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COMMENTS

A VALIDATION OF PRETEXTUAL ARRESTS: *UNITED STATES v. TRIGG*

In order to protect individuals from unreasonable searches and seizures, the fourth amendment¹ requires that law enforcement agents obtain a warrant based upon probable cause before effecting a search or seizure.² When law enforcement officials fail to comply

¹ U.S. CONST. amend. IV. The fourth amendment states:

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.

Id.

² See 1 W. LAFAYE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 3.1(a) (2d ed. 1987). The founding fathers enacted the fourth amendment to protect Americans from the unreasonable governmental intrusions that English citizens had suffered at the hands of their government. J. HIRSCHL, *FOURTH AMENDMENT RIGHTS* 1-3 (1979). Upon the issuance of a general warrant, English officers were authorized to search and seize books of a libelous nature and to arrest the suspected author. E. FISHER, *SEARCH AND SEIZURE* 2-3 (1970). These general warrants, or "writs of assistance," were used to sanction the invasion of the colonists' privacy. R. DAVIS, *FEDERAL SEARCHES AND SEIZURES* 4 (1964). These writs of assistance were one of the main grievances which led to the American Revolution. E. FISHER, *supra*, at 1 (citing *Boyd v. United States*, 116 U.S. 616, 625 (1886)).

At times, the rights of the individual come into conflict with the efforts of law enforcement. See M. ZARR, *THE BILL OF RIGHTS AND THE POLICE* 1 (1980). This is reflected in the Bill of Rights, which "struck a balance which protected fundamental incidents of liberty, while at the same time protecting public law and order and the citizen's security." *Id.* at 2; see also Note, *Addressing the Pretext Problem: The Role of Subjective Police Motivation in Establishing Fourth Amendment Violations*, 63 B.U.L. Rev. 223, 226-27 (1983) (balances fourth amendment warrant requirements with needs of police and individual). "[T]here can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails." *Camara v. Municipal Court*, 387 U.S. 523, 536-37 (1967).

In *United States v. Brinegar*, 338 U.S. 160 (1949), the Supreme Court stated that "[t]he rule of probable cause is a practical, nontechnical conception. . . . Requiring anymore would unduly hamper law enforcement." *Id.* at 176. "To allow less would be to leave law-abiding citizens at the mercy of the officer's whim or caprice." *Id.*

with this requirement, the usual remedy is to suppress, under the exclusionary rule, all the evidence obtained as a result of that search and seizure.³ In the interests of safety and effective law en-

To determine probable cause, the Court avoided adopting a balancing test that would be so complicated it could not be applied consistently. See 1 W. LAFAVE, *supra*, § 3.2(a), at 558. This was recognized by the Court in *Dunaway v. New York*, 442 U.S. 200 (1979), where the Court refused to implement a proposed multifactor "balancing test." *Id.* at 211-12. The Court feared that such a test would nullify the fourth amendment's protection. See *id.* at 213.

The fourth amendment employs a reasonableness standard since "many situations which confront officers in the course of executing their duties are more or less ambiguous, [and] room must be allowed for some mistakes on their part." *Brinegar*, 338 U.S. at 176. "But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability." *Id.* The Supreme Court has applied the same probable cause standard to both arrests and searches. 1 W. LAFAVE, *supra*, § 3.1(b), at 544. However, this does not mean the particular grounds justifying a search will justify an arrest, or vice versa, as "[e]ach requires a showing of probabilities as to somewhat different facts and circumstances." *Id.*

The Supreme Court has made it clear that searches pursuant to a warrant are to be preferred over warrantless searches. See *United States v. Ventresca*, 380 U.S. 102, 106 (1965). Thus, whether probable cause exists is usually determined by a magistrate. See Hancock, *State Court Activism and Searches Incident to Arrest*, 68 VA. L. REV. 1085, 1093 (1982). The Court in *Ventresca* stated that warrantless searches condemned by the Court often would have been held valid had the officers obtained a warrant from a magistrate, even if based upon the same evidence. See *Ventresca*, 380 U.S. at 106. Warrants may be obtained by officers electronically, via telephone or radio, to limit the need for an arrest without a warrant. See Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1492 & n.111 (1985).

