourth amendment powers as a generic matter."⁸⁵

III. MISSOURI V. BLAIR

The Supreme Court had before it during its 1986-1987 Term the ideal case in which to adopt, elucidate, or refine its position on the proper constitutional import of these pretext search issues. The case was *Missouri v. Blair*, in which certiorari was granted in January of 1986.⁸⁶ The facts in *Blair* lent themselves to analysis in paradigmatic fashion of all of the pretext issues discussed above.

A. The Facts

On November 24, 1981, Kansas City, Missouri police officers discovered the dead body of 59-year-old Carl Lindstedt in a park lagoon. Lindstedt had been bound hand and foot and shot. The only solid evidence found near the scene of the crime was a palm print discovered behind the passenger door on the victim's truck, which was discovered parked a quarter mile away from the body. The search for Lindstedt's killer got nowhere.⁸⁷

On January 22, 1982, two months after Lindstedt's body was found, an unknown tipster telephoned an investigator in the county prosecutor's office and reported that she had talked to some chil-

84. See *supra* text accompanying notes 63-64.

85. Burkoff, *Rejoinder*, *supra* note 9, at 701 (footnote omitted).

86. 474 U.S. 1049 (1986), *cert. dismissed*, 480 U.S. 698 (1987).

87. Facts are drawn from the Missouri Supreme Court's opinion, *State v. Blair*, 691 S.W.2d 259, 260 (Mo. 1985), from the unpublished Missouri Court of Appeals opinion, *State v. Blair*, No. WD35622 (Mo. Ct. App. July 3, 1984), and from the Briefs of the parties to the Supreme Court.

dren who said that they had overheard members of the Blair family bragging about their involvement in the murder. Based upon this double hearsay tip, palm prints on file of three of the Blair family members were examined by the police and were found not to match the print found at the scene of the crime. The police did not, however, have a palm print of the fourth Blair family member, Zola Blair, on file. So, on January 23, 1982, a Kansas City homicide detective issued a so-called "pick up" order to bring Zola Blair in to the stationhouse for questioning about the Lindstedt murder. The detective, according to the Missouri Supreme Court, summarizing the trial court's finding and testimony, "did not ask for a homicide arrest or search warrant because he believed there was not enough evidence to support a warrant."⁸⁸

On February 5, 1982, Zola Blair was picked up by the Kansas City police. She was taken to the downtown homicide unit, booked for homicide, detained overnight in jail, interrogated, and her palm and finger prints were taken. After denying any knowledge of the murder during interrogation, she was released at 10:45 a.m. the next day. Three days later, however, Blair was arrested and booked once again for homicide—her palm print taken on February 5, 1982, had matched the one found at the scene of the crime.

After Zola Blair's arrest, her attorney moved to suppress the palm print taken from his client after she was "picked up" by the Kansas City police as well as some incriminating statements she made after being confronted with the evidence of the matching prints. His rationale for suppression was that the police lacked probable cause to "pick up" Zola Blair for homicide before they had matched her palm print, the "pick up" was therefore unconstitutional, and the print and subsequent statements were, as a result, suppressible fruits of this unconstitutional act.

This suppression argument was not difficult to win. The United States Supreme Court has made it clear that, whatever the police call it, when you "pick up" someone, take them to the stationhouse and hold them for questioning, that's an "arrest" (a "seizure" in fourth amendment terminology).⁸⁹ And to make an arrest, the police must have "probable cause" to believe that the arrestee committed a crime.⁹⁰

In Zola Blair's case, it is clear that the police did not have probable cause with respect to her participation in the Lindstedt murder

88. *State v. Blair*, 691 S.W.2d 259, 260 (Mo. 1985), cert. granted sub nom. *Missouri v. Blair*, 474 U.S. 1049 (1986), cert. dismissed, 480 U.S. 698 (1987).

89. See, e.g., *Dunaway v. New York*, 442 U.S. 200, 216 (1979) ("detention for custodial interrogation—regardless of its label—intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest.").

90. U.S. CONST. amend. IV. See *supra* note 30 and accompanying text.

before they picked her up and took her palm print. They only had an unknown informant's uncorroborated, double hearsay tip that Zola Blair's family was bragging about the murder.⁹¹ This kind of unsupported accusation is not—and can never be—enough, by itself, to establish probable cause to arrest someone. If it were deemed to be enough, probable cause would become a meaningless requirement; anyone could arrange the arrest of a person he or she disliked simply by calling the nearest police station and anonymously accusing that person of committing a crime. Worse still, police officers would never have to uncover any real probable cause information in order to make an arrest because they could always use as justification the anonymous tip they (allegedly) received that implicated the arrestee. Indeed, in Zola Blair's case, after her attorney made his motion to suppress the evidence against her, the prosecution ultimately conceded that the informant's tip was not enough to establish probable cause to arrest her—and the Missouri courts readily agreed with this conclusion.⁹²

Given this expurgated factual recitation, the *Blair* case, while troubling because it raises the possibility that someone who may have been at a murder scene may go untried for lack of admissible evidence, raises no original or sophisticated fourth amendment issues. This would be true even if we *knew* (which we do not) that Zola Blair was actually involved in the Lindstedt murder. As Justice Scalia has recently acknowledged for the Supreme Court, "There is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all."⁹³

But, the plot thickens as a few additional facts are added to the tale. When the police arrived at Zola Blair's home (actually Zola Blair's mother's home where Zola lived) to execute the "pick up" order on February 5, 1982, they allegedly saw a car illegally parked outside the house. Upon radioing the address back to the dispatcher before entering the house, they discovered that Zola herself was not only a murder "suspect," she was also the subject of an outstanding municipal parking violation "warrant." (Actually, no physical warrant existed, just an entry noting the existence of the parking violation in a computerized file.)

91. The state also alleged that the police had found the victim's sofa in the home of James Blair. Brief for Petitioner at 6, *Missouri v. Blair*, 474 U.S. 1049 (1986). But no tie was demonstrated between Zola Blair and this residence or the sofa, and this fact was not considered relevant by the Missouri courts.

92. "In this case, it is undisputed that the police lacked probable cause to arrest defendant on the homicide charge. . . ." *State v. Blair*, 691 S.W.2d 259, 261 (Mo. 1985); *State v. Blair*, No. WD35622 (Mo. Ct. App. July 3, 1984) ("it was conceded that there existed no probable cause for the issuance of a warrant").

93. *Arizona v. Hicks*, 107 S. Ct. 1149, 1155 (1987).

As a result, when Zola Blair's defense attorney successfully argued in the Missouri courts that the unknown informant's double hearsay tip did not establish probable cause to arrest her for homicide, the prosecution responded that, in that event, the informant's tip should be treated as irrelevant because Zola Blair was arrested for the parking violation. Since she was *lawfully* under arrest for *something*, the argument went, her palm prints were constitutionally acquired.

The Missouri courts were not, however, so easily deceived. Blair's defense attorney won his pretrial suppression motion in the trial court and had it affirmed by the Missouri Court of Appeals and the Missouri Supreme Court. He won because the Missouri courts recognized what was absolutely crystal clear on the record before them, namely that Zola Blair was arrested for homicide, not bad parking. The prosecution, the Missouri courts concluded, brought up the parking violation "warrant" simply as a pretext to justify her otherwise unlawful arrest for homicide. As the Missouri Supreme Court ruled, even "[a]ssuming an arrest for the parking violation, the arrest, in the circumstances of this case, was at best a pretext employed to gather evidence on an unrelated homicide."⁹⁴

On the facts, it is rather hard, if not impossible, to quibble with the Missouri Supreme Court's conclusion: it was a *homicide* detective who ordered Zola Blair's "pick up," she was given *Miranda* warnings (people booked for traffic offenses in this jurisdiction are not given such warnings), she was taken to the downtown *homicide* unit (people booked for parking violations in this jurisdiction are taken to district police stations or the headquarters detention unit, whichever is nearer), her finger and palm prints were taken when she arrived downtown as is standard procedure for a *homicide* (people booked on parking offenses in this jurisdiction have only a right index finger impression taken), she was booked on the *homicide* charges, and she was questioned by *homicide* detectives about the *homicide*.⁹⁵ It was not until after the homicide unit released her on February 6, 1982, that Zola Blair was picked up again, fourteen minutes later, then "booked" on the parking violation and an impression of her right index finger taken. The Missouri Supreme Court concluded on this plain record, as it affirmed the court of appeal's affirmance of the trial court's order suppressing the evidence against Blair that "[t]he record in this case supports the ruling of the trial court. The execution of the parking violation warrant was but a subterfuge or pretext . . . to gather evidence of the unrelated crime of homicide."⁹⁶

Neither the Missouri Court of Appeals nor the Missouri

94. *State v. Blair*, 691 S.W.2d 259, 262 (Mo. 1985), *cert. granted sub nom. Missouri v. Blair*, 474 U.S. 1049, *cert. dismissed*, 480 U.S. 698 (1987).

95. *Id.*; *State v. Blair*, No. WD35622 (Mo. Ct. App. July 3, 1984).

96. 691 S.W.2d at 263.

