The Pretext Search Doctrine: Now You See It, Now You Don't

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The Supreme Court has held that so-called "pretext searches" are unconstitutional abuses of the fourth amendment.1 A pretext search is one where the justification proffered by the State for the search is legally sufficient, but where the searching officer was in fact searching for another, legally insufficient, reason. Similarly, a search is unconstitutional if it is the product of a pretext arrest, i.e., where the justification proffered by the State for an arrest is legally sufficient, but where the arresting officer was in fact making the arrest to search the arrestee incident to arrest for a reason which was legally insufficient to support the arrest. Perhaps it belabors the obvious to observe that pretext searches and arrests are unconstitutional because the facts and circumstances that the searching officer is de facto relying upon as justification for such fourth amendment activity — as contrasted with those facts and circumstances which, it is later argued by the State, serve as the justification de jure — are insufficient to establish probable cause to arrest or search.2 Hence, as the Hawaii Supreme Court has observed, "To condone ... [pretext searches] would make a mockery of our basic constitutional protection."3

Although the Supreme Court formally continues to recognize this pretext search doctrine, since 1978 the Court has made it increasingly difficult for defendants to establish the existence of such pretexts. I have previously "sounded the alarm"4 on this subject, arguing that the Supreme Court's 1978 decision in Scott v. United States5 served to endanger, if not to eviscerate, the pretext search doctrine.6 The Scott

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1. Occasionally, such searches are also referred to in the decisional law as "subterfuge searches."
2. See generally Burkoff, Pretext Searches, 9 SEARCH AND SEIZURE L. REP. 25 (1982). The same point applies where an investigative stop and frisk is not justified by the appropriate quantum of "reasonable suspicion."
6. See Burkoff, Bad Faith Searches, 57 N.Y.U. L. REV. 70, 72-84 (1982) [hereinafter cited as Burkoff, Bad Faith Searches]; Burkoff, supra note 2; Burkoff, The Court That Devoured
decision appeared to mandate "objective" fourth amendment analysis, with a majority of the Court declaring irrelevant to such inquiry the subjective intent of searching police officers. This decision endangered the pretext search doctrine because it became doctrinally impossible (or, more accurately, irrelevant) for a criminal defendant to demonstrate the actual existence of a searching or arresting officer's (subjective) pretextual motivation.

The Scott analysis appeared to signal that such subjective pretextual intent had to be proven objectively, i.e., through extrinsic, non-testimonial evidence of pretext. Hence, even where the searching or arresting law enforcement officers conceded intentional wrongdoing in trial testimony or elsewhere, the defendant needed to establish that unconstitutional activity existed objectively as well. Or, to put the matter the other way around, search and seizure activity was simply not unconstitutional unless the unconstitutional conduct was established objectively.

Well, if one believes, as I do, that the Supreme Court "missed the boat" in Scott with their "objective" analysis, now they've really gone and done it! In 1983, in United States v. Villamonte-Marquez, the Court took a giant step further with respect to its de facto emasculation of the pretext search doctrine. The Villamonte-Marquez majority not only continued to endorse the irrelevancy of subjective proof of pretext, it seemingly made it more difficult to prove pretext objectively as well. This is an ominous development. To the extent that a majority of the Supreme Court can be seen as intimating, inadvertently or otherwise, that fourth amendment restraints upon law enforcement officers' exercise of discretionary authority to search for (or seize) evidence are nonexistent as long as a lawful-sounding "cover story" for a given search or arrest can be concocted, the application of search and seizure law at suppression hearings is reduced to an unprincipled sham. Of what value are any fourth amendment "rules" if on those occasions when a criminal defendant proposes to demonstrate that they are being broken, the magistrate refuses — or is not permitted — to listen or respond to the breach?

One can only hope, to put it bluntly, that the Supreme Court majority in Villamonte-Marquez did not mean what it seemed to have said. Indeed, there is some evidence that this is precisely the case. In the same Term Villamonte-Marquez was decided, the Court also decided

the Fourth Amendment: The Triumph of an Inconsistent Exclusionary Doctrine, 58 OR. L. REV. 151, 190 (1979) [hereinafter cited as Burkoff, Inconsistent Exclusionary Doctrine].
7. See supra discussion in articles cited in note 6.
9. See infra text accompanying notes 33-37.
Texas v. Brown. In Brown, the Supreme Court continued to recognize and respond to the problem of pretext searches. In other words, the Court still acts as if the pretext search doctrine remains vital, despite the apparent body blow delivered to it in Scott and Villamonte-Marquez. The remainder of this Article elaborates upon the points sketched above, once again attempting to "sound the alarm" about the destruction of the pretext search doctrine, this time with just a bit more evidence — and a bit more volume. This Article also makes the case for a resuscitated pretext doctrine, one that would truly serve as an effective check against attempts to juridically "sweep under the rug" allegations of police misconduct.

I. Scott v. United States and Pretext Searches

In Scott v. United States, Justice Rehnquist concluded for a majority of the Supreme Court that the question of whether or not a fourth amendment violation exists in a given case should be resolved strictly on the basis of the objective reasonableness of the law enforcement officer's conduct in question, rather than on the basis of his or her subjective intent. Moreover, Rehnquist added, "the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action."

These propositions threaten the pretext search doctrine because of the clear difficulty they pose for a defendant attempting to prove the existence of the alleged underlying pretext. As a pragmatic matter, "[i]f subjective intent is an inadmissible consideration on the issue whether or not there has been a substantive fourth amendment violation, what other way is there to explore police officers' deterrable motivations for making a stop, an arrest, or a search?" Granted, occasionally a searching or arresting officer's pretextual subjective intent can be demonstrated "objectively," i.e., on the basis of reasonable inferences
from extrinsic rather than testimonial evidence. But even though that is the case, the Scott decision still poses a logical conundrum: if it is legitimate to demonstrate pretext indirectly through inference, why should evidence be deemed irrelevant and inadmissible which establishes the same pretext directly, e.g., from the searching officer's testimony as to what he or she was really doing and why he or she did it? 15

The Supreme Court is appropriately reluctant to resolve such perplexing doctrinal questions where their resolution is unnecessary. Moreover, to my mind, since it is desirable to avoid the destructive effects of Scott on the proof of pretexts, it should be noted that there is a convenient way to avoid the difficult task of resolving this issue. It is at least arguable, if not readily apparent, that the relevant language in Scott on the question of the significance of a law enforcement officer's subjective intent is dictum. This language can fairly — and fortuitously — be viewed as dictum because Scott was not a decision where, in the majority's view, the resolution of fourth amendment questions actually turned on subjective intent.

The Scott case involved the conduct of FBI agents monitoring a court-approved wiretap. The court order authorizing the wiretap required that interceptions be "minimized" to those conversations lawfully subject to interception by statute. 16 The tapping agents conceded, however, that they, in the trial court's words, "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." 17 Such failure to minimize electronic interceptions creates statutory and constitutional problems requiring evidentiary exclusion. 18 Nonetheless, in this particular case, on the basis of the number and nature of the calls that were actually intercepted, although the agents' intent may well have been to violate the court-ordered minimization requirement when and if they could, the Supreme Court majority held that they did not violate it, essentially because they did not have the opportunity to minimize:

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

15. Burkoff, Bad Faith Searches, supra note 6, at 111-16. See also infra note 79.
16. 436 U.S. at 130.
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 requirement. 19

In other words, the specific calls intercepted by the FBI agents in Scott were, in the majority's view, "interceptible" as a matter of law. The FBI agents had not in fact acted upon their unconstitutional intent. To complete the analysis then, the Scott majority "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." 20

Professor Wayne LaFave, a leading commentator on search and seizure law, takes a different, albeit no less revisionist, view of the import of the Scott decision on pretext searches. LaFave contends that Scott was correctly decided, if not as a matter of law, as a policy matter, at least insofar as it makes impermissible the inquiry into a searching or arresting officer's subjective intentions. He reasons 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.' " 21 However, this conclusion does not, in LaFave's view, militate toward legitimizing pretext searches. Pretext searches and arrests are still — and must continue to be treated as — unconstitutional breaches of the fourth amendment. However, LaFave argues, in a case of purported pretext.

