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State v. White: The "Inadvertency" Requirement of the Plain View Doctrine in North Carolina

The plain view doctrine holds generally that "if, while lawfully engaged in an activity in a particular place, police officers perceive a suspicious object, they may seize it immediately,"[1] without a search warrant. One requirement of the doctrine is that the discovery be "inadvertent."[2] In the past, North Carolina courts interpreted inadvertency to require "no intent on the part of the investigators to search for and seize the contested items not named in the warrant."[3] In *State v. White*[4] the North Carolina Supreme Court recently redefined "inadvertent" as applied in North Carolina.[5] Under the new interpretation a discovery is inadvertent if " 'the police [are] without probable cause to believe evidence would be discovered until they actually observe it in the course of an otherwise justified search.' "[6]

This Note analyzes the potential impact of the court's decision to redefine the "inadvertency" requirement and examines the practical significance of the new flexibility created by the definition. The Note also evaluates whether the new definition effectively satisfies the plain view policy established by the United States Supreme Court and considers the overall usefulness of the new definition and of the inadvertency requirement in general. The Note concludes that the new definition is more easily applied than the State's old one and that it affords police officers greater latitude during searches without sacrificing protections guaranteed by the fourth amendment. The Note further concludes, however, that the definition fails to effectuate one of the "plain view" policies—safeguarding against "pretext" searches—set forth by the United States Supreme Court.[7] Because North Carolina's new definition cures problems sometimes associated with specificity in search warrants, it admittedly clarifies application of the plain view doctrine in the narrow class of cases to which it applies.[8] However, the new definition accomplishes this result at the expense of the safeguards provided by the old definition against "pretext" searches, perhaps the greater of the two problems, and one of the primary evils against which the inadvertency requirement once protected.[9]

In the late months of 1985 the neighborhood surrounding Charlotte's South Mecklenburg High School suffered a rash of break-ins.[10] Defendant Danny White became a suspect after police observed several items stolen from an area

1. Texas v. Brown, 460 U.S. 730, 739 (1983).
2. Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971).
3. State v. Williams, 315 N.C. 310, 319, 338 S.E.2d 75, 81 (1986).
4. 322 N.C. 770, 370 S.E.2d 390, *cert. denied*, 109 S. Ct. 399 (1988).
5. *Id.* at 774, 370 S.E.2d at 393.
6. *Id.* (quoting United States v. Hare, 589 F.2d 1291, 1294 (6th Cir. 1979)).
7. A majority of the Supreme Court has not, however, agreed on the particulars of the plain view doctrine. *See infra* note 72 and accompanying text.
8. *See infra* notes 98-100 and accompanying text.
9. *See infra* notes 113-14 and accompanying text.
10. *White*, 322 N.C. at 771, 370 S.E.2d at 391.

residence in his station wagon parked in the school's parking lot on January 4, 1986.[11] On the strength of their observation of the stolen property and of information from an informant, Mecklenburg County police officers obtained a warrant to search White's residence.[12] The warrant application listed as items to be seized a stolen stereo, watch, and two pistols,[13] all observed by the informant while in White's house.[14]

Five officers executed the warrant on January 16, recovering only one of the listed items.[15] The officers also had with them, however, fifteen police incident reports listing property stolen during other area break-ins,[16] so that " 'the property listed on these Police Reports . . . [could] be compared with property that may have been found in the residence.' "[17] The officers seized fifty-four additional items,[18] some from these lists, and some that were on neither the warrant nor the lists, but were stolen in break-ins under investigation by the officers' counterpart city police force.[19]

At trial White argued that his fourth and fourteenth amendment rights were violated by the seizure of the items not listed in the warrant.[20] The search and seizure, he contended, met none of the exceptions to the fourth amendment's warrant requirement.[21] The State argued that the search and seizure satisfied the requirements of the "plain view" exception to the warrant requirement.[22] The trial court agreed with the State. The items seized by the police were admitted into evidence[23] and defendant was convicted of felonious possession of stolen property.[24]

The North Carolina Court of Appeals unanimously reversed the conviction.[25] It held that the search and seizure failed to satisfy the "inadvertency"

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11. *Id.*

12. *Id.* at 771-72, 370 S.E.2d at 391.

13. *Id.* at 780, 370 S.E.2d at 396.

14. *Id.* at 772, 370 S.E.2d at 391.

15. *Id.*

16. *Id.* at 780, 370 S.E.2d at 397.

17. *Id.* at 781, 370 S.E.2d at 397 (quoting the officer who secured the search warrant) (emphasis removed).

18. *Id.* at 780, 370 S.E.2d at 397.

19. *Id.* at 772, 370 S.E.2d at 392.

20. *Id.* at 772-73, 370 S.E.2d at 392. Defendant did not allege violations of his rights under the North Carolina Constitution; thus, the issue was decided under the United States Constitution. *Id.* at 773, 370 S.E.2d at 392. The fourth amendment, which contains the warrant requirement, was held applicable to the states through the fourteenth amendment in 1949. Wolf v. Colorado, 338 U.S. 25, 27-28 (1949).

21. *White*, 322 N.C. at 772-73, 370 S.E.2d at 392. See *infra* notes 43-55 and accompanying text for a discussion of the warrant requirement and its exceptions.

22. *White*, 322 N.C. at 773, 370 S.E.2d at 392. See *infra* notes 56-64 and accompanying text for a discussion of the plain view exception.

23. *White*, 322 N.C. at 772, 370 S.E.2d at 392.

24. *Id.* at 771, 370 S.E.2d at 391. White was convicted of six counts of felonious possession of stolen property and two counts of misdemeanor possession of stolen property. *Id.*

25. State v. White, 87 N.C. App. 311, 361 S.E.2d 301 (1987), *rev'd*, 322 N.C. 770, 370 S.E.2d 390, *cert. denied*, 109 S. Ct. 399 (1988). The court reversed seven of the eight counts of possession of stolen property. *Id.* at 324-25, 361 S.E.2d at 308-09.

requirement[26] of the plain view exception as mandated by the United States Supreme Court.[27] The court interpreted this requirement to mean that the discovery of evidence must be "unanticipated" for the plain view exception to apply.[28] The court reasoned that because the officers "carried the incident reports with them for the specific purpose of searching for and seizing items found in defendant's residence that comported with items listed in the reports,"[29] the discovery of the stolen items was not "unanticipated."[30]

The North Carolina Supreme Court, in an opinion by Justice Martin, reversed the court of appeals,[31] holding that it had misdefined "inadvertent."[32] The court, without explanation, chose to apply the definition of "inadvertent" established by the United States Court of Appeals for the Sixth Circuit in *United States v. Hare*[33] rather than the definition established in its own earlier decisions.[34] Under the newly adopted definition, inadvertence " 'means that the police must be without probable cause to believe evidence would be discovered until they actually observe it in the course of an otherwise justified search.' "[35] Applying this definition to the seizure of the items listed on the incident reports, the court concluded that the officers did not have probable cause to search for the items and, consequently, that their discovery was inadvertent.[36] Accordingly, the inadvertency requirement of the plain view exception was satisfied, and the seizure was within the bounds of the Constitution.[37]

Justice Frye, dissenting,[38] argued that the court's adoption of the Sixth Circuit's definition of "inadvertence" was a "drastic departure" from its own prece-

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26. See *infra* notes 65-140 and accompanying text for a discussion of the inadvertency requirement.