Supreme Court discussed the question whether this pretext was established on the record objectively or subjectively. This is not surprising. There was no reason to discuss or choose between these approaches since, as the objective evidence was crystal clear,⁹⁷ there was no need to look at the arresting officers' subjective motivations, which were, in any event, equally clear.⁹⁸ The Missouri Supreme Court simply cited federal and Missouri authorities for the settled proposition that "an arrest may not be used as a pretext to search for evidence"⁹⁹ and reasoned that "[u]nderlying these cases is appreciation for the far reaching consequences of allowing the common offense of a traffic violation to serve as a justification for an otherwise unconstitutional search."¹⁰⁰ On this basis, a four-justice majority of the Court affirmed the trial court order sustaining Blair's motion to suppress, holding that "[t]he record in this case supports the ruling of the trial court. The execution of the parking violation warrant was but a subterfuge or pretext . . . to gather evidence of the unrelated crime of homicide."¹⁰¹ Three Missouri Supreme Court justices dissented. Justice Blackmar, writing for the dissenters, concluded in contrast to the majority opinion that "[t]he common theme of the pretext cases is that the police arrested people without reason. The police had a valid pre-existing warrant for Zola Blair's

97. *See supra* text accompanying note 94.

98. The officer who took Blair into custody testified, for example, that he went to her home to pick her up pursuant to the "pick up" order from the homicide unit and that he intended to detain her on that basis. Brief for Respondent at 16, *Missouri v. Blair*, 474 U.S. 1049 (1986) (citing hearing transcript at 42-43). *See also State v. Blair*, No. WD35622 (Mo. Ct. App. July 3, 1984) ("[Patrolman] Stewart testified that he went to the residence to pick her up on the homicide pickup").

99. *State v. Blair*, 691 S.W.2d 260, 262 (Mo. 1985) (citing *United States v. Lefkowitz*, 285 U.S. 452 (1932); *Taglavore v. United States*, 291 F.2d 262, 265 (9th Cir. 1961); *State v. Goodman*, 449 S.W.2d 656 (Mo. 1970); *State v. Howell*, 543 S.W.2d 836, 838 (Mo. App. 1976)), *cert. granted sub nom. Missouri v. Blair*, 474 U.S. 1049 (1986), *cert. dismissed*, 480 U.S. 689 (1987).

100. 691 S.W.2d at 263 (citing *Amador-Gonzalez v. United States*, 391 F.2d 308 (5th Cir. 1968)).

101. 691 S.W.2d at 263. *See also State v. Blair*, No. WD35622 (Mo. Ct. App. July 3, 1984) ("[I]t appears beyond peradventure that [Blair's] arrest on the parking violation charge was but a pretext, motivated by the police officers' desire to gather evidence, in violation of her Fourth and Fourteenth Amendment rights of the United States Constitution.").

The Missouri Supreme Court further ruled that

[t]he palm and finger prints and statements obtained on February 5, 1982, were properly suppressed because they resulted from an unlawful arrest and search. Because the illegally seized evidence provided the sole basis for the arrest warrant for homicide on February 8, 1982, and led directly to [Blair's] statements on that day, the warrant and statement are also inadmissible as "fruits of the poisonous tree."

691 S.W.2d at 263 (quoting *Wong Sun v. United States*, 371 U.S. 471 (1963)). The state's further argument that the inevitable discovery exception to the exclusionary rule applied was held to be "without merit." *Id.*

arrest. Any procedural irregularities which occurred afterward should not invalidate the arrest."¹⁰²

B. Argument to the Supreme Court

After certiorari was granted on the state's petition, the state's argument to the Supreme Court on the pretext issues boiled down to advocacy of two basic points.¹⁰³ First, the state argued that Blair's

arrest on an outstanding, pre-existing arrest warrant for a municipal parking violation, justified her custodial arrest and the taking of a full set of fingerprints incident to that arrest, and the arrest and subsequent search were not rendered 'pretextual' and therefore in violation of the Fourth Amendment simply because the police *also* wished to question her about an unrelated homicide and take her fingerprints so that they could be compared to a palm print found at the scene of the homicide.¹⁰⁴

Second, the state argued that "[t]he decision of the Missouri Supreme Court essentially holds that an objectively lawful arrest, made pursuant to a valid warrant, can somehow be transformed into an invalid arrest merely because of the subjective intent of the arresting officers. Such reasoning has repeatedly been rejected by this Court."¹⁰⁵

The thrust of Zola Blair's response to these arguments¹⁰⁶ was

102. 691 S.W.2d at 267. Justice Blackmar added that [i]nasmuch as there was basis for a lawful arrest, the order of proceedings should make no difference. The time of booking on the traffic warrant is an immaterial circumstance. It would be ludicrous to suggest that suppression must be ordered because the police did not retake her fingerprints after she was booked on the traffic warrant.

Id. at 266.

103. The state also argued in the alternative that even if the arrest was pretextual and, hence, unconstitutional, the suppression order was nonetheless inappropriate because: (1) the arresting officers acted in good faith, (2) the evidence would nonetheless have been inevitably discovered, and/or Zola Blair's subsequent statements were not fruits of the illegality. Brief for Petitioner at 34, *Missouri v. Blair*, 474 U.S. 1049 (1986).

104. *Id.* at 12 (emphasis added). The state conceded that, "[t]o be sure, the police were more interested in determining the extent of [Zola Blair's] involvement in the death of 59-year-old Carl Lindstedt than they were in making her answer for the municipal parking violation." *Id.* at 15.

105. *Id.* at 12 (citations to *Scott*, *Villamonte-Marquez*, and *Macon* omitted). The *Scott*, *Villamonte-Marquez*, and *Macon* decisions are discussed *supra* text accompanying notes 10-38.

106. Blair also argued that the parking warrant arrest was in any event unlawful under Missouri law which requires actual possession of the arrest warrant and that no exception to the exclusionary rule appropriately applied. Brief for Respondent at 10, 13, 18-19, 41-45, *Missouri v. Blair*, 474 U.S. 1049 (1986).

that the supposed parking violation arrest was clearly "a pretext concealing a motive to arrest for the primary purpose of searching for and seizing [her] inked palm impressions and interrogating her pursuant to a homicide investigation."¹⁰⁷ Hence, she argued, the Missouri Supreme Court acted correctly in upholding the trial court's suppression of the fruits of that pretextual arrest because "[a]n arrest ostensibly for one purpose but in reality for the primary purpose of furthering an ulterior goal is unreasonable under the Fourth and Fourteenth Amendments."¹⁰⁸

C. Analysis

In light of the pretext commentaries previously discussed,¹⁰⁹ the pretext issues expressly or impliedly resolved in the majority and dissenting opinions of the Missouri Supreme Court in *Blair* can be parsed as follows. The *Blair* majority rejected (if implicitly) Professor Haddad's "hard choices" approach to pretext analysis, using instead what Haddad called the "case-by-case" approach that permits consideration of the existence of pretextual activity in each individual case.¹¹⁰ The *Blair* majority did not, however, explicitly use either Professor LaFave's "objective" case-by-case analysis of pretexts or my "subjective" case-by-case analysis. As previously noted, on the record in the *Blair* case, there was no need to be explicit about which case-by-case approach was being used.¹¹¹ Even under my so-called "subjective approach" to pretext analysis, a reviewing court need not assess the relevant law enforcement officer's subjective motivation for engaging in fourth amendment activity when

107. *Id.* at 11.

108. *Id.* (citing *Abel v. United States*, 362 U.S. 217 (1960); *United States v. Lefkowitz*, 285 U.S. 452 (1932)). The court in *Blair* added:

Overlooking the primary purpose of a search or seizure would reap such abuse, encourage such capricious searches and arrests, and engender such disrespect and resentment of law enforcement that this Court should not adopt such a position. Exceptions to the warrant requirement would be used as investigative tools instead of for the purpose they were created. Traffic offenses are easily committed, authorizing arrests in most states. Searches of the person and automobile would follow automatically. Inventory searches of impounded vehicles would be used as investigative tools. The plain view doctrine would no longer require discovery of evidence to be inadvertent. Administrative warrants pursuant to health, fire and building codes could be used to further criminal investigations. Police would generate facts ostensibly calling for the application of an exception to the warrant requirement or for a warrant. This search or arrest power would then be used for exploratory searches, out of caprice, or to harass or punish.

Id. at 11-12.

109. See *supra* text accompanying notes 39-85.

110. See *supra* text accompanying notes 62-85.

111. See *supra* text accompanying notes 97-98.

the *objective* facts clearly demonstrate—as they did here—that a pretext was present.¹¹² Since both the objective and subjective facts were clear in this case and led to the same conclusion, there was simply no need to rest the Court's decision upon the arresting officer's motivations, which were, in any event, confessedly pretextual.¹¹³

The dissenters on the Missouri Supreme Court in *Blair* took a different approach altogether to this subject. They did not dispute the proposition that the use of a case-by-case approach to analysis of pretexts as constitutional or unconstitutional was appropriate.¹¹⁴ Rather, they concluded that this case simply was not a pretext case because "[t]he common theme of the pretext cases is that the police arrested people without a reason,"¹¹⁵ and that, in this case, "[t]he police had a valid pre-existing [parking] warrant for Zola Blair's arrest."¹¹⁶ In short, there was no pretext here, in the dissenters' view, because the parking violation "was [a] basis for a lawful arrest."¹¹⁷

This supposed "objective" approach utilized by the *Blair* dissenters should not be confused with Professor LaFave's "objective" approach to pretext analysis. They are totally different. Under Professor LaFave's approach, the "objective" question to be asked in assessing whether a cognizable, unconstitutional pretext exists is whether this supposed parking arrest was "carried out in accordance with standard procedures in the local police department."¹¹⁸ This question is, of course, easy to answer and easily establishes a pretext on the *Blair* facts since the pick-up/arrest clearly deviated from standard procedures for traffic or parking offenses.¹¹⁹ But that fact of arbitrary deviation from standard procedures was irrelevant to the *Blair* dissenters. Rather, their point was that since it was possible to make a legitimate parking arrest in the *Blair* circumstances,¹²⁰ it does not matter for constitutional purposes that *this* parking arrest was not *in fact* a normal parking arrest or undertaken for that pur-

112. See *supra* notes 43-45 and accompanying text.

113. See *supra* note 98 and accompanying text.

114. *State v. Blair*, 691 S.W.2d 259, 266-67 (Mo. 1985), cert. granted sub nom. *Missouri v. Blair*, 474 U.S. 1049 (1986), cert. dismissed, 480 U.S. 689 (1987). The dissent cites a number of pretext cases in an approving fashion, but distinguishes them on the grounds discussed in the text which follows.