19. 436 U.S. at 142 (footnote omitted).
20. Burkoff, Bad Faith Searches, supra note 6, at 83-84 (footnotes omitted) (emphasis added); see also Note, Addressing the Pretext Problem: The Role of Subjective Police Motivation in Establishing Fourth Amendment Violations, 63 B.U.L. REV. 223, 241 (1983). I have classified activity such as that at issue in Scott as searches undertaken with "latent bad intent," which, due to that latency, should be viewed as unconstitutional. Burkoff, Bad Faith Searches, supra note 6, at 98-100; see also Massachusetts v. Painten, 389 U.S. 560, 562 (1968) (White, J., dissenting from dismissal of writ of certiorari as improvidently granted). This classificatory approach is vigorously criticized in Note, supra, at 257-60.
21. I W. LAFAVE, supra note 4, § 1.2, at 33, (quoting Massachusetts v. Painten, 389 U.S. 560, 565 (1968) (White, J., dissenting from dismissal of writ of certiorari as improvidently granted)). But see in response Burkoff, Bad Faith Searches, supra note 6, at 111-16:

[T]he argument criticizing the use of a subjective approach is essentially an "impossibility" argument. It is based on the belief that any judicial attempt to find an improper intent on the part of a searching police officer is doomed to failure either because the courts are incapable of accurately assessing such motivations or because of the likelihood of pervasive police perjury.

One is tempted to respond to this sort of criticism rhetorically by asking whether the difficulty of demonstrating the breach of a particular constitutional right should ever be a sufficient reason to bar courts from making the effort . . . But there is
the proper basis of concern is not with *why* the officer deviated from the usual practice . . . 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 . . . .

Deviation from usual police practices, in other words, constitutes objective indicia of pretext and, when established, can suffice to establish a fourth amendment violation. Whether or not such deviation exists, in Professor LaFave’s view, should be determined by deciding whether or not “the Fourth Amendment activity [in question] ‘was carried out in accordance with standard procedures’” in the applicable law enforcement agency.

Professor LaFave argues therefore, in support of the *Scott* decision, that inquiry into a searching or arresting officer’s subjective intent is both inappropriate and unnecessary to establish pretext. In my view, a subjective inquiry can be useful — and may even be necessary — to demonstrate what really occurred in a controverted episode of ambiguous objective import. A subjective inquiry, however, was irrelevant to the decision in *Scott* because the majority concluded that whatever the searching officers’ subjective intent, lawful or otherwise, they had not acted upon it. Nonetheless, in either case, using an analysis which reads the *Scott* opinion as containing dicta on the issue of subjective intent, or using an analysis which views the *Scott* language as a desirable holding but inapplicable to objective demonstrations of pretext, the pretext search doctrine can and should be viewed as having survived the *Scott* decision, if a bit worse for the wear.

II. *United States v. Villamonte-Marquez* and Pretext Searches

The effect of *United States v. Villamonte-Marquez* on the vitality

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24. Even Professor LaFave concedes, however, that the pretext search doctrine is threatened by the *Scott* decision unless courts utilize “more reliable and feasible means of determining in a particular case whether or not the challenged arrest or search was arbitrary.” I W. LAFAVE, *supra* note 4, § 1.2, at 33. See also 2 W. LAFAVE, *supra* note 4, § 5.2, at 88. This point becomes critical in the *Villamonte-Marquez* setting. See *infra* text accompanying notes 39-60.

of the pretext search doctrine may be somewhat more telling than that of *Scott v. United States*. A six-justice majority in *Villamonte-Marquez*, in an opinion written, as was *Scott*, by Justice Rehnquist, concluded that random, suspicionless stops and boardings of vessels “with ready access to the open sea” are constitutional when made by law enforcement agents for the purpose of furthering federal vessel documentation laws. But the defendants in *Villamonte-Marquez*, convicted of various federal narcotics crimes after Customs officers boarded their vessel, the *Henry Morgan II*, subsequently discovered marijuana, argued that the search of their ship was not really made for the purpose of inspecton of its documents. Rather, they contended, “the *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.”

Justice Rehnquist summarily rejected this pretext argument in cryptic and cursory fashion in footnote three:

Respondents . . . contend . . . 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 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*, 436 U.S. 128, 135-139 . . . , and we again reject it. Acceptance of respondent’s [sic] argument would lead to the incongruous result criticized by Judge Campbell in his opinion in *United States v. Arra*, 630 F.2d 836, 846 (CA1 1980): “We would see little logic in sanctioning such examinations of ordinary, unsuspect vessels but forbidding them in the case of suspected smugglers.”

A. Does *Scott* Support the Result in *Villamonte-Marquez*?

In essence, the *Villamonte-Marquez* majority refused even to respond to defendants’ arguments of pretext, relying upon a bare citation to the *Scott* decision to justify its position. Accordingly, the Court did not substantively consider defendants’ contention that the stopping and boarding of the *Henry Morgan II* was not in fact a document inspection but was, in actuality, a search for narcotics. But defendants’ argument was certainly not a frivolous one. They proffered in its sup-

26. *Id.* at 2575, 2582.
27. The majority’s conclusion that such suspicionless searches are constitutional in this setting is criticized without regard to the claim of pretext in Burkoff, *When Is A Search Not A “Search?” Fourth Amendment Doublethink*, 15 U. Tol. L. REV. 515, 541-56 (1984).
29. 103 S. Ct. at 2577 n.3.
port both subjective and objective factors supporting their pretext contention. Why was this argument rejected without any consideration of the merits?

It is difficult to respond to this rhetorical question with any confidence or facility. To the extent that footnote three might be seen as reflecting the majority’s conclusion that a focus upon pretexts is either inappropriate or impermissible, it is clearly without supportive authority. The *Scott* decision may have weakened, but did not eradicate, the pretext search doctrine. Even if the Supreme Court’s language in *Scott*, indicating that a searching officer’s subjective intent is not to be considered in assessing whether or not a fourth amendment violation exists, is treated as holding rather than dictum, the *Scott* decision certainly did not purport to cut off defendants’ right to present, at the bare minimum, “objective” evidence supporting their allegations of pretext.

The reason for adopting an objective approach to pretext analysis, in Professor LaFave’s view (the *Scott* Court itself having offered no policy justification), is that assessing pretextual motivation objectively does not risk the supposed futility of a subjective inquiry. Moreover, an objective focus arguably highlights the questioned arbitrariness of the police conduct in question. Accordingly, deviation from a law enforcement agency’s “standard procedures,” again in Professor LaFave’s view, violates the *Scott* “standard of objective reasonableness” and serves to establish pretext on the basis of unconstitutionally arbitrary conduct.

The point of this digression into doctrine is simply to demonstrate that the *Villamonte-Marquez* majority in footnote three was not truly following that which can be gleaned from the language or thrust of the *Scott* decision, even though a citation to *Scott* was the only cited rationale for its dismissive conclusion on point. The *Scott* decision does not logically support a summary dismissal of a defendant’s pretext arguments where that defendant has offered objective indicia of pretext.

### B. Objective Evidence of Pretext in *Villamonte-Marquez*

The defendants in *Villamonte-Marquez* made it clear that their pretext argument relied both upon the trial testimony of the searching law en-

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30. They pointed to, for example, trial testimony by the law enforcement officers involved that the vessel stop was based upon an informant’s tip. See infra note 33.
31. They pointed to, for example, the presence and participation of the state narcotics agent in the supposed federal document check. See infra text accompanying notes 34-35.
32. See supra text accompanying notes 22-23. LaFave’s “standard procedures” test for constitutionality should be viewed, however, as a minimum requirement. Whether or not a given law enforcement activity follows standard procedures cannot inevitably dictate the constitutionality of the practice because a police department’s “standard procedures” may, for example, themselves be unconstitutional. See, e.g., *Gomez v. Wilson*, 477 F.2d 411, 416 (D.C. Cir. 1973) (District
forcement agents with respect to their subjective intent to board to search for narcotics and upon *objective* manifestations of that intent. Such *objective* manifestations included, in the defendants' view, the fact that

> [t]he night before the boarding, customs agents had received an informant's tip that two vessels crewed by foreigners and loaded with marijuana were supposedly lying in the . . . area. The agents immediately formed a patrol of customs agents and Louisiana state officials to conduct a search of the . . . Channel for the specific purpose of locating these vessels. On the morning of the boarding in question, this patrol to locate boats loaded with marijuana resumed with the aid of members of the Louisiana State Police . . . . [T]he customs agents in the case at bar were engaged in an ongoing criminal investigation of alleged narcotics violations when they approached and boarded the *Henry Morgan II*.34

They also included the fact that

State Police Officer Dougherty, a narcotics investigator, accompanied Customs Officer Wilkins when Wilkins boarded the boat. Dougherty's presence cannot be explained as a necessary incident to the conduct of a routine administrative document check . . . . In fact, the boarding authority of 19 U.S.C. § 1581(a) (1977) only authorizes "'[a]n officer of the customs' to "go on board of any vessel . . . and examine the manifest and other documents and papers . . . .'" The statute gives no such authority to a state police officer.35

What was the *Villamonte-Marquez* majority's response to these claims of objective manifestations of pretext? In one sentence, taken again from footnote three, the Court concluded "'[t]his line of reasoning was rejected in a similar situation in *Scott* . . . , and we again reject it.'"36
No, no, a thousand times no! The Scott decision only involved the issue of the significance of subjective evidence of pretext, and even then, arguably in dictum.  