27. *White*, 87 N.C. App. at 321-22, 361 S.E.2d at 307.

28. *Id.*

29. *Id.* at 322, 361 S.E.2d at 307.

30. *Id.*

31. *White*, 322 N.C. at 777, 370 S.E.2d at 395. The reversal covered only those items that were listed on the incident reports but not on the warrant. *Id.* The supreme court affirmed the court of appeals' finding that the seizure of the items that were listed on neither the warrant nor the incident reports was illegal. *Id.* at 778, 370 S.E.2d at 395. This Note addresses only those items that were listed on the incident reports.

32. *Id.* at 773, 370 S.E.2d at 392.

33. 589 F.2d 1291 (6th Cir. 1979).

34. *White*, 322 N.C. at 774, 370 S.E.2d at 393. *See* State v. Williams, 315 N.C. 310, 319, 338 S.E.2d 75, 81 (1986); State v. Richards, 294 N.C. 474, 489-90, 242 S.E.2d 844, 854 (1978). This definition holds that "there must be no intent on the part of the investigators to search for and seize the contested items not named in the warrant." *Richards*, 294 N.C. at 489-90, 242 S.E.2d at 854.

35. *White*, 322 N.C. at 774, 370 S.E.2d at 393 (quoting United States v. Hare, 589 F.2d 1291, 1294 (6th Cir. 1979)). "Probable cause" exists when "[a]n apparent state of facts [is] found to exist upon reasonable inquiry . . . which would induce a reasonably intelligent and prudent man to believe, in a criminal case, that the accused person had committed the crime charged," BLACK'S LAW DICTIONARY 1081 (5th ed. 1979), or, in the case of a search, to believe that particular evidence will be found in a particular location.

36. *White*, 322 N.C. at 776, 370 S.E.2d at 394.

37. *Id.*

38. *Id.* at 780-83, 370 S.E.2d at 396-98 (Frye, J., dissenting). Justice Frye dissented only from that portion of the opinion holding that the discovery of items not mentioned in the application for the search warrant was inadvertent and that the items were admissible under the plain view doctrine. *Id.* at 783, 370 S.E.2d at 398 (Frye, J., dissenting).

dent.[39] He applied the principle established in the court's earlier cases—that "for a discovery to be inadvertent, there must be *no intent* on the part of the investigators to search for and seize contested items not named in the warrant"[40]—and concluded that the discovery of the items listed on the incident reports was not inadvertent.[41] Consequently, he argued, the police officers' seizure did not satisfy the requirements of the plain view exception.[42]

The fourth amendment was adopted in direct response to the oppressive search and seizure laws of England,[43] heartily rejected by the American colonists. It provides,

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.[44]

The amendment serves two constitutional goals: it prohibits searches not based on probable cause, and it requires that searches deemed necessary be as limited as possible.[45] The goals are effectuated by the requirement that probable cause be evaluated by a neutral judicial official[46] and by the requirement that warrants specifically list the place and items for which the power to search is authorized.[47]

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39. *Id.* at 780, 370 S.E.2d at 396 (Frye, J., dissenting).

40. State v. Richards, 294 N.C. 474, 489-90, 242 S.E.2d 844, 854 (1978) (emphasis added); *see also* State v. Williams, 315 N.C. 310, 319, 338 S.E.2d 75, 81 (1986) ("no intent" interpretation restated with approval).

41. *White*, 322 N.C. at 782, 370 S.E.2d at 397 (Frye, J., dissenting).

42. *Id.* at 783, 370 S.E.2d at 398 (Frye, J., dissenting).

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

44. U.S. CONST. amend. IV.

45. Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971). For other discussions of the twin goals, see Lewis & Mannle, *Warrantless Searches and the "Plain View" Doctrine: Current Perspective*, 12 CRIM. L. BULL. 5, 17 (Number 1, 1976); Comment, *Constitutional Law—Fourth Amendment—Plain View Exception to the Warrant Requirement—Exigent Circumstances*—Washington v. Chrisman, 29 N.Y.L. SCH. L. REV. 125, 132-33 (1984).

46. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 21-22 (1968). The Court stated,

> The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.

Id. at 21-22. For other discussions of the neutral magistrate requirement see *Coolidge*, 403 U.S. at 449-50; 2 W. LAFAVE, SEARCH AND SEIZURE § 4.2 (2d ed. 1987).

47. In *Marron v. United States* the Court stated,

> The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.

Marron v. United States, 275 U.S. 192, 196 (1927); *see also* State v. Williams, 315 N.C. 310, 317, 338

Like most constitutional rules, the fourth amendment's warrant requirement has exceptions.[48] The Supreme Court has upheld warrantless searches based on, among other things, hot pursuit,[49] automobile searches,[50] searches incidental to arrests,[51] border searches,[52] "stop and frisk" situations,[53] roadblocks,[54] and, as this Note discusses, observation of evidence resting in "plain view."[55]

The Supreme Court first formally recognized the "plain view" exception in 1971 in *Coolidge v. New Hampshire*.[56] In *Coolidge* police searched defendant's car pursuant to a warrant, discovering evidence that contributed to his conviction for a recent murder.[57] The Supreme Court held that the warrant issued for the search was invalid[58] and entertained arguments by the State that, notwithstanding the invalidity of the warrant, the evidence fit any of several exceptions to the warrant requirement.[59] One of those arguments was that the car, itself an instrumentality of the crime, could lawfully be searched by the officers because it was in their plain view.[60]

S.E.2d 75, 80 (1986) ("The fourth amendment's requirement that warrants must particularly describe the items to be searched for and seized is designed to prevent . . . general searches.").