115. *Id.* at 267.

116. *Id.*

117. *Id.* at 266.

118. See *supra* text accompanying note 50.

119. See *supra* text accompanying note 95.

120. This point is, parenthetically, not as self-evident as the *Blair* dissenters thought. Under Missouri law in effect at the time of the pick up/arrest, a warrant issued on the basis of a nonappearance to answer a parking violation ticket needed to be in the possession of the arresting officer in order to be validly executed. Mo. REV. STAT. § 544.180 (1978); *Rustici v. Weidemeyer*, 673 S.W.2d 762 (Mo. 1984).

pose. In short, the *Blair* dissenters argued that since probable cause to arrest Zola Blair for her criminal parking existed, it does not matter *how* (LaFave's analysis) or *why* (my analysis) she was in fact arrested for such a violation.

I think this is a very dangerous position to take¹²¹ and I have elsewhere criticized this result-oriented view of pretext law by noting that

It is one thing to conclude, as both LaFave and this author do, that a police officer's improper rationale for a search is rendered constitutionally irrelevant when a proper and independently sufficient rationale is also present at the time of the search; it is another thing entirely to argue that an improper rationale that was the sole basis for a search is irrelevant when, absent that rationale, the police "would have" engaged in the same search with a proper rationale. This hypothetical "proper rationale" bears no more relation to the search that was actually conducted than does the probable cause that unbeknownst to the searching officer "objectively" exists elsewhere in the universe. Like those "objective" facts, a hypothesized "proper rationale" for a search is irrelevant to its constitutionality. *The search must be evaluated on the basis of the facts upon which the officer actually acted, not those that an imaginative prosecutor might argue the officer would have acted upon under some other hypothetical circumstance.*¹²²

If the *Blair* dissenters' narrow view of pretext were to prevail, anyone who has an outstanding parking or traffic "warrant" could be arrested *at any time* because the police wanted to investigate any *other* offense. The fourth amendment's requirement of probable cause would, in essence, be nullified as to that individual with respect to virtually *any* searches or seizures the police wanted to make. And, considering the probable number of individuals with outstanding traffic or parking tickets that exist in this country, it is highly likely that literally millions of Americans would fall into this cate-

121. The *Blair* dissenters are not the only judges to take this flawed position. See also, e.g., Judge Gee's majority opinion in *United States v. Causey*, 834 F.2d 1179, 1185 n.11 (5th Cir. 1987) (en banc), finding nothing wrong with the arrest of a defendant, Causey, on a seven and one-half year old bench warrant for a misdemeanor theft charge in order to question him about a bank robbery for which there was no probable cause: "Causey had, long before the police apprehended him, forfeited his right to be free from arrest. He was already the object of an arrest warrant; he had been subject to arrest at all times since its issuance; and he can scarcely complain that the police finally got around to executing a valid warrant." *Id.*

122. Burkoff, *Bad Faith Searches*, *supra* note 2, at 105 (footnotes omitted) (emphasis added).

gory.¹²³ Judge Rubin of the Fifth Circuit Court of Appeals has eloquently made this same point in dissent in a case decided subsequent to the Supreme Court's short-lived consideration of *Blair*:

In the kind of society in which we live, few persons have a life so blameless that some reason to arrest them cannot be found, whether it be for entering an intersection when the light is on caution, or for violating a zoning regulation, or for having an expired brake tag. The fourth amendment protection against arrests without probable cause is designed to protect citizens against being arrested for such a matter when there is no objective justification for the arrest save the police's desire to question the person in custody about a matter for which they lack the authority to make an arrest.

123. See, e.g., *United States v. Causey*, 834 F.2d 1179, 1189-90 (5th Cir. 1987) (Rubin, J., dissenting) (footnotes omitted):

News reports indicate how many millions will be exposed to pretextual arrest . . . either because a warrant to arrest them for some offense has already been issued or because they have been charged with an offense for which a warrant might be obtained. The Federal Bureau of Investigation has been testing a system that permits inquiries about criminal suspects from every state to be compared with names registered in a computer. "The primary purpose of the project is to devise a national communications system through which a policeman in New York, a prosecutor in Chicago or a judge in Los Angeles will be able to determine swiftly whether the suspects they are holding have ever been arrested in any other state." Five years ago policemen were routinely using the system more than 300,000 times a day to answer such questions as whether a car is stolen.

Syracuse, New York, has 20,000 delinquent parking tickets. In Toledo, Ohio, 31,890 parking tickets were reported delinquent, and, after intensified police efforts, only slightly more than half were paid. In Indianapolis, Indiana, "[t]he computer told police they could find 5,800 defendants at 2,700 companies. It also showed there were 28,000 outstanding warrants for traffic offenses, 9,000 for misdemeanors and 1,500 for felonies." Indianapolis police reported an estimated 27,000 such lawbreakers.

Washington, D.C. has records of 500,000 residents of Maryland, Virginia, and the District of Columbia who have failed to pay parking tickets. Los Angeles has considered an amnesty program in which 810,000 traffic offenses carried on the court's computer docket might be settled by payment "while having arrest warrants dismissed."

These are but examples. Current technology has made it possible for every police system in the nation to record in a computer the name of every traffic offender and every other person wanted for any offense, however trivial, and for a national system to collate all of these records.

Id.

It should not be difficult to convince the Supreme Court to take judicial notice of the fact that even ordinarily law-abiding citizens occasionally receive such tickets. *Cf. Rehnquist Is Given Ticket for Speeding*, N.Y. Times, Sept. 13, 1986, at 10, col. 1.

Untold thousands of Americans are subject to arrest for failing to pay parking tickets, failure to respond to summonses for traffic violations, and similar minor offenses Police who desire to arrest an individual without probable cause may merely leaf through the files or turn to the computer to determine whether they can find some reasons to arrest a suspect for whose arrest they otherwise lack probable cause, just as the police did when they set out to find some pretext to arrest [the defendant in this case]. While I do not condone the possible law violations that led to the imposition of the earlier charges, I do not think such prior derelictions strip the alleged lawbreakers of fourth amendment protection if they should later be suspected of other offenses.¹²⁴

Are such claims of the erosion of constitutional protections hyperbolic or exaggerated? Well, the Missouri Supreme Court's *Blair* decision, accepted on certiorari, gave the United States Supreme Court the opportunity to answer this question as well as to answer or reaffirm the answer to two of the most important and controversial doctrinal questions relating to pretexts, namely:

- (1) Was the *Blair* Court correct in applying a case-by-case pretext analysis? Or, put another way, was the *Blair* Court correct in assuming that suppression of evidence seized as a result of pretextual fourth amendment activity was compelled or otherwise appropriate?
- (2) Was the *Blair* Court majority correct in ruling that when the record evidence established that an arrest was made in bad faith, i.e., as a pretextual means to arrest and acquire evidence about a crime where there was no probable cause, the arrest was *ipso facto* unconstitutional? Or, in contrast, were the *Blair* Court dissenters correct in arguing that where the record established that a lawful parking arrest *could* be made, it does not matter how or why such an arrest was actually made?

124. *Causey*, 834 F.2d at 1189 (Rubin, J., dissenting). In *Causey*, the Fifth Circuit, sitting *en banc*, on an 8 to 6 vote, reversed a prior panel decision at 818 F.2d 354 (5th Cir. 1987), which had found the pretext arrest at issue in that case to be unconstitutional. The reach of the *Causey* majority opinion is limited, however, by the comments of one of the judges in the majority (whose vote was necessary to make up the bare majority) who specifically noted that

there is a risk that with the storage and retrieval capability of today's computers, warrants may function in a manner similar to the old general writs of assistance. . . . Our conclusion today . . . does not tolerate such a storing of warrants. We decide no issues attending a system of obtaining warrants and "warehousing" them for a purpose other than to arrest for the offense for which probable cause is found.