³ See 1 W. LAFAVE, *supra* note 2, § 1.1(b), at 5. Unlike the fifth amendment, the fourth amendment does not provide for sanctions against unlawful government actions. *Id.* As a result, the exclusionary rule was designed to deter searches and seizures in violation of the fourth amendment. *Id.* § 1.1(f), at 16. The Supreme Court has stated that "[t]his Court has . . . required . . . a strict adherence to that . . . constitutionally required . . . deterrent safeguard without . . . which the fourth amendment would have been reduced to 'a form of words.'" *Mapp v. Ohio*, 367 U.S. 643, 648 (1961) (quoting *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920)). The courts use the rule to suppress evidence obtained in violation of the fourth amendment. See, e.g., *Mapp*, 367 U.S. at 655 (evidence obtained in violation of fourth amendment inadmissible in state courts); *Byars v. United States*, 273 U.S. 28, 33 (1927) (upheld suppression of evidence illegally obtained under state warrant applying federal standards); *Weeks v. United States*, 232 U.S. 383, 398 (1914) (prevented use of evidence seized by federal agents in violation of fourth amendment); *Boyd v. United States*, 116 U.S. 616, 633-35 (1886) (utilizing fourth and fifth amendments to suppress illegally obtained evidence).

The exclusionary rule has been one of the most controversial areas of constitutional law. See 1 W. LAFAVE, *supra* note 2, § 1.2 (outlining attacks made on exclusionary rule); see also B. WILSON, *ENFORCING THE FOURTH AMENDMENT: A JURISPRUDENTIAL HISTORY* 45 (1986). ("There is nothing in the wording of the Fourth Amendment that explicitly commands, or from which one can logically infer, that . . . evidence obtained in the course of [an] unlawful act shall not be admitted in a criminal [process]"). But see Schrock & Welsh, *Up From Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251, 366 (1974) (exclusionary rule is constitutionally protected individual right).

forcement, the Supreme Court has fashioned a number of exceptions to the warrant requirement.⁴ One exception, a search incident to arrest,⁵ permits law enforcement agents to conduct a warrantless search of an arrestee to seize weapons and prevent the destruction of evidence.⁶ The Supreme Court has emphasized, however, that law enforcement officials should not abuse this exception through pretextual arrests.⁷ A pretextual arrest occurs when a law enforcement agent initiates a valid arrest in order to search for evidence of an unrelated crime for which probable cause is lacking.⁸ Recently, in *United States v. Trigg*,⁹ the Seventh Circuit held that a search incident to an arrest was valid as long as the law enforce-

⁴ See, e.g., *Hudson v. Palmer*, 468 U.S. 517, 525-26 (1984) (fourth amendment not applicable when prisoner has no expectation of privacy in his cell); *Oliver v. United States*, 466 U.S. 170, 177 (1984) (open field search not unreasonable under fourth amendment); *Michigan v. Tyler*, 436 U.S. 499, 509-10 (1978) (warrantless fire investigation reasonable under fourth amendment); *United States v. Ramsey*, 431 U.S. 606, 616-19 (1977) (border searches permissible without probable cause); *Warden v. Hayden*, 387 U.S. 294, 298 (1967) (warrantless search and seizure of felon in hot pursuit permissible); *Cooper v. California*, 386 U.S. 58, 59 (1967) (warrantless search of automobile permissible on facts which would not justify search of home).

⁵ See, e.g., *New York v. Belton*, 453 U.S. 454, 460 (1981) (police may search containers found within defendant's control when conducting valid search incident to arrest); *United States v. Robinson*, 414 U.S. 218, 235 (1973). "A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification." *Id.*; see also *Harris v. United States*, 331 U.S. 145, 149-51 (1947) (evidence seized by FBI agents after five hour search of defendant's entire apartment held valid as search incident to arrest).

⁶ See *Chimel v. California*, 395 U.S. 752, 762-63 (1969) (where lawful arrest is made, "it is reasonable for the arresting officer to search the person arrested . . . to remove any weapons . . . and seize any evidence on the arrestee's person in order to prevent its concealment or destruction"); *Agnello v. United States*, 269 U.S. 20, 30 (1925) (right to search persons incident to a lawful arrest in order to seize evidence related to crime undoubted). However, in *United States v. Robinson*, 414 U.S. 218 (1973), while recognizing that the search incident to arrest exception was based upon the need to protect officers and secure evidence, the Court stated that the exception was a reasonable fourth amendment intrusion which required no additional justification. *Id.* at 235.

⁷ See *United States v. Lefkowitz*, 285 U.S. 452, 467 (1932) ("an arrest may not be used as a pretext to search for evidence"); Comment, *Pretext Searches and The Fourth Amendment: Unconstitutional Abuses of Power*, 137 U. PA. L. REV. 1791, 1803 (1989) (arguing that all pretextual arrests violate fourth amendment).