C. The Need For the Pretext Search Doctrine in Vessel (and Vehicular) Cases

The defendants in Villamonte-Marquez invoked the pretext search doctrine in what might be seen as classic objective fashion. One of the most common scenarios in which state appellate courts have held searches of vehicles and their occupants unconstitutional is where the search was made not by law enforcement officers involved in enforcing traffic laws but rather by officers whose duties were primarily or exclusively the investigation of narcotics offenses. In these situations, the objective indicia of a pretext arrest or search are substantial; it looks very much like the vice cop watched for a traffic violation strictly in order to search for drugs, using the traffic violation simply as a convenient excuse to make the search.

This is also precisely the sort of situation where LaFave's "standard procedures" analysis works best. Narcotics agents generally do not make traffic stops as a matter of "standard procedure." Accordingly, pretext in this setting is not terribly difficult to observe. And, as LaFave persuasively argues, "given the pervasiveness of such minor offenses and the ease with which law enforcement agents may uncover them in the conduct of virtually everyone, . . . [if such pretexts are allowed,] there exists [on the part of law enforcement agents] 'a power that places the liberty of every man in the hands of every petty officer,' precisely the kind of arbitrary authority which gave rise to the Fourth Amendment."

37. Given the difficulty in reconciling footnote three with the pretext search doctrine, one federal Circuit Court of Appeals panel has simply, ingenuously, concluded that footnote three did not raise the issue of, and hence does not apply to, objective demonstrations of pretext. United States v. Herrera, 711 F.2d 1546, 1554 n.13 (11th Cir. 1983). This conclusion, while desirable from my perspective, would appear to be wishful thinking given both the footnote's text and defendants' arguments. See infra note 65 for citations to cases reaching a contrary conclusion.

38. See Burkoff, Inconsistent Exclusionary Doctrine, supra note 6, at 189 (collecting cases); see also 3 W. LAFAVE, supra note 4, § 10.8, at 388-89; 2 W. LAFAVE, supra note 4, § 5.2, at 285-86; LaFave, Search and Seizure: "The Course of True Law . . . Has Not . . . Run Smooth," 1966 U. ILL. L.F. 255, 281-82.

39. See supra text accompanying note 23. Professor LaFave made this argument in this setting nearly two decades ago: "[i]t is not unduly difficult to ascertain in what cases this [pretext] situation exists . . . [T]he assignment of the officers and their interest in the defendant as to other possible charges is convincing evidence. Moreover, the fact the defendant is actually arrested for the minor offense . . . also exposes the true motives of the officer." LaFave, supra note 38, at 282.

40. See infra text accompanying notes 107-08.

41. 1 W. LAFAVE, supra note 4, § 1.2, at 32 (footnote omitted) (quoting 2 L. WROTH & H. ZOBEL, LEGAL PAPERS OF JOHN ADAMS 141-42 (1965)).
This same kind of narcotics search/pretext problem is unusually commonplace in the Villamonte-Marquez setting of supposed vessel documentation searches. Professor LaFave stresses the need to focus upon objective indicia of pretext because it is, in his view, a necessary part of a doctrine which might realistically serve to prevent arbitrary (hence, unconstitutional) police conduct. The greater the discretion a police officer has to decide when to search or seize, the more substantial the risk of arbitrary action, and the less useful the "Scott approach of disregarding "the underlying intent or motivation of the officers involved.") But," as LaFave critically pointed out even prior to the Supreme Court's decision in Villamonte-Marquez, "some courts have utilized the Scott theory even when considerable discretion exists. Illustrative are the cases holding motivation irrelevant notwithstanding the fact that Coast Guard Officers have vast discretion as to which vessels to stop for a safety and documentation inspection." In short, the Scott objective approach to fourth amendment analysis is less useful — and more threatening to privacy rights — in the vessel search setting than in other settings where less risk exists of arbitrary police action. But, despite this problem, some courts have utilized objective analysis in this area anyway, with little regard for — or serious consideration of — the deleterious consequences of such a shortsighted position.

Ironically, the principal decision LaFave cites disparagingly to illustrate this point is United States v. Arra, the federal First Circuit Court of Appeals case quoted approvingly by the Supreme Court majority in Villamonte-Marquez footnote three, the footnote which is the object of much of this Article's critical scrutiny. The quotation in question is as follows: "We would see little logic in sanctioning such [documentation] examinations of ordinary, unsuspect vessels but forbidding them in the case of suspected smugglers." Used by the Supreme Court in this context, however, this point could not be further from the mark. The question at issue is not, as the Villamonte-Marquez and Arra majorities imply, the utility of some perverse rule of law which makes it more difficult to search suspect vessels than nonsuspect vessels. Rather, the question in every case is this: what is the justifica-

42. See 1 W. LaFave, supra note 4, § 1.2., at 33-34.
43. Id. at 33 (quoting Scott v. United States, 436 U.S. 128, 138 (1978)); see also supra text accompanying notes 31-32.
44. 1 W. LaFave, supra note 4, § 1.2, at 34 n.153; see also 3 W. LaFave, supra note 4, § 10.8, at 165-66.
45. See infra note 66.
46. 630 F.2d 836 (1st Cir. 1980).
48. 103 S. Ct. at 2577 n.3 (quoting United States v. Arra, 630 F.2d 836, 846 (1st Cir. 1980)).
49. I criticize Arra in some detail on the pretext issue elsewhere in one of those two-page footnotes that editors hate, but tend to create. See Burkoff, Bad Faith Searches, supra note 6, at 115 n.219.
tion for the search? It is hardly perverse to conclude that if the State is justifying its search as a document search, it must be a document search. That is what the pretext search doctrine is all about. If the State is searching for narcotics smugglers, then it must undertake lawful narcotics searches. A narcotics search, like any other investigatory search, needs to meet all of the ordinary fourth amendment requirements, whether the standard at issue is "suspicion" to meet Terry\textsuperscript{50} stop and frisk requirements or probable cause legitimizing a full scale search.\textsuperscript{51} The \textit{Arra} language in the \textit{Villamonte-Marquez} context, accordingly, while purportedly responsive to respondents' pretext arguments, totally begs the question. The "logic," in response to the \textit{Arra} rhetorical question, in "forbidding [document searches] in the case of suspected smugglers," is that a check on documentation is \textit{not} why such searches are being made. To argue that is to argue a lie. The searches are being made strictly to apprehend suspected smugglers, with a documentation check as the cover story. Where that is not the case, there is, of course, no pretext at issue, and document searches may be — indeed, are, after \textit{Villamonte-Marquez} — perfectly legitimate.\textsuperscript{52} Again and again, the point is that to find acceptable a justification for such searches which is duplicitous, in that it is \textit{not} the real reason why a given search was actually made, perverts the whole notion that the fourth amendment is capable of supporting workable restrictions on police misconduct.\textsuperscript{53} If such restrictions work only where a clever prosecutor fails to come up with a good cover story for what has occurred, what deterrent effect can any fourth amendment rules be reasonably expected to have?