48. For discussions of the exceptions, see Texas v. Brown, 460 U.S. 730, 735-36 (1983); Lewis & Mannle, *supra* note 45, at 6; Note, Texas v. Brown: *The Plain View Doctrine Stretched Beyond the Visual*, 16 U. WEST L.A. L. REV. 151, 157 & n.26 (1984). "For the most part, these exceptions are based upon a conclusion that under certain circumstances, the exigencies of a situation make immediate search and seizure without benefit of a warrant imperative." United States v. Hare, 589 F.2d 1291, 1293 (6th Cir. 1979).

The general statement of the amendment's rule is that " 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.' " *Coolidge*, 403 U.S. at 454-55 (quoting Katz v. United States, 389 U.S. 347, 357 (1967)).

49. Warden v. Hayden, 387 U.S. 294 (1967).

50. United States v. Ross, 456 U.S. 798 (1982).

51. New York v. Belton, 453 U.S. 454 (1981); United States v. Robinson, 414 U.S. 218 (1973); Chimel v. California, 395 U.S. 752 (1969).

52. Almeida-Sanchez v. United States, 413 U.S. 266 (1973).

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

54. Delaware v. Prouse, 440 U.S. 648 (1979).

55. Coolidge v. New Hampshire, 403 U.S. 443 (1971).

56. *Id.* The Court had implicitly recognized the doctrine on a number of earlier occasions. For accounts of the pre-*Coolidge* history of the exception, see Lewis & Mannle, *supra* note 45, at 7-17; Comment, *supra* note 45, at 133-41; Note, *Criminal Procedure—The Supreme Court Takes a Stance With Plain View Searches and Seizures*—Arizona v. Hicks, 10 CAMPBELL L. REV. 331, 334-38 (1988).

For significant Supreme Court plain view cases since *Coolidge*, see Arizona v. Hicks, 480 U.S. 321 (1987) (holding that officers must have probable cause to believe that items are related to criminal activity in order to seize them under plain view doctrine); Texas v. Brown, 460 U.S. 730 (1983) (applying the plain view doctrine to an automobile search); Washington v. Chrisman, 455 U.S. 1 (1982) (holding that officer may accompany arrested person into private areas after arrest and may seize items spotted in plain view in the process).

57. *Coolidge*, 403 U.S. at 445-48.

58. *Id.* at 453. The warrant was invalid because it was not issued by a "neutral and detached" magistrate. It had been issued by the state's Attorney General who had himself earlier assumed command of the investigation. *Id.* For an analysis of this aspect of the *Coolidge* decision, see *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 238-41 (1971) [hereinafter *The Supreme Court*].

59. *Coolidge*, 403 U.S. at 453. The State argued that the evidence could be seized incidentally to the arrest, *id.* at 455-57, that it could be seized in an automobile search, *id.* at 458-64, and that it could be seized because it was in plain view, *id.* at 464-73.

60. *Id.* at 464.

The Court rejected this argument,[61] but in the process defined the parameters of the plain view exception.[62] The plurality opinion, authored by Justice Stewart,[63] held that a plain view discovery does not violate the fourth amendment if three conditions are met: (1) the initial intrusion bringing the officer into contact with the evidence in plain view must be lawful; (2) the incriminating character of the item discovered must be immediately apparent; and (3) the discovery of the object must be "inadvertent."[64]

Of the three requirements for a plain view discovery, inadvertency has been the most troublesome.[65] The requirement is designed to keep initially valid (and therefore limited) searches from turning into general searches by forcing police, "where the discovery is anticipated, where [they] know in advance the location of the evidence and intend to seize it,"[66] to include the evidence in the initial warrant.[67] The warrantless seizure of an inadvertently discovered piece of evi-

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61. *Id.*

62. *Id.* at 465-471. Justice Stevens noted in *Coolidge*, as did Justice Rehnquist in Texas v. Brown, 460 U.S. 730 (1983), that plain view is not so much an independent exception as "an extension of whatever the prior justification for an officer's 'access to an object' may be." *Id.* at 738-39. "[P]lain view provides grounds for seizure of an item when an officer's access to an object has some prior justification under the Fourth Amendment." *Id.* at 738. For similar comments, see *Coolidge*, 403 U.S. at 466.

63. This was a particularly confusing plurality opinion, with the various Justices creating a veritable web of joinders and dissents from portions of each others' opinions. In all, five opinions were filed. The situation led Professor Brandis, in his work on North Carolina evidence, to direct to *Coolidge* "those readers possessing a capacity superior to that of this writer to determine what was decided by whom." 1 STANSBURY'S NORTH CAROLINA EVIDENCE § 121a n.22 (Brandis Rev. 1973).

64. *Coolidge*, 403 U.S. at 466. The plurality seemed to suggest an exception to the inadvertency requirement. During its explanation of the requirement the opinion states,

> But to extend the scope of such an intrusion to the seizure of objects—*not contraband nor stolen nor dangerous in themselves*—which the police know in advance they will find in plain view and intend to seize, would fly in the face of the basic rule that no amount of probable cause can justify a warrantless seizure.

Id. at 471 (emphasis added). In the very next paragraph, when the Court begins to apply the plain view doctrine to the seizure of Coolidge's car, the Court notes that "this is not a case involving contraband or stolen goods or objects dangerous in themselves." *Id.* at 472. Thus the plurality suggested that a discovery of these items would not need to be inadvertent at all. Justice White, concurring in part and dissenting in part, criticized this distinction as "reminiscent of the confusing and unworkable [mere evidence] approach that [he] thought Warden v. Hayden . . . had firmly put aside." *Id.* at 519 (White, J., concurring and dissenting). In *Warden v. Hayden* the Court had abolished the "mere evidence" rule, which prohibited the seizure of items not contraband, stolen goods, or objects dangerous in themselves. Warden v. Hayden, 387 U.S. 294, 300-01 (1966).

While the items seized in *White* were in fact stolen property, the North Carolina Supreme Court did not mention this possible exception to the inadvertency requirement. For discussions of this possible exception to the requirement, see Cronin, *Plain View and Party Balloons*, 8 OKLA. CITY U.L. REV. 161, 172-73 (1983); Note, *"Plain View"—Anything but Plain: Coolidge Divides the Lower Courts*, 7 LOY. L.A.L. REV. 489, 511-13 (1974); Note, *Retreating from Plain View:* Texas v. Brown, 37 SW. L.J. 841, 847-48 (1983).

65. *See, e.g.*, Texas v. Brown, 460 U.S. 730, 743 (1983) (hinting at the continuing discord within the Court regarding the requirement: "Whatever may be the final disposition of the 'inadvertence' element of 'plain view,' . . ."); United States v. Hare, 589 F.2d 1291, 1294 (6th Cir. 1979) ("Interpreting *Coolidge* is not an easy task . . . ."); Lewis & Mannle, *supra* note 45, at 17 ("[T]he result of these differing views [on the inadvertency requirement] by the Justices in *Coolidge* is that the Constitutional standards justifying a warrantless seizure of criminal evidence under the plain view doctrine are far from clear.").