⁸ *Warren v. City of Lincoln*, 816 F.2d 1254, 1257 (8th Cir. 1987) ("[a]n arrest ostensibly for one purpose but in reality for the primary purpose of furthering an ulterior goal is unreasonable under the fourth . . . amendment[.]"), *cert. denied*, 109 S. Ct. 2431 (1989); *Taglavore v. United States*, 291 F.2d 262, 265 (9th Cir. 1961) ("the search must be incident to the arrest and not vice versa") (emphasis in original). See generally, *Burkoff, Bad Faith Searches*, 57 N.Y.U. L. REV. 70, 100-19 (1982) (discussing different approaches to determining bad faith searches).

⁹ 878 F.2d 1037 (7th Cir. 1989).

ment agent had probable cause for the initial arrest and was legally authorized to make a custodial arrest, irrespective of the agent's pretextual motives.¹⁰

On February 1, 1988, Officers Philip Bird and Dan Edenfield of the Allen County (Indiana) Police Department arrested defendant William Trigg on an outstanding body attachment.¹¹ Officer Bird ran a computer check which revealed that Trigg was driving an automobile with a suspended license.¹² Trigg was not informed of the driving infraction and his license was returned.¹³ On March 16, 1988, while investigating the town's known "crack houses," Officer Bird drove by Trigg's house and observed Trigg's vehicle in the driveway.¹⁴ Due to the vehicle's "dubious history" (Bird remembered having seen this vehicle parked in front of a known "crack house"), Officer Bird placed it under surveillance.¹⁵ When Trigg entered his vehicle and drove away, the police followed him.¹⁶ Officer Bird ran a second computer check, which revealed that Trigg's license was still suspended.¹⁷ Officer Bird relayed this information to Officer Royse, and Trigg was arrested for driving with a suspended license.¹⁸ Trigg was subjected to a pat-down search where it was discovered that he was carrying fifty-three grams of cocaine.¹⁹ The district court granted Trigg's motion to suppress the cocaine, concluding that the traffic arrest was a pretext to search for narcotics.²⁰ The government appealed, and the United States Court of Appeals for the Seventh Circuit reversed.²¹

¹⁰ *Id.* at 1041.

¹¹ *Id.* at 1038. The body attachment was issued because Trigg had failed to appear for several court dates. *Id.* at 1038 n.1.

¹² *Id.* at 1038. Officer Bird ran the computer check after Trigg was placed in lockup. *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* Officer Bird requested, and was granted permission, to begin the surveillance. *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* Officer Royse was asked to assist in stopping Trigg because Officer Bird, a narcotics officer, normally would not make traffic arrests. *Id.* at 1038 n.2. Officer Royse claimed he arrested Trigg because he was familiar with his history, and also because Trigg had attempted to flee. *Id.* at 1038 n.3. The district court expressly rejected this second assertion. *Id.*

¹⁹ *Id.* at 1038. Trigg was indicted on one count of possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1) (1982). *Id.*

²⁰ *Id.* The district court relied on the fact that numerous narcotics officers participated in the routine traffic arrest and that Officer Royse could have issued Trigg a traffic citation, but declined to do so. *Id.* at 1038 & n.4.

²¹ *Id.* at 1038.

Writing for the Seventh Circuit, Judge Flaum noted that the Supreme Court had not defined the term "pretextual arrest."²² The court, however, interpreted three recent Supreme Court cases as dictating that an objective assessment of a police officer's actions was required when considering alleged fourth amendment violations.²³ The court concluded that the validity of a search incident to arrest depended upon the existence of probable cause for the initial arrest and authorization to effect a custodial arrest.²⁴ The court, finding that the facts of this case satisfied these requirements, held that the arrest and subsequent search in question were reasonable under the fourth amendment.²⁵

In a concurring opinion, Judge Ripple asserted that the test adopted by the majority was overly broad.²⁶ Although agreeing with the majority that recent Supreme Court decisions mandated an objective analysis of police conduct, Judge Ripple argued that the Supreme Court had not adopted the same "rigid position" asserted by the majority.²⁷ He posited that, at times, police conduct could rise to the level of gross abuse of authority in violation of the fourth amendment.²⁸ Judge Ripple, however, determined that no such abuse existed in this case, since Trigg was properly arrested because of his suspended license.²⁹

By adopting an objective test, the Seventh Circuit maintained that an allegedly pretextual arrest was reasonable under the fourth amendment, due to the existence of probable cause for the initial arrest.³⁰ This Comment will suggest that the Seventh Circuit's adoption of an objective test was premised upon an erroneous analysis of the pertinent Supreme Court decisions. Further, this Comment will assert that Supreme Court precedent supports the utilization of subjective factors to determine whether a fourth amendment violation has occurred. Finally, this Comment will pro-

²² *Id.* at 1039 ("Supreme Court's response to the problem of pretextual arrests has been ambiguous").