Furthermore, as LaFave has pointed out, suspicionless vessel


\textsuperscript{51} As the Fifth Circuit Court of Appeals concluded in an en banc opinion "[u]nlike a routine customs search or administrative search, [a suspicionless investigatory search] is not morally neutral — the purpose of the search is to uncover evidence of \textit{suspected} wrongdoing, and contemporary jurisprudence requires that criminal investigations be carefully constrained to protect the rights of criminal suspects . . . ." United States v. Williams, 617 F.2d 1063, 1086-87 (5th Cir. 1980) (en banc). \textit{See also} United States v. Warren, 578 F.2d 1058, 1077 (5th Cir. 1978) (Roney, J., dissenting); id. at 1079 (Fay, J., dissenting), \textit{modified on other grounds}, 612 F.2d 887 (5th Cir. 1980) (en banc), \textit{cert. denied}, 446 U.S. 956 (1980).

\textsuperscript{52} I have argued further that in a case of "mixed motives," where the searching or arresting officer has both cognizable constitutional and unconstitutional motives for his or her fourth amendment activity, the search should be viewed as constitutional. \textit{See} Burkoff, \textit{Bad Faith Searches}, \textit{supra} note 6, at 103-04; \textit{see also} United States v. Demanett, 629 F.2d 862, 868-69 (3rd Cir. 1980), \textit{cert. denied}, 450 U.S. 910 (1981) (vessel documentation search constitutional where "dual purpose" of document check and criminal investigation). My conclusion on this point has been criticized, however, as insufficiently deterrent of unconstitutional behavior on the part of the police. \textit{See} Note, \textit{supra} note 20, at 257-63.

\textsuperscript{53} "Searches instituted as a mere subterfuge in order to seek evidence of crime should be deemed contrary to the fourth amendment, since they constitute an attempt to subvert the probable cause requirement." \textit{Note}, \textit{High on the Seas: Drug Smuggling, the Fourth Amendment and Warrantless Searches at Sea}, 93 \textit{Harv. L. Rev.} 725, 749 (1980) (footnote omitted); \textit{see also} Burkoff, \textit{supra} note 27, at 544 n.105.
documentation searches pose a uniquely high risk of law enforcement abuse of discretion. Other commentators, after canvassing the pre-Villamonte-Marquez case law and reports of law enforcement practice, have made the same point, indeed, even more emphatically. One commentator has observed that

[t]he truth of the matter . . . is that [federal law enforcement agents] conduct many [safety and documentation] boardings motivated by a desire to discover narcotics smuggling. Officials often do not perform safety and documentation inspections because of a desire to deter noncompliance; they merely state that purpose and use it as an instrument to board a vessel "legally" with hopes of discovering narcotics violations. 54

Another commentator has concluded

the particular danger which the Supreme Court has emphasized in other administrative search cases — abuse of discretion — is especially acute in the case of vessel inspections . . . . [T]he availability of authority to conduct purported safety inspections of vessels whose selection is totally in the discretion of the officer creates a potential for abuse of the safety inspection authority in order to search for evidence of crime. In fact, Coast Guard and Customs Service officials have openly admitted that their administrative search powers are regularly used to conduct searches for contraband. 55

The Coast Guard itself is apparently quite candid about its improper investigatory intentions in this setting. As a federal Third Circuit Court of Appeals panel described the evidence presented by one defendant in a Coast Guard vessel boarding case:

[I]nstructions [were] issued to Coast Guard personnel to the effect that boardings for administrative inspections may often produce the opportunity for observation of concealed contraband. The [instructions] included typical or possible hiding places on various types of vessels, and directions that inspections for compliance with safety regulations be conducted in such a manner as to intrude into all these concealed spaces. 56

55. Note, supra note 53, at 743 (footnote omitted) (emphasis added); see also Comment, supra note 54, at 1542 n.37, 1560-61.
Rather than considering some solution to this recurring problem of pretext in vessel search cases, the Villamonte-Marquez majority totally dismissed the claimed objective manifestations of defendants' pretext claim through inapposite citation to Scott. Instead of facing this issue head on, the Court implicitly legitimized the use of document searches as a pretext for engaging in suspicionless searches which are actually intended to support investigations of narcotics smuggling. Indeed, the Court was not the least bit reticent about making its underlying concern about smuggling manifest, even though the whole point of the case was that the search at issue was (purportedly) not undertaken for that purpose. In defense of its conclusion that fourth amendment restrictions on police conduct were inapplicable to vessel documentation searches, the majority reasoned that "'[t]he nature of the governmental interest in assuring compliance with documentation requirements, particularly in waters where the need to deter or apprehend smugglers is great, are [sic] substantial . . . .'" 58

Although the bare aim of deterring or apprehending smugglers is a laudable goal, it cannot support a fourth amendment search or seizure in se; rather, fourth amendment requirements of reasonable suspicion for a Terry stop or probable cause for a full blown search must be compiled with when the reason for the search is not to check documents, but to search for smuggled contraband. 59 Accordingly, the failure of the Villamonte-Marquez majority to make even a cursory inquiry into the question whether or not the facts on record tenably supported a finding of pretext — objectively or subjectively — serves to emasculate dramatically the role of the pretext search doctrine in "keeping the State honest" by insuring that the reasons proffered in support of a given search or seizure are the same reasons which truly caused it to occur. 60

57. It has been suggested that, to effectively respond to this problem of widespread arbitrary and pretextual vessel searchings, the courts should adopt a rebuttable presumption that a purported administrative search was based on pretext whenever any one of a number of factors indicative of criminal investigatory motives exists. If, for example, the boarding team carries with it a drug identification kit, or the Coast Guard vessel involved is of a type not normally used for safety inspection, or the vessel is on patrol for general law enforcement, rather than safety inspection, the burden should be on the government to show that no pretext was involved.

Note, supra note 53, at 749-50 (footnote omitted).


59. See Burkoff, supra note 27, at 553 n.144.

60. The spectre of a prosecutor offering reasons in support of a search or seizure which he or she knows did not actually prompt the activity in question also raises questions concerning the ethical propriety of such advocacy. Certainly argument of this sort would appear to be unethical under all prevailing or proposed professional ethical codes. See, e.g., MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(5) (amended 1981) ("In his representation of a client, a lawyer should not . . . knowingly make a false statement of law or fact."); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3.(a)(1) (1983) ("A lawyer shall not knowingly . . . make a false statement of material fact or law to a tribunal."); THE AMERICAN LAWYER'S CODE OF CONDUCT


III. TAKING FOOTNOTES SERIOUSLY

The reader may be tempted at this point to liken this critique of Villamonte-Marquez footnote three to the sort of analysis undertaken by “Kremlin-watchers.” These analysts of Soviet behavior have often appeared to be excessively preoccupied with nuance and minutiae, inferring massive shifts in Soviet domestic authority, for example, from such arcane details as precisely where various dignitaries stand at parades or funerals, or who is quoted most often or prominently in Pravda. Similarly, the reader might wish to point out at this juncture, “Hold on a moment — all we’re really talking about here is one lousy footnote! Isn’t it a bit premature — even a bit paranoid — to infer the collapse of principled fourth amendment doctrine, all stemming from this one cryptic footnote?”

Well, gentle but irascible reader, the answer to your hypothesized query is both “yes” and “no.” “Yes,” because the world will (assumedly) not end if footnote three is not immediately renounced and repudiated by the Supreme Court; as I later point out, fourth amendment doctrine can still be “resuscitated,” albeit with a bit of revisionist doctrinal tinkering. But the answer is also “no” to this question of apocalyptic vision; it is “no” because the destructive effects of footnote three of the Villamonte-Marquez opinion are already apparent on two levels.

A. Impact of Villamonte-Marquez on Vessel Searches

Villamonte-Marquez was a case of first impression in the Supreme Court. It resulted in the first and only Supreme Court decision answering the important question of precisely when a vessel can be detained, boarded, searched, and its occupants questioned, all under the presumptive
authority of the federal vessel documentation laws. The issue of pretext searches of vessels boarded in inland waters had been frequently raised and resolved in a number of different ways by appellate courts prior to the decision in Villamonte-Marquez. Accordingly, the Villamonte-Marquez majority opinion — and footnote three — would now appear to settle the law on this point, namely that allegations of pretext will not be considered in this setting on the asserted basis of the Court's prior holding in Scott v. United States. However inappropriate this conclusion, as discussed earlier, it is apparently the law and, at least in the first few months after decision, it has been unflinchingly — even enthusiastically — accepted by some lower federal courts. As one panel of the First Circuit Court of Appeals interpreted footnote three: "The [Villamonte-Marquez] Court there explicitly stated that an otherwise lawful document search does not become unlawful because the officer might in fact have been looking for drugs, not documents." Given this sort of unhesitating application, Villamonte-Marquez footnote three is obviously of tremendous and immediate significance to the inland waters-travelling public with respect to their pragmatic expectation of privacy from stops, boarding and search.