66. *Coolidge*, 403 U.S. at 470.

67. *Id.* at 469-71.

dence causes only "minor peril to Fourth Amendment protections," according to the *Coolidge* plurality, while reaping a "major gain in effective law enforcement."[68] Requiring the police to ignore the evidence until they have obtained a warrant particularly describing it would be a needless, and sometimes dangerous, inconvenience.[69]

The problem with the requirement is that courts have not been sure what "inadvertent" means in constitutional terms. Because of the Supreme Court's failure to define the level of expectation required to make a discovery inadvertent,[70] development of the doctrine at the state level has been confused and inconsistent.[71] Some courts, recognizing that the opinion of a mere plurality of the Court is not binding on them,[72] have chosen not to apply the requirement.[73] Most states, however, have accepted the notion of inadvertency but have encountered difficulty in defining it.[74]

North Carolina is among the states that apply the inadvertency requirement to plain view discoveries,[75] and *State v. White* is the State's most recent step in distilling an appropriate definition. Prior to *White*, the North Carolina Supreme Court held that a discovery is inadvertent if "there [is] no intent on the part of the investigators to search for and seize the contested items not named in the warrant."[76] In *White*, however, the court changed stride, setting the old definition aside without explanation and adopting the definition of the Court of Appeals for the Sixth Circuit in *United States v. Hare*.[77] This definition holds that a discovery is inadvertent if "the police [are] without probable cause to believe

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68. *Id.* at 467.

69. *Id.* at 467-68.

70. *See* State v. White, 322 N.C. 770, 773, 370 S.E.2d 390, 392, *cert. denied*, 105 S. Ct. 399 (1988); United States v. Hare, 589 F.2d 1291, 1293 (6th Cir. 1979); 2 W. LAFAVE, *supra* note 46, at § 4.11(d); Comment, *Criminal Procedure—"Inadvertence": The Increasingly Vestigial Prong of the Plain View Doctrine*, 10 MEM. ST. U.L. REV. 399, 401 (1980); *The Supreme Court*, *supra* note 58, at 244.

71. Comment, *supra* note 70, at 401.

72. Justice Rehnquist noted in *Texas v. Brown* that the *Coolidge* plurality opinion is not binding precedent. Texas v. Brown, 460 U.S. 730, 737 (1983). He noted further, however, that "it should obviously be the point of reference for further discussion of the issue." *Id.*

Indeed, Justice White continues to reiterate his objection to the inadvertency requirement. *See* Arizona v. Hicks, 480 U.S. 321, 329-30 (1987) (White, J., concurring); Texas v. Brown, 460 U.S. 730, 744 (1983) (White, J., concurring).

73. *See, e.g.*, United States v. Bradshaw, 490 F.2d 1097, 1101 n.3 (4th Cir.), *cert. denied*, 419 U.S. 895 (1974) (choosing not to apply the rule in favor of a decision on other grounds); United States v. Santana, 485 F.2d 365, 369-70 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974) (questioning the viability of the rule); North v. Superior Court, 8 Cal. 3d 301, 307-08, 502 P.2d 1305, 1308-09, 104 Cal. Rptr. 833, 836 (1972) (rejecting the requirement: "If the plurality opinion in *Coolidge* were entitled to binding effect as precedent, we would have difficulty distinguishing its holding from the instant case .... [However,] the 'plain view' issue raised by the plurality opinion was in fact considered by an equally divided court, and hence was not actually decided in *Coolidge*."); State v. King, 191 N.W.2d 650, 655 (Iowa 1971) (choosing not to apply the rule), *cert. denied*, 406 U.S. 908 (1972).

74. Texas v. Brown, 460 U.S. 730, 746 & n.2 (1983) (Powell, J., concurring); Comment, *supra* note 70, at 401; Note, *Look But Don't Touch—The Limits of the Plain View Doctrine Following* Arizona v. Hicks, 10 GEO. MASON U.L. REV. 533, 536 (1988); 2 W. LAFAVE, *supra* note 46, at § 4.11(d).

75. *See, e.g.*, *White*, 322 N.C. at 773, 370 S.E.2d at 392; State v. Williams, 315 N.C. 310, 317, 338 S.E.2d 75, 80 (1986); State v. Richards, 294 N.C. 474, 489, 242 S.E.2d 844, 854 (1978).

76. *Williams*, 315 N.C. at 319, 338 S.E.2d at 81.

77. 589 F.2d 1291 (6th Cir. 1979).

evidence would be discovered until they actually observe it in the course of an otherwise justified search."[78] The North Carolina court took not only the bag but also the baggage from the *Hare* court, adopting not only its definition but also its reasoning.[79] The court observed,

> There are many times when a police officer may 'expect' to find evidence in a particular place, and that expectation may range from a weak hunch to a strong suspicion. However, the Fourth Amendment prohibits either a warrant to issue or search based on such an expectation. Yet if in the course of an intrusion wholly authorized by another legitimate purpose, that hunch or suspicion is confirmed by an actual observation, the police are in precisely the same position as if they were taken wholly by surprise by the discovery. The same exigent circumstances exist, and no warrant could have been obtained before the discovery.[80]

The court reasoned that a legitimately inadvertent discovery creates a situation meriting an exception to the warrant requirement, for to leave the evidence alone while obtaining a warrant would be to risk its loss altogether.[81] The seizure of the evidence in this situation, the court decided, creates "no significant diminution of fourth amendment privacy protections."[82]

When a court defines "inadvertency," it is actually defining a level of expectation that a police officer may have that he will find a piece of evidence for which he lacks probable cause during an otherwise justified search. Under North Carolina's old definition, that level of expectancy must be measured in terms of "intent."[83] Under the new definition it must be measured in terms of a lack of probable cause.[84] Analysis of the change, then, must address whether these definitions define different levels of expectation, and, if they do, whether the new definition increases or decreases the amount of expectation that will be tolerated. Once the relative change caused by the new definition is defined, an analysis of its potential impact becomes possible.

The first point to address in evaluating North Carolina's new definition of inadvertency is whether it is in fact a new definition or is actually just a reformulation of the old one. The court makes no mention of change; nowhere in the opinion is there language to suggest a departure from the old definition. On the contrary, the court noted that its result "comports with *State v. Williams* and *State v. Richards*, in which [it] held that to qualify as inadvertent a putatively plain view seizure must not be marred by police intent to search for and seize items not described in the warrant."[85] If the new definition "comports" with the old one, perhaps only nomenclature—not substance—has changed.