834 F.2d at 1186 (Higginbotham, J., specially concurring) (footnote omitted).

While these two specific issues set out above were clearly before the Supreme Court arising out of the Missouri Supreme Court's decision in *Blair*, the briefs of the parties to the Court, as is perhaps to be expected, muddled the waters just a bit. The state contended that Zola Blair's arrest was not pretextual "simply because the police also wished to question her about an unrelated homicide and take her fingerprints."¹²⁵ The state also argued that the *Blair* majority decision "essentially holds that an objectively lawful arrest, made pursuant to a valid warrant, can somehow be transformed into an invalid arrest merely because of the subjective intent of the arresting officers."¹²⁶

Both of these arguments misstate the record and the Missouri Supreme Court's holding in *Blair*. The *Blair* Court did *not* find, as the state suggested, that the record facts presented a situation involving "mixed motives," *i.e.*, that the police were acting for a mix of proper and improper reasons.¹²⁷ I have argued that in such mixed motives cases, there is a cognizable unconstitutional pretext *only* if, borrowing former Justice Powell's formula from *Michigan v. Clifford*,¹²⁸ the improper motive is "the primary object of the search."¹²⁹ Professor Haddad has responded that if a motive-oriented test was used by the Court, it should require evidentiary suppression in a broader category of cases, namely where "the improper motivation played a *significant* role in the officers' decisional process."¹³⁰ But neither Haddad's nor my approach would have been dispositive in *Blair* because the Missouri Supreme Court ruled (as had the lower courts) that the reasons for Zola Blair's arrest were *entirely* improper: "[T]he arrest, in the circumstances of this case, was at best a pretext employed to gather evidence on an unrelated homicide . . ."¹³¹ Accordingly, the state misstated the record in arguing to the United States Supreme Court that the *Blair* case involved the issue of whether a lawful arrest was rendered pretextual simply because the

125. See *supra* text accompanying note 104.

126. See *supra* text accompanying note 105.

127. See discussion of mixed motives in Burkoff, *Bad Faith Searches*, *supra* note 2, at 103-04; Burkoff, *Pretext Search Doctrine*, *supra* note 17, at 534; Haddad, *supra* note 16, at 649, 674 n.158, 683-85; Burkoff, *Rejoinder*, *supra* note 9, at 698 n.16; Note, *supra* note 23, at 257-63.

128. 464 U.S. 287 (1984).

129. Burkoff, *Rejoinder*, *supra* note 9, at 697-98, 698 n.16.

130. Haddad, *supra* note 16, at 684 (emphasis original) (citing Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motivation*, 1971 SUP. CT. REV. 95, 130-31).

131. State v. Blair, 691 S.W.2d 259, 262 (Mo. 1985), *cert. granted sub nom. Missouri v. Blair*, 474 U.S. 1049 (1986), *cert. dismissed*, 480 U.S. 689 (1987). The court added that "[t]he record in this case supports the ruling of the trial court [that] the execution of the parking violation warrant was but a subterfuge or pretext . . . to gather evidence of the unrelated crime of homicide." *Id.* at 263.

police questioned the arrestee about other crimes.¹³² That is an interesting question, but, it was not before the Supreme Court in *Blair*.

The second pretext issue raised by the State of Missouri in its brief to the Supreme Court in *Blair*, that the Missouri Supreme Court had used a subjective pretext analysis, was also a misstatement of the Missouri Supreme Court's holding. As previously discussed, the issue of the significance of the subjective motivations of the arresting law enforcement officers in *Blair* was simply not part of the *Blair* Court's decision, nor was it necessary to the decision.¹³³

The pretext arguments raised by Zola Blair before the Supreme Court simply and understandably (*i.e.*, she won below) followed the lead of the Missouri Supreme Court majority urging that a finding of pretext was clearly established on the record.¹³⁴ In addition, Blair went a step further. She asked the Court in her brief to acknowledge the fact that the subjective intent of law enforcement officers is—and has been—a relevant consideration in assessing the existence of pretext,¹³⁵ warning that "[i]f [the] subjective intent of the police is made totally irrelevant to Fourth Amendment analysis, such activity will never be deterred as it will never come to the attention of the courts."¹³⁶

As I have noted, this issue of the significance of the subjective intention of the arresting officers was not directly before the Supreme Court in *Blair*.¹³⁷ Nonetheless, given the posture of the case as argued to the Court, it was conceivable that the Court might also express its views on a third question, not included within the

132. The state was wildly excessive in its argument on this point, contending that the "effect [of the Missouri Supreme Court's *Blair* decision] would be to immunize from arrest those parking violators who are suspected of serious crimes, while allowing the arrest of all other nonsuspicious violators." Brief for Petitioner at 32-33, *Missouri v. Blair*, 474 U.S. 1049 (1986). The state added: "This is foolishness." *Id.* at 33. The state was, at least, correct on that score. It would, of course, not have been a pretext if Zola Blair had been lawfully arrested for murder, whatever her status as a parking violator.

133. See *supra* text accompanying notes 97-98, 111-13. The state once again waxed hyperbolic on this non-issue, warning the Court that "[i]f the decision of the Missouri Supreme Court is allowed to stand, it would be the first case where an otherwise lawful arrest, made pursuant to a valid, pre-existing arrest warrant, was held unlawful simply because of the subjective intent of the arresting officers." Brief for Petitioner at 32, *Missouri v. Blair*, 474 U.S. 1049 (1986) (footnote omitted). Not only is this an untrue and inaccurate statement of the Missouri Supreme Court's majority opinion, it is also not true that if this case did rely solely on the subjective intent of the arresting officers, it would be an unprecedented case. There are hundreds of such cases (and rightfully so). See, *e.g.*, decisions cited *supra* note 56.

134. See *supra* text accompanying notes 96 and 101.

135. Brief for Respondent at 22-41, *Missouri v. Blair*, 474 U.S. 1049 (1986).

136. *Id.* at 39.

137. See *supra* text accompanying note 133.

two issues set out previously arising out of the Missouri Supreme Court's decision.¹³⁸ That third question is:

(3) Is the subjective motivation of the searching or arresting officers—their bad faith (or lack thereof)—properly considered in assessing whether or not there is a cognizable pretext?

As previously discussed, none of these three questions—or any other issue relating to fourth amendment pretexts—was discussed or resolved by the United States Supreme Court in *Blair* because the Court simply and inexplicably dismissed the writ of certiorari as improvidently granted.¹³⁹ Nonetheless, the justices must have clearly considered, analyzed, and debated these pretext issues and arguments since they later expressed their collective views on these matters in the very same term that the *Blair* case was argued and dismissed. These views were propounded in four decisions handed down after the oral argument in *Blair*: *Colorado v. Bertine*,¹⁴⁰ *Maryland v. Garrison*,¹⁴¹ *O'Connor v. Ortega*,¹⁴² and *New York v. Burger*.¹⁴³ If there was any question (as there obviously was in some minds) whether a viable pretext doctrine existed after the Supreme Court's unfortunate obiter dicta in *Scott* and unfortunate footnote in *Villamonte-Marquez*, these four decisions resolved that question, making it clear that the doctrine is very much alive and well.

IV. THE "RETURN" OF PRETEXT LAW: *BERTINE*, *GARRISON*, *ORTEGA*, AND *BURGER*

A. *Colorado v. Bertine*

In *Colorado v. Bertine*,¹⁴⁴ the Supreme Court ruled that the suspicionless inventory search of the contents of a van belonging to an arrestee, Steven Bertine, was constitutional. Bertine had already been taken into custody for driving while under the influence of alcohol when the van was searched. The van was towed to an impoundment lot only after the inventory search took place.

During the inventory search, the searching officer discovered narcotics contained in metal canisters in a nylon bag in a closed backpack that was found directly behind the front seat of the van. The Supreme Court majority, in an opinion by Chief Justice Rehn-

quist, held that the discovery of the narcotics was constitutional despite the absence of probable cause (or reasonable suspicion) to search anywhere: the van, the backpack, the nylon bag, or the metal canisters. Rehnquist cited in support of the conclusion that probable cause was unnecessary the following language from *South Dakota v. Opperman*: "The standard of probable cause is peculiarly related to criminal investigations, not routine, noncriminal procedures. . . . The probable-cause approach is unhelpful when analysis centers upon the reasonableness of routine administrative caretaking functions, particularly when no claim is made that the protective procedures are a subterfuge for criminal investigations."¹⁴⁵

As previously noted,¹⁴⁶ *South Dakota v. Opperman* is a paradigmatic case reaffirming the constitutional validity of what Professor Haddad had critically termed "case-by-case" pretext analysis. In *Opperman*, the Supreme Court held that inventory searches of automobiles are an exception to the fourth amendment warrant and probable cause requirements and, accordingly, may only be made for routine administrative caretaking purposes. As a result, the *Opperman* Court ruled that law enforcement officers cannot make such suspicionless searches pretextually for the actual purpose of criminal investigation. The *Bertine* Court's approving quotation of the language in *Opperman* making this point is, in and of itself, an implicit reaffirmation of the appropriateness of this type of case-by-case approach to pretext analysis. But the *Bertine* Court went farther still and made this implicit point explicit.

After finding that the inventory search of Bertine's van and its contents was constitutional even in the absence of probable cause due to the special status of such routine administrative searches, the Court made clear that this exceptional administrative search rule applied, however, in the *Bertine* case only because there was no evidence of pretext on the record. In Chief Justice Rehnquist's words, "In the present case, as in *Opperman* and *Lafayette*¹⁴⁷, there was no showing that the police, who were following standardized procedures, acted in bad faith or for the sole purpose of investigation."¹⁴⁸

This is a critical point for understanding the Court's view of how the pretext search doctrine applies. The Supreme Court's ruling in *Bertine* that suspicionless inventory searches of the contents of vehicles are constitutional was explicitly conditioned upon the finding that there was no evidence that the police officers were not mak-

138. The oral argument in *Blair* before the Supreme Court reflected various justices' keen interest in this third issue.

139. See *supra* text accompanying notes 6-7.

140. 479 U.S. 367 (1987).

141. 480 U.S. 79 (1987).

142. 480 U.S. 709 (1987).

143. 107 S. Ct. 2636 (1987).

144. 479 U.S. 367 (1987).

145. *Id.* at 371 (quoting *South Dakota v. Opperman*, 428 U.S. 364, 370 n.5 (1976)).