B. Impact of Villamonte-Marquez Throughout the Law of Search and Seizure: State v. Bruzzese

More significant, however, the second level of destructive effects engendered by footnote three is in its impact on the pretext search doctrine generally, i.e., in contexts other than the arguably idiosyncratic — hence distinguishable — area of vessel searches. Footnote three, if interpreted broadly, makes it nigh unto impossible to establish pretext

63. The Villamonte-Marquez analysis may also apply to Coast Guard safety inspections. See, e.g., United States v. Thompson, 710 F.2d 1500, 1508 (11th Cir. 1983).
64. See cases discussed in Note, supra note 53; Comment, supra note 54.
65. See, e.g., United States v. Burke, 716 F.2d 935, 937-38 (1st Cir. 1983); United States v. Kincaid, 712 F.2d 1, 3-4 (1st Cir. 1983); United States v. Thompson, 710 F.2d 1500, 1505-08 (11th Cir. 1983). But see United States v. Herrera, 711 F.2d 1546, 1554 n.13 (11th Cir. 1983) ("nothing in [Villamonte-Marquez] suggests that reasonable suspicion is not required when the Customs officers' conduct, objectively assessed, indicates they did not stop and board the vessel to make a document inspection").
66. United States v. Kincaid, 712 F.2d 1, 4 (1st Cir. 1983); see also United States v. Watson, 678 F.2d 765, 769-71 (9th Cir.), cert. denied, 103 S. Ct. 451 (1982) (reaching same conclusion on basis of Scott, limited, however, to "this special context" of vessel searches). As discussed earlier, these assertions beg the question whether a pretext search is "otherwise lawful." See supra text accompanying notes 42-53. In the Fifth Circuit, there are a number of decisions justifying searches and seizures for narcotics without any pretense that the stop for a document check was lawful. See, e.g., United States v. Mazyk, 650 F.2d 788, 790 (5th Cir. 1981), cert. denied, 455 U.S. 922 (1982); United States v. DeWeese, 632 F.2d 1267, 1269 (5th Cir. 1980), cert. denied, 454 U.S. 878 (1981); see also United States v. Alonso, 673 F.2d 335, 336 (11th Cir. 1982).
67. The search would still have to "look like" a document search. As the Villamonte-Marquez majority noted, "it involves only a brief detention where officials come on board, visit public areas of the vessel, and inspect documents." 103 S. Ct. at 2581. Of course, items coming into plain view during such a search — as bales of marijuana did in Villamonte-Marquez — would
This fear of an overly broad application has, in the brief period of time since decision of *Villamonte-Marquez*, also become more than a mere hypothetical possibility. Consider, for example, the recent decision of the New Jersey Supreme Court in *State v. Bruzzese*, handed down less than two months after the decision in *Villamonte-Marquez*.

The key issue in *Bruzzese* was one of the focal issues of this Article, namely the significance of a searching officer’s intent and actions in the determination whether or not the search in question was a pretext. The trial court in *Bruzzese* concluded, in part on the basis of the searching officer’s testimony, that the actual reason for the search in question was to investigate a burglary without probable cause to undertake such a search; it was not, the trial court held, a plain view search following defendant’s arrest on an outstanding contempt warrant, the rationale proffered to support the search by the prosecution. The searching officer had made it clear in his trial testimony that “his work did not normally entail ‘contempt follow ups’ . . . and, furthermore, that ‘normal’ procedure in handling contempt warrants was not to arrest but to call the person by telephone and ask him to appear at headquarters.”

The New Jersey Superior Court upheld the trial court’s grant of defendant’s suppression motion on these facts, agreeing with the trial court that the search which produced the evidence sought to be suppressed was an investigatory search made incident to a pretextual arrest. The Superior Court reached this conclusion by using a subjective approach to pretext analysis, adopting my view that “bad faith” searches or seizures are unconstitutional even though they may appear to be objectively constitutional. However, the Court further noted, citing Professor LaFave’s “objective” analysis discussed earlier, that we find that the seizure here would be vulnerable even in the absence of a finding of subjective bad faith . . . [as] the arrest, whether or not characterized as subjectively ‘pretextual,’ be admissible into evidence if viewed inadvertently. On the other hand, the “inadverence” question raises the issue of pretext. See infra note 113 and text accompanying notes 111-117.

68. See supra text accompanying notes 31-60 & 65-66.
71. 444, 455 A.2d at 497 (citing Burkoff, Bad Faith Searches, supra note 6, and Amsterdam, supra note 22). The latter citation is inapposite as Professor Amsterdam makes clear in the cited article that he is opposed to resolution of these issues on a subjective basis. Amsterdam, supra note 22, at 436-37 (“surely the catch is not worth the trouble of the hunt when courts set out to bag the secret motivations of policemen in this context”).
72. See supra text accompanying notes 21-23, 32 & 39-41.
was not effected in accordance with ‘normal’ procedures in the local police department. The seizure can fairly be characterized as the product of arbitrary police activity and thus in violation both of the Fourth Amendment and of N.J. CONST. (1947), Art. I, par. 7.³⁵

In short, to the trial court and to the New Jersey Superior Court, Bruzzese was a classic case of pretext both on the basis of the searching officer’s confessed subjective intent to search as a means of investigating a burglary (not to execute a contempt warrant) and on the objective basis of the officer’s arbitrary deviation from “normal procedures” in following up contempt cases.

1. Rejecting subjective bad faith—The New Jersey Supreme Court, however, reversed this Superior Court decision, with a majority of the Court emphatically disagreeing with both of the Superior Court’s legal rulings.³⁶ The Bruzzese Supreme Court majority rejected, first of all, the subjective “bad faith doctrine,”³⁷ holding instead (citing Scott)³⁸ “that the proper inquiry for determining the constitutionality of a search and seizure is whether the conduct of the law enforcement officer who undertook the search was objectively reasonable, without regard to his or her underlying motives or intent.”³⁹ In essence, the New Jersey

³⁷ Id. at 227, 463 A.2d at 329.
³⁹ 94 N.J. at 219-20, 463 A.2d at 325. The New Jersey Supreme Court rejected a subjective approach for a number of policy reasons, including the following:

Were the Court to adopt the defendant’s subjective rule, practically every search-and-seizure case would require the court to engage in a costly and time-consuming expedition into the state of mind of the searching officer. Since motives are seldom apparent or vocalized, there is little reliable evidence of them. Even where motives are evident, the analysis may still pose problems. Complex creatures that they are, humans usually have several motives.

A further weakness of the subjective approach is that it is neither reliable nor predictable. Appellate courts with views of human psychology different from those of the trial court would no doubt be tempted to second-guess the latter’s assessment of the searching policeman’s true intentions.

The subjective test ... places an unfair burden on law enforcement authorities. Delving into the so-called ulterior motives of policemen penalizes officers who outwardly behave in a constitutionally appropriate way. Under this rule, a defendant subjected to an objectively reasonable search may receive a windfall because the searching police officer harbored bad thoughts, despite the fact that those thoughts did not alter the external effects of the officer’s actions.

Id. at 221-22, 463 A.2d at 326-27.

There are a number of responses which can be made to these arguments. See generally Burkoff, Bad Faith Searches, supra note 6, at 107-16, where I respond at some length. Briefly, however, it should be pointed out that (1) the fact that proof of a matter may be difficult and time-consuming is no cause to disallow such proof where it is nonetheless available and relevant to
Supreme Court took the Scott language to be holding, not dicta, and applied it so as to make fourth amendment analysis in pretext cases wholly "objective."  