78. *White*, 322 N.C. at 774, 370 S.E.2d at 393 (quoting *Hare*, 589 F.2d at 1294).
79. *Id.* at 774-75, 370 S.E.2d at 393.
80. *Id.* at 775, 370 S.E.2d at 393 (quoting *Hare*, 589 F.2d at 1294).
81. *Id.*
82. *Id.*
83. *See supra* note 76 and accompanying text.
84. *See supra* note 78 and accompanying text.
85. *White*, 322 N.C. at 777, 370 S.E.2d at 394-95 (citations omitted).

Two factors point convincingly to the conclusion that the new definition in fact differs from the old, allowing either a greater or lesser degree of expectation by the police that they will find items not listed on their warrants. First, Justice Frye, dissenting, accused the majority of making "a drastic departure from [the court's] cases interpreting the plain view exception."[86] Second, the court's decision in *State v. Williams*,[87] decided only two years before *White*, implicitly suggests that there is a difference between the old North Carolina definition and the Sixth Circuit's *Hare* definition. In *Williams*, the court noted that "some courts," citing *United States v. Hare*, "have said that inadvertence means the police must be without probable cause to believe that the evidence would be discovered . . . ."[88] Immediately after describing the *Hare* standard, the court reported that "[t]his Court has interpreted the requirement as meaning that there must be no intent on the part of the investigators to search for . . . the contested items not named in the warrant."[89] Thus, instead of taking that opportunity to adopt the *Hare* definition, the court implied that the *Hare* definition differed from the then existing rule in North Carolina.

Although the new definition appears to be a departure from the old one, it remains to be seen whether the new definition increases or decreases the amount of expectation that a police officer may have and still make a discovery inadvertently. Rephrased, the question now is whether the "intent" of the old definition or the "probable cause" of the new one connotes a higher degree of expectation.

Justice Frye's dissent and the language in the majority opinion that the new definition "comports" with the old cases suggest that the new definition allows police to foster a higher degree of expectation. Justice Frye noted that the old definition "was an effort to thwart . . . attempts by law enforcement officers to cloak general exploratory searches under the veil of plain view."[90] He then suggested that "[t]he majority succeeds in dismantling this effort,"[91] thus expanding the freedom of police officers in executing searches.

The "comporting" language in the majority opinion also suggests, when viewed logically, that the new standard tolerates a higher degree of police expectation that they will find objects not listed on their warrants. The court mentioned that its result "comports" with *State v. Richards* and *State v. Williams*, two cases in which it had applied the old definition.[92] If the new definition allows a higher degree of expectation than the old one, then necessarily any "expectation" discovery that satisfied the old rule would satisfy the new one. *Richards* and *Williams* would thus have been decided the same way under the new rule and would thus "comport" with it. On the contrary, if the new definition decreases the tolerable amount of expectation from the old one, discoveries

86. *Id.* at 780, 370 S.E.2d at 396 (Frye, J., dissenting).
87. 315 N.C. 310, 338 S.E.2d 75 (1986).
88. *Id.* at 319, 338 S.E.2d at 81.
89. *Id.*
90. *White*, 322 N.C. at 782, 370 S.E.2d at 398 (Frye, J., dissenting).
91. *Id.* (Frye, J., dissenting).
92. *Id.* at 777, 370 S.E.2d at 394-95 (citing State v. Williams, 315 N.C. 310, 338 S.E.2d 75 (1986); State v. Richards, 294 N.C. 474, 242 S.E.2d 844 (1978)).

that satisfied the old rule would not necessarily satisfy the new one. *Richards* and *Williams* would thus not necessarily have been decided the same way had the new rule been applied, and thus would not necessarily "comport" with it.

These two indicators suggest that the new definition increases the degree of expectancy that a police officer may have that evidence not listed in his warrant will be discovered while still allowing the discovery to fall within the bounds of "inadvertency." This conclusion is bolstered by the ordinary definitions of the words used in the two definitions; clearly an officer could have "intent to search" without having probable cause to find the item in question.[93]

North Carolina's old and new definitions of "inadvertent" represent the two commonly considered possible definitions.[94] The switch from an intent-based definition to a probable cause-based definition adds the State to the growing trend of other jurisdictions making this choice.[95] Despite this trend commentators have criticized the probable cause rule as being limited in application.[96] When compared to the other available alternatives, however, the probable cause definition is generally regarded as the best option.[97]

The probable cause rule clearly affects only a very limited class of searches. It is violated only when police—faced with no exigent circumstances[98]—search for or seize items for which they have probable cause and could have obtained search warrants. Commentators thus criticize the rule as having limited effect,[99] for "if the police bother to secure a warrant they have no reason not to list in it objects they expect to find and seize if visible. . . . [I]t would make no sense for the police, when they have probable cause to obtain a search warrant as well as to arrest, to opt for a warrantless arrest and the chance of a plain-view seizure."[100]

Use of the probable cause definition causes two further problems, one arising from the other. Because the rule requires that the police lack probable cause in plain view discoveries, an anomalous situation will arise in challenges to the constitutionality of those discoveries. First, police will argue that they lacked probable cause, while the search victims argue that police actually had probable cause and could have obtained warrants.[101] Obviously, those roles are typically

93. See *supra* note 35 for a definition of "probable cause."

94. *See, e.g.*, Lewis & Mannle, *supra* note 45, at 18-19; *The Supreme Court, supra* note 58, at 244-46.

95. *See infra* notes 109-10 and accompanying text.

96. *See, e.g.*, Lewis & Mannle, *supra* note 45, at 18; *The Supreme Court, supra* note 58, at 244.

97. *See, e.g.*, Lewis & Mannle, *supra* note 45, at 19.

98. Warrantless searches are permitted if sufficiently "exigent" circumstances are manifest. *See* Coolidge v. New Hampshire, 403 U.S. 443, 468 (1971) ("no amount of probable cause can justify a warrantless search or seizure absent 'exigent circumstances' "). The exceptions to the warrant requirement, discussed *supra* notes 49-55 and accompanying text, generally reflect various exigent circumstances.

99. *See supra* note 96.

100. *The Supreme Court, supra* note 58, at 244-45; *see also Coolidge*, 403 U.S. at 517 (White, J., concurring in part and dissenting in part) ("Only oversight or careless mistake would explain the omission in the warrant application if the police were convinced they had probable cause to search for" an additional item, for some reason not included in a warrant.).