²³ *Id.* at 1040. The *Trigg* court relied primarily on *Maryland v. Macon*, 472 U.S. 463, 470-71 (1985), *United States v. Villamonte-Marquez*, 462 U.S. 579, 584 (1983), and *Scott v. United States*, 436 U.S. 128, 131 (1978). See *Trigg*, 878 F.2d at 1040.

²⁴ *Trigg*, 878 F.2d at 1041.

²⁵ *Id.*

²⁶ *Id.* at 1042 (Ripple, J., concurring).

²⁷ *Id.* at 1042-43 (Ripple, J., concurring).

²⁸ *Id.* at 1043 (Ripple, J., concurring).

²⁹ *Id.* (Ripple, J., concurring).

³⁰ *Id.* at 1040-41.

pose a more effective test to evaluate the reasonableness of a pretextual arrest under the fourth amendment, combining both objective and subjective standards.

I. THE *Trigg* APPROACH: A PURELY OBJECTIVE ANALYSIS

The *Trigg* court began its analysis by acknowledging the problem of pretextual arrests.³¹ The court determined that the pretext problem stemmed from three factors: (1) the Supreme Court's recognition of the search incident to arrest exception; (2) the extension of the search incident to arrest exception to all custodial arrests; and (3) the admissibility of all evidence discovered during a lawful search.³² These factors allow police officers to use lawful arrests as a pretext for the investigation of unrelated crimes.³³ While the *Trigg* court had an opportunity to curb pretextual arrests, the court failed to focus on the pretext issue; instead, it limited its inquiry to whether a pretextual arrest was reasonable under the fourth amendment.³⁴ Under the court's analysis, an arrest is reasonable when the arresting officer has both probable cause for the underlying arrest and the authority to make a custodial arrest.³⁵ As a result, the issue in *Trigg* was not the validity of a search incident to arrest, but whether the initial arrest was a pretext which would render the initial arrest and subsequent search unlawful.³⁶ The *Trigg* standard, as Judge Ripple acknowledged, does not adequately address the pretext problem.³⁷ Under the *Trigg* standard,

³¹ *Id.* at 1038-39. Judge Flaum stated that "[t]he subject of pretextual arrests presents some of the most intriguing historical, conceptual and practical issues in the often problematic area of fourth amendment jurisprudence." *Id.*

³² *Id.* at 1039.

³³ *See id.*

³⁴ *See id.* at 1041.

³⁵ *See id.* As Judge Flaum noted, "[t]his proposition may be stated another way: so long as the police are doing no more than they are legally permitted and objectively authorized to do, an arrest is constitutional." *Id.*

³⁶ *See id.* at 1037-38.

³⁷ *See id.* at 1042 (Ripple, J., concurring). Judge Ripple stated that "the test formulated today requires a rigidity that will, in future cases, ill serve what Chief Justice Rehnquist has termed 'the overarching principle of 'reasonableness' embodied in the fourth amendment.'" *Id.* In expounding on the Seventh Circuit's stance on pretextual arrests, Judge Will, in *United States v. Kordosky*, 878 F.2d 991 (7th Cir. 1989), *cert. granted and judgment vacated*, 110 S.Ct. 1943 (1990), stated that "the [Seventh] Circuit, rightly or wrongly, has determined that any basis for a valid arrest justifies a search regardless of motive or how pretextual the arrest is." *Id.* at 955 (Will, J., concurring). Judge Will also noted that the Seventh Circuit's "objective" test is "clearly inconsistent" with *United States v. Lefkowitz*, 285 U.S. 452, 467 (1932). *Kordosky*, 878 F.2d at 955 (Will, J., concurring).

police officers will easily be able to circumvent the pretextual arrest restriction. For example, to search an individual suspected of narcotics activity where probable cause is lacking, an officer could place the individual's vehicle under surveillance.³⁸ If a traffic violation occurs during the surveillance, the police officer could then arrest the individual and search for evidence of an unrelated crime.³⁹ Such an arrest is pretextual, and yet valid, since the police officer had probable cause for the underlying traffic violation and authority to make a custodial arrest. In effect, the Seventh Circuit, by adopting an objective approach, has validated pretextual