More to the instant point, this conclusion, the majority continued, was "again endorsed" in Villamonte-Marquez. Footnote three, the Court ruled, "clearly establishes that the pretext approach advocated by the dissent [, an expanded version of the Superior Court's approach,] is not the prevailing approach of our nation's highest court." If there was any doubt then, in the majority's view, that Scott narrowed the permissible scope of inquiry in pretext cases, the Villamonte-Marquez footnote resolved that doubt entirely, at least in the minds of the New Jersey Supreme Court majority. Dissenting Justice Pollock forcefully argued, however, that on this point Villamonte-Marquez was sui generis: "[T]he [Villamonte-Marquez] Court, in sustaining the search, relied heavily on the vessel's ability to head for the open seas, an ability not shared by the defendant's home." The majority rejected this distinction, however, and treated the Villamonte-Marquez inroad into the pretext search doctrine as generic rather than idiosyncratic.

2. Rejecting objective deviations— In any case, so much for this author's subjective pretext analysis! The Bruzzese majority did not reject the pretext search doctrine; rather, it purported to adopt an "objective" approach to pretext analysis. The Superior Court also had, as an alternative holding, applied just such an analysis in Bruzzese, referring to LaFave's approach. What did the New Jersey Supreme Court make of Professor LaFave's arguments? Well, in being rejected by the New Jersey Supreme Court, the company is certainly congenial.

the constitutional inquiry; (2) "mixed motive" situations are not as difficult a doctrinal matter to deal with as the New Jersey Supreme Court suggests, see supra text accompanying note 52; (3) trial courts make subjective intent determinations every day in many, if not most, civil and criminal cases (e.g., Was the civil plaintiff or defendant negligent? Did the criminal defendant have the requisite mens rea?) — the task of assessing subjective intent is not only not bizarre nor exceptional, it is commonplace; and (4) acceptance of the criticism of a subjective approach proffered in the final paragraph above would have the effect of totally swallowing up any possibility of possessing an effective, enforceable fourth amendment. Essentially the majority's point boils down to the following: if we can give a good (albeit false) explanation for an officer's actions, it is irrelevant why he or she really acted. Such a policy makes a mockery both of any tenable fourth amendment deterrence theory undergirding the exclusionary rule (e.g., we will only deter duplicitous police officers teamed with bad prosecutors) and of notions of judicial integrity (e.g., we don't care what this officer really did as long as we can come up with an acceptable though false cover story). See also Note, supra note 20.

80. As dissenting Justice Pollock pointed out, however, after adopting this supposedly objective approach, the majority, "by rely[ing] on the police officers' alleged fear for their safety, [to justify the search,] . . . ironically resort[s] to the officers' state of mind to justify the conclusion that the search was reasonable." 94 N.J. at 247-48, 463 A.2d at 340 (Pollock, J., dissenting). Claiming to use an objective approach and then relying upon subjective evidence is far from an uncommon judicial phenomenon. See infra text accompanying notes 118-19.

81. 94 N.J. at 221, 463 A.2d at 326.
82. Id. at 249, 463 A.2d at 341 (Pollock, J., dissenting).
83. See supra text accompanying note 75.
The *Bruzzese* majority was not overly fond of LaFave's views either, concluding:

[w]e do not endorse the rule that a search shall be deemed unreasonable merely because a police officer deviates from his department's standard operating procedure. This theory is espoused by Professor LaFave . . . . The adoption of such a rule would discourage police officers from thinking and from exercising initiative. There are numerous situations that arise in law enforcement that are unique and call for a special response. It is impossible for a police department to envision and to develop standard operating procedures for all such situations.  

3. *Examining a deviation “on its merits”*: What does this mean?—If they didn't buy a subjective approach and they rejected LaFave's objective approach, what rule did the New Jersey Supreme Court apply? The answer: “[A] deviation from standard police practice should be examined on its merits to determine whether it constitutes an unreasonable act.” 85 What does this mean? Literally, it would appear to indicate that some but not all deviations from standard police practice should be considered unreasonable and, hence, unconstitutional — a sensible enough result. 86

But, in application, excluding consideration of the police officer's testimony as to his subjective intent and focusing, therefore, only on the question whether or not the searching officer's “abnormal” appearance to execute a contempt warrant was “on its merits . . . an unreasonable act,” the *Bruzzese* majority held that it was not, because

[u]pon issuance of a lawful arrest warrant, a police officer has the right to execute the warrant by arresting a defendant at his or her home. There is no legal requirement that before executing a valid arrest warrant a police officer must telephone the person sought and request that he voluntarily appear at headquarters [, as was this officer's "normal" practice].

. . .

The circumstances of the defendant's arrest disclose that the officers exercised a legitimate investigatory technique in a proper and reasonable manner. The hour of the arrest, 10:30 a.m., was reasonable . . . . Their entry into the house was entirely

84. 94 N.J. at 228, 463 A.2d at 330.
85. *Id*; see also State v. Guerra, 93 N.J. 146, 152-53, 459 A.2d 1159, 1162-63 (1983) (search constitutional despite other defects if “overall objective reasonableness”).
86. See Burkoff, *Bad Faith Searches, supra* note 6, at 110 (“deviation from police department procedures does not in all cases rise to the level of a constitutional violation”).
proper. They were polite, nonviolent, and entered only upon the consent of defendant's aunt. While defendant's aunt went upstairs to get him, the police officers remained downstairs. They did not explore any room of the house. When defendant came downstairs, [the arresting officer] promptly identified himself and placed defendant under arrest.87

But, shades of Villamonte-Marquez footnote three, this approach is pure and simple issue avoidance! This certainly is not a pretext analysis. Indeed it loses sight of what is at issue. The Bruzzese majority essentially tells us that everything here can be explained away as perfectly lawful if we look at it from the right "objective" perspective! Execution of a contempt warrant can be a perfectly lawful thing to do and the officers can be seen as having executed it reasonably and politely. If we consider only selected facts and law in a clinical fashion, without looking for the truth as to what actually happened, it is not hard to justify this search.

The majority approach is, in sum, the creation of an elaborate "superobjectivist" fiction. It has noting to do with reality or the justices' actual perceptions of the facts of the case. The majority knew better, they knew that in reality (or, as the Superior Court found it necessary to put it, under "the 'true facts'"),88 there was much more to this scenario than their sanitized, supposedly objective account of the incident makes evident. Of particular significance here, the majority knew (1) that the arresting officer who subsequently accompanied the arrested defendant upstairs was in fact looking for evidence of another crime, he said as much,89 and they knew (2) that this officer — and the police generally — did not normally execute arrest warrants for contempt.90 The former point is significant under my pretext analysis,91 the latter under Professor

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87. 94 N.J. at 228-29, 463 A.2d at 330 (footnote omitted).
88. 187 N.J. Super. at 446, 455 A.2d at 498.
89. See supra note 70.
90. See supra text accompanying note 71.
91. See supra text accompanying notes 14-20. See also discussion of the "superobjectivist" approach to pretexts in Burkoff, Bad Faith Searches, supra note 6, at 88-89.

The majority did note in dictum that "even under the dissent's . . . subjective analysis, the record does not reveal a bad faith effort to conduct a full-blown warrantless search." 94 N.J. at 230, 463 A.2d at 331. This conclusion is, at the same time, both extremely significant and inconsequential. It is significant because if the majority had ruled that the trial court's and Superior Court's legal analysis was proper but their factual conclusions did not square with that analysis, i.e., this was a "mixed motives" case, see supra note 52, there would be no controversy here, at least from my perspective. Indeed, two concurring justices took precisely this position. Id. at 240, 463 A.2d at 336 (Handler, J., concurring). A later New Jersey Supreme Court majority may, optimistically, adopt this concurring viewpoint and discard the rest of the majority opinion as dicta.

The language quoted above is also inconsequential, however, because it is totally irrelevant that the searching officer did not intend "a full-blown" search if he intended to effect — and, as he conceded and the trial and Superior Courts concluded, did in fact effect — a limited investigatory search which was not itself justified under the fourth amendment.
LaFave's. Under either view, however, the aim of the inquiry is finding the true justification for the search as efficaciously as possible in order that we be assured that this true justification was sufficient to support the fourth amendment activity which followed from it. But the Bruzzese majority was not interested in ascertaining the truth; they were asking what set of legal and doctrinal constructs suffice to help us avoid facing — and making decisions based upon — the (unpleasant) truth, i.e., that the police officer in question may have acted improperly.