146. See *supra* note 76 and accompanying text.

147. The reference is to *Illinois v. Lafayette*, 462 U.S. 640 (1983), a case that held constitutional the suspicionless inventory search of personal effects in a shoulder bag carried by an arrestee at a police station.

148. 479 U.S. 367, 372 (1987) (emphasis added).

ing precisely what the search purported to be, namely an inventory (not an investigative) search. Following the *Bertine* Court's language, a defendant could demonstrate that a search was not in fact an inventory, *i.e.*, that it was pretextual, by making a showing that the police failed to follow "standardized procedures" or "acted in bad faith or for the sole purpose of investigation."¹⁴⁹

This language from *Bertine* is, of course, a striking reaffirmation of the so-called case-by-case approach to pretext analysis. If *Bertine* had been able to make this showing of pretext in his case, the search would have been declared unconstitutional because it was not in fact what it purported to be. Moreover, the *Bertine* Court's exposition of this point is also an express endorsement of the sort of "objective" analysis of pretext urged by Professor LaFave¹⁵⁰ coupled with the sort of "subjective" analysis I have urged.¹⁵¹

LaFave's "objective" approach is followed in *Bertine* by the Court's requirement that for the inventory search to be constitutional, the searching officers must have followed "standardized procedures." Reference to this phrase was not inadvertent. The *Bertine* Court strongly reiterated this requirement later in its opinion, again citing *Opperman* and *Lafayette*, and declared, "We emphasize that, in this case, the trial court found that the police department's procedures mandated the opening of closed containers and the listing of their contents. Our decisions have always adhered to the requirement that inventories be conducted according to standardized criteria."¹⁵²

Indeed, it is worth noting that the "standardized procedures" requirement was set out not only in the Rehnquist majority opinion but was emphatically endorsed by all nine of the justices in *Bertine*. Justice Blackmun, joined by Justices Powell and O'Connor, wrote a brief, separate concurring opinion in *Bertine* specifically for the purpose of "underscor[ing] the importance of having such inventories conducted only pursuant to standardized police procedures."¹⁵³ Justice Marshall, joined by Justice Brennan, dissented in *Bertine*, but acknowledged nonetheless that "[s]tandardized procedures are necessary to ensure that this narrow exception is not improperly used to justify, after the fact, a warrantless investigative foray."¹⁵⁴

The *Bertine* Court, as previously noted, did not simply reaffirm an objective approach to pretext analysis; rather, it *also* expressly endorsed the use of the sort of "subjective," "bad-faith," "case-by-case" analysis of pretexts that I have long been urging.¹⁵⁵ As the

Bertine majority stressed, this particular inventory search was constitutional as an inventory search not only because there was no showing of the failure to follow "standardized procedures," but *also because* "there was no showing that the police . . . acted in bad faith or for the sole purpose of investigation."¹⁵⁶ Despite Chief Justice Rehnquist's curious disjunctive reference to a showing *either* of "bad faith" *or* an improper "sole purpose" on the part of the searching officers, the import of this language is clear, namely that a subjective approach to pretext analysis is not merely legitimate, it is an essential part of fourth amendment doctrine in this area. The *Bertine* majority reiterated this point later in its opinion when it held that "[w]e conclude that here, as in *Lafayette*, reasonable police regulations relating to inventory procedures administered in good faith satisfy the Fourth Amendment."¹⁵⁷

It is important to stress that the objective and subjective pretext criteria are also repeatedly used by the *Bertine* Court in the disjunctive. This is an important point because it means that a showing of *either* type of proof of pretext satisfies the test set out in *Bertine* and serves to make such a search unconstitutional. Hence, even where the police procedures are themselves objectively reasonable, a showing of the absence of good faith, *i.e.*, bad faith or subjective pretextual motivation, is sufficient *in se* to establish unconstitutional activity. The *Bertine* Court made the disjunctive application of its pretext test patent when it summed up its pretext analysis as applied to the particular facts of *Bertine* in the penultimate paragraph of the opinion as follows:

Nothing in *Opperman* or *Lafayette* prohibits the exercise of police discretion so long as that discretion is exercised according to standard criteria [the objective test] *and* on the basis of something other than suspicion of evidence of criminal activity [the subjective test]. Here, the discretion afforded the Boulder police was exercised in light of standardized criteria, related to the feasibility and appropriateness of parking and locking a vehicle rather than impounding it. [Hence, no objective evidence of pretext.] There was no showing that the police chose to impound *Bertine's* van in order to investigate suspected criminal ac-

149. *Id.*

150. See *supra* text accompanying notes 46-61.

151. See *supra* text accompanying notes 39-45.

152. *Bertine*, 479 U.S. at 374 n.6 (citations omitted, emphasis added).

153. *Id.* at 376 (Blackmun, J., concurring).

154. *Id.* at 381 (Marshall, J., dissenting).

155. See *supra* text accompanying notes 39-45.

156. *Bertine*, 479 U.S. at 372 (emphasis added). While I urged at one time adoption of a bad-faith pretext test like the "sole purpose" language used in the disjunctive in this quotation from *Bertine*, see Burkoff, *Bad Faith Searches*, *supra* note 2, at 103-04, I have moderated in my dotage and favor the more workable "primary object" test first announced by former Justice Powell in *Michigan v. Clifford*, 464 U.S. 287, 294 (1984). See *supra* text accompanying notes 128-29; Burkoff, *Rejoinder*, *supra* note 9, at 698 n.16.

157. 479 U.S. 367, 372 (1979) (emphasis added).

tivity. [Hence, no subjective evidence of pretext.]¹⁵⁸

As previously discussed, there is absolutely no tension between the *Bertine* Court's acceptance of both an objective and subjective pretext analysis.¹⁵⁹ Indeed, this is the appropriate way to analyze pretexts. The subjective test is best considered a supplementary one useful to illuminate the meaning of otherwise neutral-appearing (objective) police conduct. Where law enforcement search and seizure activity is patently objectively unconstitutional, there is simply no need to turn to a subjective analysis of the searching officers' motivations for undertaking the search.¹⁶⁰ Where, on the other hand, the objective evidence is facially neutral, *i.e.*, it neither supports nor precludes unconstitutional motivation, a defendant has the opportunity to establish—where he or she can—the existence of an unconstitutional motivation in that case, the intent in fact to make an investigatory search.

In sum, the *Bertine* Court reaffirmed that a defendant may establish that a purported inventory search was unconstitutional where the searching officers: (1) did not possess probable cause, and (2) the defendant can establish *either* (a) that the officers failed to follow "standardized procedures" in their inventory activity, or (b) that there was "bad faith" on the part of the searching officers or that the search was undertaken "for the sole purpose of investigation."¹⁶¹ If there was ever truly any question whether the Supreme Court accepts case-by-case application of the pretext search doc-

158. *Id.* at 375-76 (emphasis added) (footnote omitted).

159. See *supra* discussion at text accompanying notes 43-45, note 45, and text accompanying note 52.

160. This is what happened in the Missouri Supreme Court's opinion in *Missouri v. Blair*. See *supra* text accompanying notes 97-98 and 111-13. Moreover, allowing for some differences in terminology, this is assumably the same point made in dissent in *Bertine* by Justice Marshall when he offered his own explanation of the majority result as follows:

Standardized procedures are necessary to ensure that this narrow [inventory search] exception is not improperly used to justify, after the fact, a warrantless investigative foray. Accordingly, to invalidate a search that is conducted without established procedures, it is not necessary to establish that the police actually acted in bad faith, or that the inventory was in fact a "pretext."

Bertine, 479 U.S. at 381 (emphasis added).

Other than the fact that Justice Marshall implicitly equates use of the term "pretext" only with a subjective analysis, this explanation fully comports with the majority holding. Where an objective showing of pretext is made, it is totally unnecessary to also make a subjective, bad-faith showing of pretext in order to establish the unconstitutionality of the police conduct. Nonetheless, as the Supreme Court majority in *Bertine* repeatedly stated, a showing that bad faith existed (*i.e.* that the search was actually investigatory) is sufficient in and of itself to render such a purported inventory search pretextual and, hence, unconstitutional.

161. *Bertine*, 479 U.S. at 372.

trine,¹⁶² the *Bertine* decision should have settled the issue once and for all.

B. Maryland v. Garrison

One month after the Supreme Court decided *Bertine*, it handed down another fourth amendment decision, *Maryland v. Garrison*.¹⁶³ The *Garrison* Court shed additional light on the question whether a law enforcement officer's subjective intent to engage in unconstitutional activity could render otherwise objectively neutral activity unconstitutional. Consistent with the analysis and holding in the *Bertine* decision, the *Garrison* Court answered this question in the affirmative.

In *Garrison*, a majority of the Supreme Court held constitutional a search by Baltimore police officers of the wrong apartment pursuant to a search warrant. The warrant authorized a search for marijuana of the person of Lawrence McWebb and "the premises known as 2036 Park Avenue third floor apartment."¹⁶⁴ In fact, unbeknownst to the police, the third floor of the residence located at 2036 Park Avenue was divided into two apartments, one occupied by McWebb and the other by defendant, Harold Garrison, who was neither a target of the search nor otherwise under suspicion. The executing officers went into Garrison's apartment by mistake and, before they became aware of their error, they discovered heroin.¹⁶⁵ Garrison claimed that since the police did not have a warrant to enter his apartment, the heroin was seized as a result of an unconstitutional search and should, accordingly, be suppressed. The Supreme Court disagreed.