101. *See The Supreme Court, supra* note 58, at 245.

reversed. Second, this role reversal discourages police truthfulness; officers will at least be tempted to downplay their expectations and suspicions.[102]

The intent-based definition, followed by North Carolina prior to *White*, nevertheless receives greater criticism by commentators than does the probable cause rule.[103] Clearly the inadvertency requirement will have significant impact under the intent-based definition, because the police often have suspicions that extend beyond the scopes of their warrants.[104] Such a rule, according to commentators, sweeps too broadly: it invalidates many "slight suspicion" seizures because it is difficult for police to prove that they in fact harbored no expectations of finding the non-warranted items.[105] Application of the rule thus results in the loss of much of the evidence that the plain view doctrine is designed to permit police to seize.[106]

Thus, the probable cause definition seems too narrow and the intent definition too broad. One commentator speculates about a rule that compromises between these extremes, attempting somehow "to distinguish untimed intrusions from ones in which police deliberately delayed arrest for the ulterior purpose of obtaining a view of a particular place."[107] This compromise is also undesirable, however, because in addition to proof-of-expectation problems, it fails to account for the many situations in which police have legitimate reasons for carefully timing arrests.

The commentators generally agree that, of these alternatives, the probable cause definition adopted by the North Carolina court in *White* is the best option.[108] This definition is the prevailing view in the federal courts[109] and appears to be the subject of a growing trend in the states.[110] Though the rule fails to guard against many planned warrantless searches, it succeeds in giving police flexibility in plain view discoveries and it protects individual privacy from the most extreme situations, those in which police have probable cause but fail to obtain warrants.

The new definition of inadvertency, allowing as it does a greater degree of expectation in plain view discoveries, creates many consequences. One of the primary benefits of the definition is easier administration of plain view discoveries for both police and courts. Probable cause is a concept familiar to police and to courts alike, for they regularly deal with it in obtaining search and arrest warrants and in litigating fourth amendment search issues. "Intent," on the

102. *See* Lewis & Mannle, *supra* note 45, at 19; *The Supreme Court*, *supra* note 58, at 245.

103. *See, e.g.*, Lewis & Mannle, *supra* note 45, at 19; *The Supreme Court*, *supra* note 58, at 245-46.

104. *See, e.g.*, Lewis & Mannle, *supra* note 45, at 19; *The Supreme Court*, *supra* note 58, at 246.

105. *See, e.g.*, Lewis & Mannle, *supra* note 45, at 19; *The Supreme Court*, *supra* note 58, at 245-46.

106. In short, "law enforcement would be severely hampered with no promotion of the individual's privacy interests." Comment, *supra* note 70, at 404-05.

107. *The Supreme Court*, *supra* note 58, at 246.

108. *See e.g.*, Lewis & Mannle, *supra* note 45, at 19.

109. Comment, *supra* note 70, at 402.

110. Moylan, *The Plain View Doctrine: Unexpected Child of the Great "Search Incident" Geography Battle*, 26 MERCER L. REV. 1047, 1083 & n.170 (1975).

other hand, the guidepost of the old definition, is a much more amorphous concept. While probable cause is to some extent objectively measureable, intent is largely subjective. Police and courts should thus be more capable now of managing plain view discoveries. The police presumably are familiar enough with the concept of probable cause to recognize situations in which their expectations of finding evidence not listed on their warrants rise to that level. Meanwhile the courts, equally armed with the familiar standard, will be more capable of adjudicating plain view issues.

Another potential benefit created by the increase in tolerable expectation is a corresponding increase in police discretion during searches. Under the new definition officers may use their "hunches" more effectively. They may, for example, follow the lead of the officers in *White* by taking precautions to enable them to take full advantage of suspected but nevertheless fortuitous discoveries when they arise.[111] It is not likely that the steps taken by the officers in *White* would have survived scrutiny under the old rule;[112] thus, that case is a clear example of a situation in which the increased flexibility of the new rule enabled officers to be prepared should their suspicions—not supported by probable cause—come to fruition during a lawful search.

Increased police discretion during searches has one major drawback: it fails to discourage—and may actually encourage—the planned warrantless searches feared by the Supreme Court in *Coolidge*.[113] The Court in *Coolidge* apparently intended for the inadvertency requirement to guard against abuses of the warrant requirement through illicit use of the plain view doctrine.[114] There are two general classes of potential abuses: (1) particularity problems, in which officers fail to list on their warrants all of the items for which they have probable cause and intend to search; and (2) pretext problems, in which officers use existing legal means to get into positions in which they can make plain view searches for items for which they otherwise lack probable cause. Applied to these potential abuses, the *White* definition of "inadvertency" guards against the first class[115] but utterly fails to address the second.[116] In comparison, North Carolina's old intent-based definition addressed both classes; its treatment of the first class was imprecise,[117] however, and its treatment of the second overbroad.[118] *White*,

111. *See supra* notes 10-19 and accompanying text.

112. *See White*, 322 N.C. at 780-83, 370 S.E.2d at 396-98 (Frye, J., dissenting). By the officers' own admission, they intended to compare items found in the residence with those listed in the incident reports. *Id.* at 781, 370 S.E.2d at 397 (Frye, J., dissenting). To Justice Frye, it was "eminently evident that the seizure of those items listed in the police reports and not listed in the application for the search warrant was not inadvertent as that requirement has been interpreted by [the North Carolina Supreme] Court." *Id.* at 780-81, 370 S.E.2d at 396 (Frye, J., dissenting).

113. *See* Coolidge v. New Hampshire, 403 U.S. 443, 471 & n.27 (1971).

114. *Id.*; *see also* Note, *supra* note 74, at 536 (The inadvertence requirement was "adopted to restrict the use of the plain view doctrine to circumvent the warrant process."); *The Supreme Court*, *supra* note 58, at 244 ("Justice Stewart may well have meant that plain-view seizures must be limited to inadvertent discoveries in order to prevent the police from using the exception in conjunction with a deliberately timed arrest to seize evidence that, absent a judicially authorized search warrant, would remain hidden.").

115. *See infra* notes 119-27 and accompanying text.

116. *See infra* notes 128-40 and accompanying text.

117. Police officers and courts are better suited to deal with probable cause—a concept with

then, acts to cure the particularity problems, but only at the high cost of the forfeiture of any safeguard against pretext searches.