Such a visibly apparent result-orientation diminishes the possibility that the pretext search doctrine — and fourth amendment law in general — can serve as any real check on police misconduct. What if the searching officer in Bruzzese also conceded in his testimony that the real reason he went to defendant's house — the only reason — was that defendant was black and he hated blacks? Under the New Jersey Supreme Court's "superobjectivist" approach, that concession would also be totally irrelevant to a pretext analysis. Indeed, what pretext analysis? We would know that the search was a pretext but there would be no way for defense counsel to prove it.

The result of the New Jersey Supreme Court approach is the creation of a palpable sense of unreality — and worse. As dissenting Justice Pollock castigated his brethren in Bruzzese:

In sustaining the search, the majority purports to adopt an "objective" analysis, the purpose of which is to avoid probing the psyche of the police when they make warrantless searches. Although an "objective" test has much to recommend it in many cases, like other rules of law, it has its own limits. In a case such as this, in which an arrest warrant is used as a pretext, the "objective" test can become an instrument of injustice.

To the extent that Villamonte-Marquez footnote three is viewed as supporting or requiring the Bruzzese majority's approach or conclusions, subverting the pretext search doctrine in cases other than those involving vessels with ready access to the sea, its impact is extremely — and broadly — destructive.

IV. The Pretext Search Doctrine Lives

All of the foregoing discussion notwithstanding, there is some substantial evidence that the malign effect of both the Scott and Villamonte-Marquez opinions on the pretext search doctrine may have been

92. See supra text accompanying notes 21-24, 32 & 39-41.
93. See generally Burkoff, supra note 27.
94. 94 N.J. at 247, 463 A.2d at 340 (Pollock, J., dissenting) (emphasis added).
unintended. The primary evidence supporting this conclusion is the sim­
ple fact that in other decisions, despite Scott and Villamonte-Marquez,
the Supreme Court has treated the doctrine as if it retains vitality.95

Prior to Scott, the Supreme Court applied the pretext search doc­
trine explicitly and implicitly, in holding and in dicta, on numerous
occasions. In United States v. Lefkowitz,96 decided in 1932, for example,
the Supreme Court flatly ruled that “[a]n arrest may not be used as
a pretext to search for evidence.”97 In Abel v. United States,98 a 1960
decision, the Court upheld the search of a suspected Soviet spy, rejec­
ting his argument that he was subject to a pretext arrest. However,
Justice Frankfurter, speaking for the Court, premised this conclusion
upon the trial court’s finding that there was no “bad faith” on the
part of the searching officers.99 If “bad faith” had been found to have
existed, Frankfurter continued, it would “reveal a serious misconduct
by law-enforcing officers . . . . [that] must meet stern resistance by
the courts.”100 In short, had the arrest which the government argued
justified the search been pretextual, Frankfurter admonished, “our view
of the matter would be totally different.”101 In another pre-Scott deci­sion,
Jones v. United States,102 handed down in 1958, the Supreme
Court was even clearer in its adherence to the pretext search doctrine.
The federal government in Jones sought to justify a search before the
Supreme Court on grounds that had not been previously advanced on
appeal, namely that the search was incident to an arrest. Justice Harlan
squarely and explicitly rejected this argument on pretext grounds, con­
cluding that “the record fails to support the . . . theory now advanced
by the Government. The testimony of the federal officers makes clear
beyond dispute that their purpose in entering [defendant’s home] was
to search for distilling equipment, and not to arrest [the defendant].”103

In South Dakota v. Opperman,104 decided in 1976, the Supreme Court
upheld the constitutionality of so-called “automobile inventory”
searches, but, notably, only so long as such searches were not, in reality,
“a pretext concealing an investigatory . . . motive.”105 Other pre-Scott

95. For additional discussion of many of these decisions, see 1 W. LAFAVE, supra note 4, § 1.2(g),
at 21-31; Note, supra note 20, at 243-44.
96. 285 U.S. 452 (1932).
97. Id. at 467.
99. Id. at 226.
100. Id.
101. Id. at 230.
103. Id. at 500. It is also notable that the Jones Court utilized a subjective rather than an
objective pretext analysis. For a further discussion of Jones, see Burkoff, Bad Faith Searches,
supra note 6, at 79-81.
105. Id. at 376 (footnote omitted). There are many state appellate decisions handed down
after the decision in Scott applying the pretext search doctrine in the Opperman setting, holding
unconstitutional investigatory searches argued by the State to be inventory searches. See Burkoff,
opinions, authored by various Supreme Court justices, reflect a similar fixed adherence to the four corners of the pretext search doctrine.  

After Scott, the Supreme Court has continued to adhere to the doctrine in various decisions. In Colorado v. Bannister, for example, the Supreme Court unanimously upheld a police officer’s seizure of suspected stolen goods discovered in plain view after the officer stopped the defendant’s car for a traffic violation. But the Court made it clear that it reached this result of constitutionality where “[t]here was no evidence whatsoever that the officer’s presence to issue a traffic citation was a pretext to confirm any other previous suspicion about the [car’s] occupants.” Similarly, in Steagald v. United States, the Court refused to permit law enforcement officers to search for the subject of an arrest warrant in the home of a third party unless they possessed a search warrant or were acting under a suitable exception to the warrant requirement. One of the principal reasons for this ruling was the fear of pretext searches. Specifically, the Court expressed its belief that adoption of a contrary rule “would create a significant potential for abuse . . . [in that] an arrest warrant may [otherwise] serve as the pretext for entering a home in which the police have a suspicion, but not probable cause to believe, that illegal activity is taking place.”

More recently still, indeed decided in the very same Term as Villamonte-Marquez, Justice Rehnquist, the author of the Scott and Villamonte-Marquez majority opinions, wrote a plurality opinion in Texas v. Brown, which continued to take cognizance of the significance and import of the pretext search doctrine. In Brown, a majority of the Supreme Court upheld the warrantless seizure and subsequent search of a knotted, opaque balloon ultimately found to contain heroin after it was viewed in defendant’s hand by a police officer who had just made a lawful stop of defendant’s automobile. 

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supra note 2 (collecting cases); Note, supra note 20, at 225-26 n.14 (collecting cases).

106. See, e.g., Brown v. Illinois, 422 U.S. 590, 611 (1975) (Powell, J., concurring) (Miranda warnings will rarely be sufficient to dissipate the taint of a pretext search); Wainwright v. City of New Orleans, 392 U.S. 598, 606-07 (1968) (Warren, C.J., dissenting) (evidence obtained through a pretext arrest should be subject to the exclusionary rule); United States v. Rabinowitz, 339 U.S. 56, 82 (1950) (Frankfurter, J., dissenting) (pretext arrests one of the abuses Framers sought to curb); see also United States v. Ceccolini, 435 U.S. 268, 276 n.4 (1978).

For further discussion of these pre-Scott cases see Burkoff, Bad Faith Searches, supra note 6, at 78-81; Burkoff, Inconsistent Exclusionary Doctrine, supra note 6, at 189-90; 1 W. LAFAVE, supra note 4, § 1.2, at 26-31.


108. Id. at 4 n.4.


110. Id. at 215; see also Michigan v. DeFillippo, 443 U.S. 31, 40-41 (1979) (Blackmun, J., concurring).

111. 103 S. Ct. 1535 (1983).