Justice Stevens, writing for a six-justice majority of the Court in *Garrison*, held the search and seizure constitutional because, although mistaken about whose premises they were searching, the executing officers "perceived McWebb's apartment and the third-floor premises as one and the same; therefore their execution of the warrant reasonably included the entire third floor . . . [since] the officers' conduct was consistent with a reasonable effort to ascertain and identify the place intended to be searched within the meaning of the Fourth Amendment."¹⁶⁶

162. As previously discussed, Professor Haddad has argued that the Supreme Court has never accepted such an approach. See *supra* text accompanying notes 63-64 and 84.

163. 480 U.S. 79 (1987).

164. *Id.* at 80. There was no question that the warrant to search McWebb and his premises was valid and supported by probable cause. *Id.*

165. As the officers entered the third floor vestibule, they could see the interior of McWebb's apartment to their left and Garrison's to the right as the doors to both apartments were open. *Id.*

166. *Id.* at 88-89 (footnotes omitted).

The reasonableness of the executing officers' mistake about the apartment they were in was, however, critical to this holding. The officers' belief that they were in McWebb's apartment was a reasonable one, the Court concluded, given the physical configuration of the 2036 Park Avenue third floor. As Justice Stevens reasoned:

[T]he validity of the search of [Garrison's] apartment pursuant to a warrant authorizing the search of the entire third floor depends on *whether the officers' failure to realize the overbreadth of the warrant was objectively understandable and reasonable*. Here it unquestionably was. The objective facts available to the officers at the time suggested no distinction between McWebb's apartment and the third-floor premises.¹⁶⁷

In essence, the rule that the *Garrison* Court adopted to govern when mistaken searches of premises pursuant to a valid warrant are constitutional is a reasonable good-faith test. The Court upheld the constitutionality of this search and seizure due to the confluence of the proper *subjective* criteria, *i.e.*, the executing officers believed in good-faith that they were in the right place, and *objective* criteria, *i.e.*, that belief was reasonable. As Justice Stevens explained, "[This] Court has . . . recognized the need to allow some latitude for *honest mistakes* that are made by officers in the dangerous and difficult process of making arrests and executing search warrants."¹⁶⁸

But we are not interested in this Article in honest mistakes; we are interested in pretexts, searches or seizures undertaken for reasons that do not constitute a proper legal justification for such activity. To analyze the relationship between the pretext issue and the law relating to the constitutionality of an honest mistake, consider a new case, arising after the *Garrison* decision, that poses the *Garrison* case facts with everything unchanged except one critical fact: the executing officers *know* full well that they are in the wrong place, namely Garrison's apartment. Perhaps it is belaboring the obvious to point out that there are any number of explanations for why police officers might want to search Garrison's apartment even though they know it is his and that they have a warrant only for McWebb's premises. Perhaps the executing officers don't like the way Garrison looks or acts or the color of his skin, perhaps they wonder about him because he has a previous arrest record or because he lives in the wrong part of town, the wrong building, or next to the wrong neighbor, or perhaps they simply "suspect" that he might be involved in other crimes but they have no—or not enough—evidence to lawfully arrest or search him on that basis (remember the facts in *Missouri v.*

*Blair*¹⁶⁹). If the executing officers searched Garrison's premises on this pretextual basis, the question then arises: would such a search be unconstitutional?¹⁷⁰

The answer, of course, is "yes." Before explaining why, let me respond to the nay-sayers first. Professor Haddad would apparently argue that the answer to this question is and should be "no," that the law enforcement officers' unlawful subjective intentions are totally irrelevant to fourth amendment analysis, that the Supreme Court has not paid any attention to such subjective considerations, that, in any event, no attention *should* be paid to such pretextual activity in any individual case. Rather, Haddad contends, the Supreme Court might consider changing its rule on mistaken searches pursuant to search warrants in order to generally deter such pretextual activity.¹⁷¹

The most obvious problem with this approach—aside from the fact that, as I have previously discussed,¹⁷² it does not reflect what the Supreme Court has actually said in the past nor what the law should be—is that in application, it ignores pretextual activity altogether thus endangering the efficacy of fourth amendment law. Pretexts are cases where, whatever the fourth amendment rule is, it is not followed (except in a fictive sense). To effectively deter pretexts only with general rules, the Supreme Court would have to continuously change *every* fourth amendment rule every time it saw a way for law enforcement officers to circumvent the rule while engaging in facially neutral activity. But this is impossible; law enforcement officers can *always* pretend to follow the law while not actually doing so. Professor Haddad concedes as much.¹⁷³ As a result, changes in fourth amendment general rules can do little or nothing to effectively deter actual pretexts. In any event, the Supreme Court has already crafted a general rule in *Garrison*, as it has in numerous other cases, like *Opperman*,¹⁷⁴ to take account of pretexts by recognizing the necessity for dealing with them on a case-by-case basis and, as will be discussed, by permitting the use of a subjective analysis to boot.

Justice Blackmar of the Missouri Supreme Court and the other dissenting justices in *Missouri v. Blair*¹⁷⁵ would also be constrained on the basis of the theory propounded in their *Blair* dissent to up-

169. See *supra* text accompanying notes 87-102.

170. A search made on this basis would be pretextual by definition. See *supra* text at note 2.

171. See *supra* text accompanying notes 62-72.

172. See *supra* text accompanying notes 73-85.

173. Professor Haddad throws up his hands and says: "So be it." See *supra* note 66 and accompanying text.

174. *South Dakota v. Opperman*, 428 U.S. 364 (1976), discussed *supra* note 76 and accompanying text and text accompanying note 146.

175. See *supra* text accompanying note 12.

167. *Id.* (emphasis added, footnote omitted).

168. *Id.* at 87 (emphasis added, footnote omitted).

hold the constitutionality of the actions of my pretextual executing officers in my *Garrison*-based hypothetical. As the dissenters argued in *Blair*, even if the officers are *in fact* acting without constitutional justification, they *could have* acted constitutionally, *i.e.*, in this example, if they had not known that they were in the wrong place, their action would have been objectively constitutional under the rule in *Garrison*; hence, there is no pretext. This approach leads to the same dysfunctional and dangerous results as Professor Haddad's approach. As I have criticized earlier,¹⁷⁶ this result-oriented analysis, by failing to pay any attention to what has *actually* occurred, as opposed to the fictive possibilities, totally fails to deter any police misconduct where the searching officers had the perspicacity to make their actions *look* good, even though they clearly were not. Indeed, using Justice Blackmar's or Professor Haddad's analyses, the search would be declared constitutional even if the misbehaving officers repeatedly confessed their unconstitutional misbehavior under oath, *e.g.*, "We searched Garrison's apartment only because he is black," since a suppression court would be constrained to ignore the subjective motivations of the searching officers altogether.

But, fortunately, the Supreme Court neither endorsed nor utilized the Blackmar or Haddad approaches. What did the Supreme Court *actually* say in *Garrison* relevant to this pretext issue? To repeat my question: 'would a search of Garrison's apartment be unconstitutional if all the facts were the same as in the actual case except that the executing officers *knew* that they were in the wrong place?'

The Supreme Court made it crystal clear in *Garrison* that such a pretextual search would be unconstitutional. As the Court noted with respect to the warrant application and issuance, "Plainly, *if the officers had known, or even if they should have known*, that there were two separate dwelling units on the third floor of 2036 Park Avenue, they would have been obligated to exclude [Garrison's] apartment from the scope of the requested warrant."¹⁷⁷ Moreover, with respect to the warrant's execution, the Court made exactly the same point: "*If the officers had known, or should have known*; that the third floor contained two apartments before they entered the living quarters on the third floor, and thus had been aware of the error in the warrant, they would have been obligated to limit their search to McWebb's apartment."¹⁷⁸

In short, as the Supreme Court repeatedly emphasized in *Garrison*,

176. See *supra* text accompanying notes 114-24.

177. *Maryland v. Garrison*, 480 U.S. 79, 85 (1987) (emphasis added).

178. *Id.* at 87 (emphasis added). The Court added: "Moreover, as the officers recognized, they were required to discontinue the search of [Garrison's] apartment as soon as they discovered that there were two separate units on the third floor" *Id.*

son, if Garrison had shown—as he did not—that the executing officers in fact did not make an honest mistake, if he had shown instead that they knew that they were in the wrong apartment, the search would have been unconstitutional. It would have been unconstitutional because it was a pretext since the officers did not have the lawful constitutional authority to search Garrison's apartment and the search was undertaken instead for reasons that did not constitute a proper justification for such activity. It would have been unconstitutional despite the fact that the search *looked* objectively constitutional, *i.e.*, if we didn't know better, this looked like these officers honestly thought they were searching McWebb's apartment, and it would have been unconstitutional despite the fact that a lawful search of Garrison's apartment *could have* been made, *i.e.*, if the officers had honestly and reasonably believed they were searching McWebb's apartment. The fact that a lawful search *could have* been made does not mean that when the police do not in fact make such a lawful search, we can ignore the pretext and pretend that the search is constitutional.