The first class of abuses, consisting of particularity problems, includes situations in which officers have probable cause to search for items yet fail to obtain valid warrants specifically listing those items or fail to include those items in otherwise valid warrants. The first of these failures is exemplified by *Coolidge* itself: the officers had probable cause to find Coolidge's car, yet they failed to obtain a valid warrant.[119] The second failure arises when officers intend to search for items A and B, yet, for whatever reason,[120] fail to include one or the other of these items in their otherwise valid warrant. In neither of these cases will the *Coolidge* court's interpretation of the plain view doctrine validate warrantless seizures, for the discoveries are not "inadvertent."[121]

The North Carolina definition of "inadvertence" guards against these particularity problems insofar as it prohibits validation under the plain view doctrine of warrantless seizures of items for which the police had probable cause to search.[122] However, the *Coolidge* Court noted that if a warrant fails to mention a particular object, though the police know its location and intend to seize it, then there is a violation of the express constitutional requirement of "warrants . . . particularly describing . . . [the] things to be seized."[123] This statement apparently means that when an officer has probable cause for and intends to seize an item, the Constitution demands that he obtain a warrant for it.[124] Clearly the Court would not allow an officer, having failed to so obtain a warrant, to rely on the plain view doctrine to validate a warrantless seizure of the item. Indeed,

> to extend the scope of [a search] . . . to the seizure of objects . . . which the police know in advance they will find in plain view and intend to

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which they deal every day—than with amorphous "intent." *See supra* text accompanying notes 110-111.

118. *See supra* notes 103-106 and accompanying text. Officers commonly have suspicions that they will find items not listed on their warrants; the intent-based definition would presumably invalidate any such seizures, whether actually driven by pretext or not.

119. *Coolidge*, 403 U.S. at 472.

120. Commentators argue that such failures to include probable cause items in warrants rarely happen. *See supra* notes 99-100 and accompanying text. Even when they do occur, however, lower courts "regularly characterize as 'inadvertent' the discovery of items as to which it appears the police could have made a probable cause showing in advance had it occurred to them to do so." 2 W. LAFAVE, *supra* note 46, at § 4.11(d) (citing cases).

121. *Coolidge*, 403 U.S. at 468-73.

122. See *supra* note 78 and accompanying text for the new North Carolina definition of "inadvertent."

123. *Coolidge*, 403 U.S. at 471.

124. The Court states that,

> where the discovery is anticipated, [and] where the police know in advance the location of the evidence and intend to seize it . . . [t]he requirement of a warrant to seize imposes no inconvenience whatever, or at least none which is constitutionally cognizable in a legal system that regards warrantless searches as "per se unreasonable" in the absence of "exigent circumstances."

Id. at 470. Further, "the police must, whenever practicable, obtain advance judicial approval of searches and seizures." Terry v. Ohio, 392 U.S. 1, 20 (1968).

> seize [but for which they have not obtained warrants[125]], would fly in the face of the basic rule that no amount of probable cause can justify a warrantless seizure.[126]

Thus existing constitutional dogma, namely the particularity clause and the rule that "no amount of probable cause can justify a warrantless search or seizure absent 'exigent circumstances,' "[127] prohibits use of the plain view doctrine on items for which officers have probable cause from the outset. Consequently, at least with regard to these particularity problems, the inadvertency requirement is nothing more than a shorthand reference to existing fourth amendment jurisprudence; as such, it is apparently nothing more than a gloss on existing law.

The second class of abuses of the warrant requirement, pretext searches,[128] includes all situations in which officers "[use] a prior justified intrusion upon a protected area 'as a mere subterfuge for a "Plain View" reconnoitering.' "[129] This subterfuge may be accomplished in at least three ways: (1) officers, having probable cause for item A but lacking it for item B, in which they are really interested, obtain a warrant ostensibly for item A and make a plain view search for item B; (2) officers, wishing to search a car or other particular area, arrest the defendant for some minor infraction as a pretext for gaining a plain view of the area; and (3) officers, lacking probable cause but wishing to search a particular area related to a potential defendant, time their arrest for when the defendant is in that area; once in, they make a plain view search. In each case officers manage, through the use of pretexts, to search for items for which they lack probable cause, thus circumventing the warrant requirement.

The North Carolina definition of "inadvertence" utterly fails to guard against any of these pretext searches, and in that respect it falls far short of the goals enunciated in *Coolidge*. The *White* definition of inadvertency is violated only if the police have probable cause that they will find items not listed on their warrants.[130] Police officers carrying out these pretext searches by definition lack probable cause for the unlisted items.[131] Therefore the *White* rule is never offended by pretext searches, and it completely fails to serve the goal of *Coolidge*.

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125. This passage by the Court concerns "warrant[s] that fail to mention a particular object, though the police know its location and intend to seize it." *Coolidge*, 403 U.S. at 471.

126. *Id.*

127. *Id.* (explaining the requirements under the particularity clause of the fourth amendment).

128. For thorough discussions of pretextual searches, see Burkoff, *The Pretext Search Doctrine: Now You See it, Now You Don't*, 17 U. MICH. J.L. REF. 523 (1984); Note, *Addressing the Pretext Problem: The Role of Subjective Police Motivation in Establishing Fourth Amendment Violations*, 63 B.U.L. REV. 223 (1983); 2 W. LAFAVE, *supra* note 46, at § 4.11(e).

129. Note, *Confusing Views: Open View, Plain View, and Open Fields Doctrines in Tennessee*, 14 MEM. ST. U.L. REV. 337, 354 (1984) (quoting Brown v. State, 15 Md. App. 584, 609, 292 A.2d 762, 776 (1972)).

130. See *supra* note 78 and accompanying text for the new North Carolina definition of "inadvertent."

131. The whole point of planned warrantless seizures is that the officers lack probable cause and must therefore resort to seizure methods outside the warrant process. *See* 2 W. LAFAVE, *supra* note 46, at § 4.11(e) ("Indeed, the lack of good faith would most likely be present when the unnamed items sought could not have been included in the warrant, as where the police, knowing that they have no grounds to search the suspect's premises for evidence of crime A, are prompted by their desire to find such evidence to get a warrant for objects relating to crime B.").

Insofar as officers know that evidence so seized will not be suppressed, they will be encouraged to perform these unconstitutional pretext searches. North Carolina's pre-*White* definition, on the contrary, would invalidate these searches.[132]

The failure to guard against pretext searches is mitigated to some extent by recent United States Supreme Court decisions dealing with the relationship between the fourth amendment and subjective intent of police officers. In *Scott v. United States*[133] the Court cast doubts on the viability of "bad faith" or pretext as grounds for a violation of the fourth amendment.[134] In *Scott* the Court upheld the wiretapping of defendant's phone even though the officers involved failed to abide by a court order to attempt to intercept only those calls related to the criminal activity in question.[135] The Court declared that searches are to be examined "under a standard of objective reasonableness without regard to the underlying intent or motivation of the officers involved."[136] Five years later, in *United States v. Villamonte-Marquez*,[137] the Court drove another nail into the pretext coffin,[138] again rejecting allegations of pretext.[139] In *Villamonte-*

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132. *See supra* notes 103-06 and accompanying text.