112. Id. at 1537 (plurality opinion of Rehnquist, J.); id. at 1544 (White, J., concurring); id. at 1544 (Powell, J., concurring); id. at 1545 (Stevens, J., concurring).
plurality of four, Chief Justice Burger, Justices Rehnquist, White, and O'Connor, concluded that the balloon was lawfully seized under the "plain view doctrine" because its discovery was "inadvertent." 113

Inadverence, in the Supreme Court's view, was established by the fact that the defendant had failed to prove that an expectation on the part of the searching officer existed that the stop of defendant's automobile would produce this evidence. 114 If this approach sounds familiar, it is because, in essence, the inadvertence requirement was treated as a way of negating a defendant's allegations of pretext with respect to a plain view seizure. Or, as the plurality stated the point, quoting from an earlier plurality opinion in Coolidge v. New Hampshire, 115 for a plain view search to be constitutional, "the officer must discover incriminating evidence 'inadvertently,' which is to say, he may not 'know in advance the location of [certain] evidence and intend to seize it,' relying on the plain view doctrine only as a pretext." 116

In short, the balloon in Brown was seized constitutionally because, inter alia, the law enforcement conduct which brought it into "plain view" was not pretextual. As Justice Rehnquist specifically applied the pretext search doctrine to the facts in Brown:

The circumstances of this meeting . . . give no suggestion that the roadblock was a pretext whereby evidence of narcotics violation might be uncovered in 'plain view' in the course of a check for drivers' licenses. Here, although the officers no doubt had an expectation that some of the cars they halted . . . [in this] "medium" area of narcotics traffic . . . would contain narcotics or paraphenalia, there is no indication in the record that they had anything beyond this generalized expectation. Likewise, there is no indication that [the searching officer] had any reason

113. The "inadverence" element of the "plain view doctrine" was taken from the plurality opinion in Coolidge v. New Hampshire, 403 U.S. 443 (1971) (plurality opinion of Stewart, J.), and was applied arguendo by the plurality in Brown without a formal ruling on its status as a sine qua non of the "plain view doctrine." See 103 S. Ct. at 1543. A majority of the Court in Brown, however, did not question the "inadverence" requirement. Justice Powell, joined by Justice Blackmun, observed that there is "no reason at this late date to imply criticism of [this requirement] . . . It has been accepted generally for over a decade." Id. at 1544 (Powell, J., concurring) (footnote omitted). Justice Stevens, joined by Justices Brennan and Marshall, cited the Coolidge plurality as authority without comment. Id. at 1546. Since the inadvertence requirement received the explicit or implicit support of a majority of the justices, the discussion of this issue in the plurality opinion should be seen as a necessary component of the decision.

114. See infra text accompanying note 117.

115. 403 U.S. 443 (1971).

116. 103 S. Ct. at 1540 (quoting 403 U.S. at 470) (bracketed material from Brown opinion). There had been a good deal of discussion in the lower courts of what the inadvertence requirement should cover in terms of law enforcement officers' prior expectations. See, e.g., United States v. Liberti, 616 F.2d 34, 36-38 (2d Cir. 1980); id. at 38 (Newman, J., dissenting).
to believe that any particular object would be in Brown’s glove compartment or elsewhere in his automobile. The ‘inadvertence’ requirement of ‘plain view,’ properly understood, was [, accordingly,] no bar to the seizure here. 117

Application of the pretext search doctrine, the necessity of a finding that the plain view search at issue was not pretextual, was, therefore, a dispositive consideration in the decision of Texas v. Brown. Clearly, in one form or another, the pretext search doctrine lives.

V. RESUSCITATING THE PRETEXT SEARCH DOCTRINE

How does one reconcile Scott, Villamonte-Marquez footnote three, and their destructive effect on the pretext search doctrine, with Texas v. Brown and all the earlier Supreme Court decisions which appear with equal facility to support and apply it? Indeed, one might inquire further, how does one reconcile the objective approach to fourth amendment inquiries, including pretext analysis, seemingly mandated by Justice Rehnquist in Scott with Justice Rehnquist’s resolution of the Brown plain view inadvertence/pretext issue on the basis of the searching officers’ (subjective) knowledge, intent, beliefs, and expectations? 118

There are a number of different ways to answer these questions, but they lead me to a single conclusion.

That conclusion is that the Court must recognize (continue to recognize?) that a criminal defendant should be entitled to offer both objective and subjective evidence of pretext in those cases where such proof is useful and available. Objective evidence of pretext must be permitted, at the very minimum, else fourth amendment decisional law is rendered wholly ineffective to respond to police misconduct when the state is able to contrive an appropriate legal justification to account for the appearance (but not the reality) of a questioned search. Professor LaFave has ably marked out what should be the minimum allowed a criminal defendant alleging pretext: the opportunity to prove the arresting or searching officer’s deviation from standard police practices, thus (objectively) establishing the existence of pretext. Notably, in support of this proposition, one panel of the federal Eleventh Circuit Court of Appeals has recently concluded, contrary to my arguments about the detrimental impact of Villamonte-Marquez footnote three

117. 103 S. Ct. at 1543-44. Justices Powell and Blackmun concurred in the finding of inadvertence. Id. at 1545 (Powell, J., concurring).

118. See supra text accompanying notes 116-17. In similar inconsistent fashion, a plurality of the Court in Florida v. Royer, 103 S. Ct. 1319, 1326 (1983) endorsed an "objective" approach to the question when a fourth amendment "seizure" of a person takes place, but then resolved the seizure question in that case in large part upon the basis of "the testimony of the officers at the suppression hearing . . . indicating that had [the defendant] refused to consent to a search of his luggage, the officers would have held the luggage and sought a warrant to
on objective proof of pretexts, that the *Villamonte-Marquez* Court did not rule out the possibility of demonstrating pretext objectively in this fashion.\(^{119}\)

However, the availability of this sort of objective argument is not enough. Not only is fourth amendment doctrine threatened, the whole fabric of the law is threatened, when the law permits — even encourages — the state to legitimize its otherwise unconstitutional acquisition of evidence on the basis of a lie. That is why a defendant must also be offered the opportunity to demonstrate pretext subjectively, where the objective evidence is otherwise unilluminating.\(^{120}\)

To make this point clearer, consider the *Texas v. Brown* facts with one difference — the searching officer states on the record: "The real reason — the only reason — I stopped Brown's car was to search for narcotics, not to check drivers' licenses. I knew I didn't have the right to stop the car for that reason but I just didn't like Brown's looks!" If we take the *Scott* decision and its reaffirmation in *Villamonte-Marquez* literally, this subjective "concession" of wrongdoing would be irrelevant, the constitutionality of the search would still turn only on the significance of other, so-called "objective" factors. This is exactly what happened in the New Jersey Supreme Court’s unfortunate decision in *Bruzzese*.\(^{121}\)

But what kind of objectivity is this, objectivity which ignores — even flaunts — the obvious truth? One would assume that a concern about discovering the truth — the New Jersey Superior Court’s "true facts"\(^{122}\) — is precisely why Justice Rehnquist focused his *Texas v. Brown* analysis of plain view inadvertence on the searching officer's "intent" and "expectations." If a police officer's intent was strictly to act unconstitutionally under the fourth amendment and if an objective view of the episode in question confirms that that is what he did in fact,\(^{123}\) that

\(^{119}\). See United States v. Herrera, 711 F.2d 1546, 1554 n.13 (11th Cir. 1983) ("[N]othing in [*Villamonte-Marquez*] suggests that reasonable suspicion is not required when the Customs officials' conduct, objectively assessed, indicates they did not stop and board the vessel to make a document inspection."). *But see contra*, e.g., United States v. Kincaid, 712 F.2d 1, 3-4 (1st Cir. 1983).

\(^{120}\). Where the objective evidence clearly demonstrates pretext, a subjective showing is unnecessary. *See Burkoff, Bad Faith Searches, supra* note 6, at 116.

\(^{122}\). *See supra* text accompanying notes 69-94.

\(^{123}\). An improper subjective intent not acted upon should not lead to a finding of unconstitutionality. That — and only that — is what the *Scott* decision should be seen as establishing. *See supra* text accompanying notes 15-20; *see also* Florida v. Royer, 103 S. Ct. 1319, 1329 (1983)
is precisely how courts should view his conduct. Truthfully. Not like the New Jersey Supreme Court majority in Bruzzese, straining to "objectively" rationalize away questionable police conduct.\(^{124}\) Indeed, at a time when the exclusionary rule is regularly limited in application by a majority of the Supreme Court to those situations where deterrence is seen as incrementally maximized,\(^{125}\) what more optimal setting for its application than one where a searching officer's clear and confessed "bad faith" is established on the record?

In this light, to effectively resuscitate the pretext search doctrine, the Supreme Court's approach to pretexts in Villamonte-Marquez footnote three should, frankly, be disregarded. It can be — and should be — viewed as aberrational, as unintentional, or simply as ill-considered. To take it as implying anything else threatens not only the pretext search doctrine, but the credibility of the fourth amendment itself as an effective deterrent to police misconduct.

\(^{124}\) See supra text accompanying notes 76-94.