C. O'Connor v. Ortega

Just a few weeks after the Supreme Court's decision in *Garrison*, the Court decided another case that directly touched upon fourth amendment pretext issues, *O'Connor v. Ortega*.¹⁷⁹ A five-justice majority of the Court (composed of a four-justice plurality and one concurring justice) ruled that some searches of the offices of public employees undertaken without probable cause by their employers are constitutional.¹⁸⁰ Justice O'Connor, in her plurality opinion for four members of the Court, concluded that "public employer intrusions on the constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances."¹⁸¹ Justice Scalia, who provided the fifth vote upholding the constitutionality of the search of public employees' offices without probable cause, disagreed "with the plurality's view that the reasonableness of the expectation of privacy (and thus the existence of Fourth Amendment protection) changes 'when an intrusion is by a supervisor rather than a law enforcement official.'"¹⁸² Nonetheless, Justice Scalia concluded that warrantless "government searches [of

179. 480 U.S. 709 (1987).

180. The *Ortega* decision concerned the fourth amendment but was not a fourth amendment case. Rather, it was a civil rights action filed under 42 U.S.C. § 1983 (1982) on the basis of an alleged violation of an individual's fourth amendment rights.

181. 480 U.S. at 725-26 (O'Connor, J.).

182. *Id.* at 731 (Scalia, J., concurring) (quoting the plurality opinion).

public employees' offices] to retrieve work-related materials or to investigate violations of workplace rules" are constitutional within the dictates of the fourth amendment.¹⁸³

The issue of pretext arose in *Ortega* because it was not clear from the record why the particular public employee office search at issue in that case was carried out. Since the four-justice plurality concluded that *only* public employee searches undertaken by an employer "for noninvestigatory, work-related purposes . . . [or] for investigations of work-related misconduct"¹⁸⁴ were constitutional when undertaken on less than probable cause, the Court remanded¹⁸⁵ the case in order for the trial court to determine "the actual justification for the search."¹⁸⁶

The existence of a pretext issue in *Ortega* should be clear from the Supreme Court's finding of the necessity for a remand to resolve the factual question of the searching agents' justification for their search. Dr. Ortega, whose office was searched, based much of his argument on a pretext claim.¹⁸⁷ He contended, in the plurality's words, "that the intrusion was an investigatory search whose purpose was simply to discover evidence that would be of use in administrative proceedings."¹⁸⁸ The plurality ordered a remand so that the trial court could, *inter alia*, "determine the justification for the search and seizure."¹⁸⁹ This is classic pretext search doctrine. If the search of Dr. Ortega's office was in fact undertaken for work-related reasons, it was constitutional; if, instead, it was in fact undertaken for investigatory reasons, it was unconstitutional (despite its otherwise objectively neutral appearance). ▲

Justice Scalia, whose fifth vote was necessary to form a majority, also turned the question of the constitutionality of this search under the fourth amendment on the lower court's resolution on remand of the question whether the search of Dr. Ortega's office was in fact "to retrieve work-related materials or to investigate violations of workplace rules."¹⁹⁰ To Justice Scalia, such a motivation on the part of the searching agents would be, in his words, "a validating purpose."¹⁹¹ The absence of such a proper purpose, in contrast, dic-

183. *Id.* at 732 (Scalia, J., concurring).

184. *Id.* at 725 (O'Connor, J.).

185. The *Ortega* decision resulted in a remand of the civil rights action because that was the relief ordered by *both* the plurality and Justice Scalia in his separate opinion and, hence, was the relief agreed to by a majority of the Court.

186. *O'Conner v. Ortega*, 480 U.S. 709, 729 (1987) (emphasis added).

187. See Brief for Respondent In Propria Persona at 45-47, *O'Conner v. Ortega*, 480 U.S. 709 (1987); Brief of Amicus Curiae Joel Klein at 30-31, *O'Conner v. Ortega*, 480 U.S. 709 (1987).

188. *Ortega*, 480 U.S. at 725-26.

189. *Id.* at 729.

190. *Id.* at 732 (Scalia, J., concurring).

191. *Id.*

tated a finding of unconstitutionality. It is hard to imagine a firmer endorsement from either the *Ortega* plurality or from Justice Scalia of the propositions that case-by-case analysis of pretexts is appropriate *and* that the subjective motivation of the searching agents is important to fourth amendment pretext analysis, *i.e.*, whether a lawful "validating purpose" existed for the search.

Furthermore, there were four dissenting justices in *Ortega* and their dissenting analysis did no violence to—indeed it underscored—the majority's pretext doctrinal analysis. Justice Blackmun, joined by Justices Brennan, Marshall, and Stevens, dissented because he concluded that there was no "special need" to search public employees' offices sufficient to justify a *per se* exception to the normal fourth amendment requirements of a warrant and probable cause.¹⁹² Although this conclusion was dispositive for the dissenters, Justice Blackmun also took issue with the plurality's analysis of the record facts. After reviewing the evidence in the record, primarily deposition testimony about how the search was conducted, when it was conducted, *and why it was conducted*, Justice Blackmun concluded that the search was indeed "plainly exceptional and investigatory in nature."¹⁹³ Accordingly, he castigated the plurality for permitting the potential application of "inventory search" rules to an investigative search case. In other words, Justice Blackmun's dissent evaluated the objective and subjective evidence on the record as establishing that—whatever the searching agents or their lawyers claimed—this search was not actually an inventory search. The fact that it was not an inventory search means that it was not entitled to the relaxed constitutional rules that apply to such searches. This analysis is, of course, as in the *Bertine* case, a straightforward application of a "case-by-case" pretext search doctrine using both objective and subjective criteria to establish the pretext.

D. New York v. Burger

A few weeks after it decided *Ortega*, the Supreme Court in *New York v. Burger*¹⁹⁴ handed down a decision that once again directly confronted the issue of the proper analysis of pretext searches. The primary issue in *Burger* was whether the warrantless search of an automobile junkyard pursuant to a New York state statute authorizing such searches fell within the exception to the fourth amendment warrant requirement carved out for administrative inspections of pervasively regulated industries. A six-justice majority of the Court, in an opinion by Justice Blackmun, held that it did and that, accordingly, the search in question was constitutional.

192. *Id.* at 744 (Blackmun, J., dissenting).

193. *Id.* at 746.

194. 107 S. Ct. 2636 (1987).

In discussing the evidence actually discovered in this junkyard search, the *Burger* Court cited to the cryptic parenthetical language in *United States v. Villamonte-Marquez* relating to pretexts,¹⁹⁵ previously discussed, for the proposition that "[t]he discovery of evidence of crimes in the course of an otherwise proper administrative inspection does not render that search illegal or the administrative scheme suspect."¹⁹⁶ The key question, of course, for pretext purposes, is when is a search otherwise proper? The *Burger* Court answered this important question in a lengthy footnote appended to the language quoted above, noting the existence of two different types of pretexts that might make a search *not* "otherwise proper."

The first type of pretext mentioned is the possibility of pretext on the part of the New York Legislature that enacted the warrantless junkyard inspection statute. The defendant in *Burger* argued that the legislature actually enacted the statute for criminal investigatory—rather than administrative—purposes. The *Burger* Court seemingly accepted defendant's argument that "pretextual" legislation might be constitutionally deficient, but nonetheless ruled that there was no evidence of such pretext on the record in this case: "The legislative history of [this statute], in general, and [the inspection sub-section], in particular, reveals that the New York Legislature had properly [sic] regulatory purposes for enacting the administrative scheme and was not using it as a 'pretext' to enable law enforcement authorities to gather evidence of penal law violations."¹⁹⁷

The second type of pretext noted by the *Burger* Court is the type of pretext discussed throughout this Article, namely searches made by agents of the state, usually law enforcement officers, for reasons that do not constitute a proper legal justification for such activity. The *Burger* Court deemed the case before it constitutional in part *because* there was no pretext *since* the reasons for making the search in this case *did* in fact constitute a proper legal justification for making such an administrative search. In Justice Blackmun's words, speaking for the majority of the Court, "There is . . . no reason to believe that the instant inspection was actually a 'pretext' for obtaining evidence of [defendant's] violation of penal laws. It is undisputed that the inspection was made solely pursuant to the administrative scheme."¹⁹⁸ In short, the implication of this language is that if the "inspection" was *not* made for proper administra-

tive reasons, but rather was made for investigatory reasons (without probable cause or other lawful antecedent justification), the search would have been unconstitutional.

That implicit suggestion, that such pretextual administrative searches are unconstitutional, was made explicit in Justice Blackmun's next sentence, where he added that "[i]n fact, because the search here was truly a[n administrative] inspection, the [New York] Court of Appeals was able to reach in this case, as it could not in *People v. Pace*, the question of the constitutionality of the statute."¹⁹⁹

This reference by the Supreme Court in *Burger* to the *Pace* decision is important if cryptic standing alone and needs some explanation. The reason that the New York Court of Appeals in *Pace* did not reach the question of the constitutionality of the junkyard administrative search statute—indeed, "*could not*" reach this question, in the United States Supreme Court's view—was that the *Pace* case—unlike *Burger*—involved a pretextual administrative search. The New York Court of Appeals suppressed the evidence seized in *Pace* because, on the facts on record, "[t]he warrantless search of defendants' automobile salvage yard was not undertaken for administrative purposes."²⁰⁰ Indeed, it is notable that the record facts in *Pace* established pretext strictly on the basis of the (subjective) testimonial evidence given by the searching officers' detailing their actual, unlawful motivations for searching. As the Appellate Division of the New York Supreme Court concluded, "[T]he [searching] police officers expressly maintained that their mission was to gather evidence of a crime rather than to administer any regulatory scheme. *When a search is not undertaken as a routine regulatory inspection the administrative search rationale is simply inapplicable . . .*"²⁰¹ In short, the *Pace* decision was one which held dispositive the fact that pretextual search and seizure activity is *ipso facto* unconstitutional when subjective evidence is utilized to establish the pretext. The United States Supreme Court majority cited this decision with evident approval in *Burger*, expressly contrasting it with the facts in *Burger* where there was no pretext and where, *for that reason*, the search was found to be constitutional.