133. 436 U.S. 128 (1978).

134. 2 W. LAFAVE, *supra* note 46, at § 4.11(e) ("The continued vitality of [the good faith] approach has been cast into doubt by *Scott*."); Burkoff, *supra* note 128, at 523 ("*Scott v. United States* served to endanger, if not to eviscerate, the pretext search doctrine.").

For examples of cases applying good faith tests, see, *e.g.*, United States v. Tranquillo, 330 F. Supp. 871 (M.D. Fla. 1971); State v. Van Beek, 87 S.D. 598, 212 N.W.2d 659 (1974); Phenix v. State, 488 S.W.2d 759 (Tex. Crim. App. 1973).

135. *Scott* dealt with Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-20 (1982), which regulates, among other things, wiretapping and electronic surveillance. The Act directs that such surveillance " 'be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under [the Act].' " *Scott*, 436 U.S. at 130 (quoting 18 U.S.C. § 2518(5) (1982)). Officers in that case admitted that they had made no effort to abide by this provision or the court order providing similarly, while they intercepted defendant's phone calls. *Id.* at 133-34. The Court nevertheless upheld the search as reasonable under an objective standard. *Id.* at 137-43.

136. *Scott*, 436 U.S. at 138. Further, the Court agreed with the Government's position that "[s]ubjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional." *Id.* at 136.

One scholar notes:

> The result of the *Scott* decision is a substantial neutralization of whatever deterrent disincentives the exclusionary rule currently produces, because any colorable legal construct that accounts for the conduct of officers as objectively viewed vitiates at law the consequences of their improper motives. . . . [T]he fact that [a] search was unlawfully motivated is irrelevant to the question of the existence of a remediable fourth amendment violation as long as a court can point to other "objectively reasonable" grounds for [the initial law enforcement act].

Burkoff, *The Court that Devoured the Fourth Amendment: The Triumph of an Inconsistent Exclusionary Doctrine*, 58 OR. L REV. 151, 189-90 (1979).

137. 462 U.S. 579 (1983).

138. Burkoff, *supra* note 128, at 524. Burkoff argues that while seriously injured, the pretext doctrine is not dead. *See id.* He also argues for its rapid resuscitation. *Id.* at 548-50.

139. *Villamonte-Marquez*, 462 U.S. at 584 n.3. Pretext searches are, of course, unconstitutional as end runs around the fourth amendment. After *Scott* and *Villamonte-Marquez*, however, subjective intent is an unacceptable way to prove a violation; indeed, this evidence is irrelevant to the calculus. *Scott*, 436 U.S. at 136. Other approaches are sometimes advanced for guarding against pretexts. Professor LaFave, for example, advocates extra consideration of standard police procedures:

> [T]he *Scott* approach of disregarding [the subjective intent of the officers] . . . is correct . . . *provided* there are more reliable and feasible means of determining in a particular case

Marquez the Court upheld the offshore boarding of a ship by customs officials, ostensibly pursuant to a customs statute, despite allegations that use of the statute was merely a pretext for a search for illegal drugs.[140]

Given this apparently blossoming Supreme Court position on pretextual searches, under which it is all but impossible to allege pretext searches as fourth amendment violations, the *White* decision's failure to address pretexts is not as significant as it might otherwise be. Had the United States Supreme Court agreed to evaluate subjective intent in determining whether otherwise legitimate searches are in fact subterfuges, the *White* court's failure to address pretexts would have been egregious. Since the Court is apparently shying away from subjective intent analysis in fourth amendment cases, however, the *White* shortcoming will likely prove to be insignificant.

The court's redefinition of "inadvertency" in *White* clearly evinces a change in the State's constitutional interpretation. The new definition tends toward law and order and away from personal privacy, broadening the searching powers of police officers by allowing them to capitalize on "hunches" not supported by probable cause. Under the new definition police may seize items of evidence for which they lack probable cause but that they nevertheless discover during otherwise justified activities.[141]

The new definition is both a success and a failure. Of the various definitions suggested by commentators and other courts, the objective probable cause definition chosen in *White* seems to be the best choice.[142] It succeeds in one respect by providing police and courts with a more workable standard than that found in the old subjective intent definition. It further succeeds, at least in the eyes of law enforcement, by increasing police discretion during searches, allowing officers to seize items that they suspect they may find during otherwise justified searches but for which they lack probable cause.

The definition has one major shortcoming, however: it fails to discourage pretext searches, the subject of major concern to the Supreme Court and one of

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> whether or not the challenged arrest or search was arbitrary. This can best be accomplished by more widespread application of the requirement . . . that the Fourth Amendment activity "was carried out in accordance with *standard procedures* in the local police department."

1 W. LAFAVE, SEARCH AND SEIZURE § 1.4(e) (1987) (quoting South Dakota v. Opperman, 428 U.S. 364, 374-75 (1976)).

140. In *Villamonte-Marquez* customs officials and a Louisiana state policeman boarded a boat pursuant to a federal statute providing that " '[a]ny officer of the customs may at any time go on board of any vessel . . . at any place in the United States . . . and examine the manifest and other documents and papers . . . .' " *Villamonte-Marquez*, 462 U.S. at 580-83 (quoting 19 U.S.C. § 1581(a)). While on board the officials found 5,800 pounds of marihuana. *Id.* at 583. The question presented concerned the validity of the suspicionless boarding of the vessel. *Id.* at 584. The Court, however, addressed the subjective intent issue in a footnote:

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

Id. at 584 n.3 (citation omitted).

141. *White*, 322 N.C. at 774, 370 S.E.2d at 393.

142. See *supra* note 94-107 and accompanying text for a discussion of alternative definitions.

the problems that motivated the inadvertency requirement in the first place. Instead, by allowing officers extra freedom, the new definition practically encourages such searches. This shortcoming is mitigated, however, by the Supreme Court's recent suggestions that police officers' sujective intents are irrelevant to the fourth amendment calculus.

State v. White, in the end, amounts to one more stone's falling from the initially-weak foundation of the inadvertency doctrine. First, the requirement was created by a Supreme Court plurality, thus lacking any binding effect as precedent.[143] Second, it has never been accepted by a majority of the Court. Finally, the current Court is showing signs of treating pretexts—one of the evils to which the requirement was initially targeted—in a different fashion,[144] and cases like *White* construe the requirement so narrowly as to give it very limited effect. Nevertheless, the requirement clings to its spot in search and seizure jurisprudence and, after *White*, provides a helpful safeguard against abuse of the fourth amendment.

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143. *See supra* note 72 and accompanying text.
144. *See supra* notes 130-40 and accompanying text.