Furthermore, the three dissenting justices in *Burger* completely agreed with the majority's analysis that such pretext searches are unconstitutional. Indeed, the dissenters took the analysis one step further; they also concluded, unlike the majority, that the *Burger* case was *in fact* a case of unconstitutional pretext and that the evidence seized should, accordingly, be suppressed on that basis. In Justice Brennan's words, "[T]he State has used an administrative scheme as

195. See discussion of *Villamonte-Marquez*, *supra* text accompanying notes 15-31.

196. 107 S. Ct. at 2651 (emphasis added, footnote and citation to *Villamonte-Marquez* omitted).

197. *Id.* at 2651 n.27 (citations omitted). The Court added that "an administrative scheme may have the same ultimate purpose as penal laws, even if its regulatory goals are narrower." *Id.* at 2659.

198. *Id.* at 2651 n.27.

199. *Id.* (citation omitted).

200. *People v. Pace*, 65 N.Y.2d 684, 481 N.E.2d 250, 491 N.Y.S.2d 618, (1985).

201. *People v. Pace*, 101 A.D.2d 336, 340, 475 N.Y.S.2d 443, 446 (1984) (emphasis added, citations omitted).

a pretext to search without probable cause for evidence of criminal violations. It thus circumvented the requirements of the Fourth Amendment by altering the label placed on the search."²⁰² Such conduct, Justice Brennan made clear, citing numerous Supreme Court decisions, violates established fourth amendment doctrine relating to the unconstitutionality of pretexts.²⁰³ What is more, Justice Brennan added, failure to recognize the significance of ignoring such pretexts threatens the efficacy of any fourth amendment rules. As his dissent concluded, "The implications of the Court's opinion, if realized, will virtually eliminate Fourth Amendment protection of commercial entities in the context of administrative searches. No State may require, as a condition of doing business, a blanket submission to warrantless searches for any purpose."²⁰⁴ Exactly.

202. *New York v. Burger*, 107 S. Ct. 2636, 2656 (1987) (Brennan, J., dissenting).
203. Justice Brennan explained:

In the law of administrative searches, one principle emerges with unusual clarity and unanimous acceptance: the government may not use an administrative inspection scheme to search for criminal violations. See *Michigan v. Clifford*, 464 U.S. 287, 292, 104 S. Ct. 641, 646, 78 L. Ed. 2d 477 (1984) (opinion of Powell, J.) (in fire investigation, the constitutionality of a post-fire inspection depends upon "whether the object of the search is to determine the cause of the fire or to gather evidence of criminal activity"); *Michigan v. Tyler*, 436 U.S. 499, 508, 98 S. Ct. 1942, 1949, 56 L. Ed. 2d 486 (1978) ("if the authorities are seeking evidence to be used in a criminal prosecution, the usual standard of probable cause will apply") (citations omitted); *Donovan v. Dewey*, 452 U.S., at 598, n.6, 101 S. Ct., at 2538, n.6 ("[warrant and probable cause requirements] pertain when commercial property is searched for contraband or evidence of crime"); *Almeida-Sanchez v. United States*, 413 U.S. 266, 278, 93 S. Ct. 2535, 2542, 37 L. Ed. 2d 596 (1973) (Powell, J., concurring) (traditional probable cause not required in border automobile searches because they are "undertaken primarily for administrative rather than prosecutorial purposes"); *Camara v. Municipal Court*, 387 U.S., at 539, 87 S. Ct., at 1736 (authorization of administrative searches on less than probable cause will not "endange[r] time-honored doctrines applicable to criminal investigations"); See *v. City of Seattle*, 387 U.S., at 549, 87 S. Ct., at 1742 (Clark, J., dissenting) ("nothing . . . suggests that the inspection was . . . designed as a basis for a criminal prosecution"); *Abel v. United States*, 362 U.S. 217, 226, 80 S. Ct. 683, 690, 4 L. Ed. 2d 668 (1960) ("[t]he deliberate use by the Government of an administrative warrant for the purpose of gathering evidence in a criminal case must meet stern resistance by the courts"); *id.* at 248, 80 S. Ct. at 701 (Douglas J., dissenting) (Government cannot evade the Fourth Amendment "by the simple device of wearing the masks of [administrative] officials while in fact they are preparing a case for criminal prosecution"); *Frank v. Maryland*, 359 U.S. 360, 365, 79 S. Ct. 804, 808, 3 L. Ed. 2d 877 (1959) ("evidence of criminal action may not . . . be seized without a judicially issued search warrant").

Id. at 2655 (footnote omitted).

204. *Id.* at 2657-58.

V. CONCLUSION: MISSOURI V. BLAIR REDUX

The import of the four recent Supreme Court decisions discussed above is that they provide the answers to the fourth amendment pretext search doctrine questions that were before the Court in *Missouri v. Blair*, but which were left unanswered when the Court cryptically dismissed the writ of certiorari as improvidently granted.²⁰⁵

The first question before the Court in *Blair* was as follows:

(1) Was the *Blair* Court correct in applying a case-by-case pretext analysis? Or, put another way, was the *Blair* Court correct in assuming that suppression of evidence seized as a result of pretextual fourth amendment activity was compelled or otherwise appropriate?

There is absolutely no question when the Supreme Court's decisions in *Bertine*, *Garrison*, *Ortega*, and *Burger* are considered that the *Blair* Court's use of a case-by-case analysis of pretexts, compelling a finding of unconstitutionality where relevant pretexts are established, was correct. All of the opinions in all four of those cases either used or implicitly accepted such an analysis. There was never even a suggestion in any of those cases that Professor Haddad's "hard-choice" approach reflected settled fourth amendment policy or had subsumed the necessity for—or the appropriateness of—consideration of pretexts on a case-by-case basis.

The second question before the Supreme Court in *Blair* was as follows:

(2) Was the *Blair* Court majority correct in ruling that when the record evidence established that an arrest was made in bad faith, i.e., as a pretextual means to arrest and acquire evidence about a crime where there was no probable cause, the arrest was *ipso facto* unconstitutional? Or, in contrast, were the *Blair* Court dissenters correct in arguing that where the record established that a lawful parking arrest *could* be made, it does not matter how or why such an arrest was actually made?

Again, all of the opinions in *Bertine*, *Garrison*, *Ortega*, and *Burger* directly or indirectly support the view of the *Blair* Court majority that such "bad faith" fourth amendment activity is unconstitutional. The *Bertine* Court made this point most cogently, finding inventory searches of the contents of impounded vehicles unconstitutional where the searching officers "acted in bad faith or for the sole purpose of investigation."²⁰⁶ Furthermore, the *Garrison* majority opinion would appear to make it clear that the Missouri Supreme Court

205. See *supra* text accompanying note 139.

206. *Colorado v. Bertine*, 479 U.S. 367, 372 (1987).

dissenters' view in *Blair* that fourth amendment activity can be justified on the basis of what could have happened rather than what did happen is quite simply incorrect.²⁰⁷

Finally, the third question put before the Court by the parties in *Blair* (although unnecessary to a decision) was as follows:

- (3) Is the subjective motivation of the searching or arresting officers—their bad faith (or lack thereof)—properly considered in assessing whether or not there is a cognizable pretext?

Once again, all of the opinions in *Bertine*, *Garrison*, *Ortega*, and *Burger* directly or indirectly used or accepted the use of such subjective criteria where it was necessary, *i.e.*, where the objective evidence was facially neutral, and where it was otherwise available and relevant. In particular, the *Bertine* majority expressly adopted a test for pretext including a subjective "bad faith" analysis, the *Garrison* majority used subjective evidence of motivation to determine the constitutionality of a search, the *Ortega* Court turned the ultimate resolution of that case on evidence of the searchers' actual motives for searching, and the *Burger* majority noted that subjective evidence of pretext *could* be dispositive of the issue of constitutionality, while the *Burger* Court dissenters found evidence of pretext on the record and, indeed, ruled that it *was* dispositive.

In short, while a Supreme Court decision in *Missouri v. Blair* would have been the surest and most direct way to obtain resolution of the most troubling questions raised by a few judges and commentators relating to the existence and content of the pretext search doctrine, the four recent Supreme Court decisions discussed above answered all of the questions raised in *Blair*—and then some. Lower court opinions that state or imply that the *Scott*, *Villamonte-Marquez*, or any other Supreme Court decision handed down prior to *Bertine*, *Garrison*, *Ortega*, and *Burger*, have commanded the evisceration of a workable pretext search doctrine are, quite simply, in the light of these recent rulings, dead wrong.²⁰⁸ These decisions make it clear beyond peradventure that pretext searches are unconstitutional and, further, that it is appropriate to utilize evidence of searching officers' motivation in determining constitutionality. Whether or not the pretext search doctrine ever left, it has returned.

207. See *supra* text accompanying notes 175-79.

208. See, *e.g.*, *United States v. Causey*, 834 F.2d 1179 (5th Cir. 1987). The *Causey* majority opinion, which was based in large part upon a mistaken reading of *Scott* and *Villamonte-Marquez*, flatly "validated so-called pretextual arrest warrants." *United States v. Zukas*, 843 F.2d 179, 182 n.1 (5th Cir. 1988).

Recent Changes in Michigan Disciplinary Procedure: A Job Unfinished*

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