Further, he concluded that if the case was one of first impression, he would hold the arrest and subsequent search invalid, but the Seventh Circuit's adoption of this standard mandated his concurrence. *Id.* (Will, J., concurring)

³⁸ See *United States v. Smith*, 799 F.2d 704, 711 (11th Cir. 1986). The *Smith* court stated that if they abandoned their reasonable officer test, and adopted a narrow *Trigg*-type objective test, "police officers could easily make the random, arbitrary stops denounced in *Terry*." *Id.* "With little more than an inarticulate 'hunch' of illegal activity an officer could begin following a vehicle and then stop it for the slightest deviation from a completely steady course." *Id.* Most scenarios dealing with pretextual arrests involve minor traffic violations as the initial offense. See 2 W. LAFAVE, *supra* note 2, § 5.2(e), at 457. Since very few drivers can manage to avoid some traffic violation when driving for any appreciable distance, "[i]t is apparent that virtually everyone who ventures out onto the public streets and highways may then, with little effort by the police, be placed in a position where he is subject to a full search." *Id.* at 458.

³⁹ See *Smith*, 799 F.2d at 711. "[I]t is clear that this subterfuge is employed as a means for searching for evidence on the persons of suspects who could not be lawfully arrested for the crimes of which they are suspected." See 2 W. LAFAVE, *supra* note 2, § 5.2(e), at 458. Professor LaFave described the potential for pretextual abuse as "frightening," leading him to conclude that the Supreme Court must formulate a rule to govern police practice to protect against pretextual arrests. *Id.* This sentiment is also shared by Professor John Burkoff. See Burkoff, *The Pretext Search Doctrine Returns After Never Leaving*, 66 U. DET. L. REV. 363, 389-91 (1989). According to Professor Burkoff, the purely objective test "is a very dangerous position to take." *Id.* at 389. If such "[a] narrow view of pretext were to prevail, anyone who has an outstanding parking or traffic 'warrant' could be arrested at any time because the police wanted to investigate any other offense." *Id.* (emphasis in original). "It should not be difficult to convince the Supreme Court to take judicial notice of the fact that even ordinarily law-abiding citizens occasionally receive [traffic] tickets." *Id.* at 390 n.123 (citing *Rehnquist Is Given Ticket for Speeding*, N.Y. Times, Sept. 13, 1986, at 10, col. 1). As a result of this approach "[t]he fourth amendment's requirement of probable cause would, in essence, be nullified." See Burkoff, *supra*, at 389.

A similar opinion was expressed by the Tenth Circuit in *United States v. Guzman*, 864 F.2d 1512, 1516 (10th Cir. 1988). The *Guzman* court noted:

an objective test that asks no more than whether some set of facts might justify a given stop would permit arbitrary intrusions in situations such as traffic stops. Under such a test, thousands of everyday citizens who violate minor traffic regulations would be subject to unfettered police discretion as to whom to stop.

Id.

arrests.⁴⁰

II. SUBJECTIVE INTENT APPROACH

A subjective pretext analysis seeks to determine the motivation of the arresting law enforcement officer.⁴¹ When the arresting officer's primary purpose is to uncover evidence of an unrelated crime for which probable cause is lacking, the arrest is invalid.⁴² The *Trigg* court itself conceded that a subjective analysis is the most effective method of determining whether an arrest is pretextual.⁴³ Nevertheless, the court opined that the Supreme Court had mandated that only objective factors be considered when addressing fourth amendment issues.⁴⁴ However, the *Trigg* court itself ad-

⁴⁰ See *supra* note 39 & accompanying text; see also *Kordosky*, 878 F.2d at 995 (Will, J., concurring) ("this circuit, rightly or wrongly, has determined that any basis for a valid arrest justifies a search regardless of . . . how pretextual the arrest is").

⁴¹ See *Warren v. City of Lincoln*, 816 F.2d 1254, 1258 (8th Cir. 1987), *cert. denied*, 109 S. Ct. 2431 (1989); *United States v. Smith*, 802 F.2d 1119, 1124 (9th Cir. 1986).

⁴² See *Warren*, 816 F.2d at 1257; *State v. Blair*, 691 S.W.2d 259, 262-63 (Mo. 1985) (en banc), *cert. dismissed*, 480 U.S. 698 (1987).

⁴³ See *Trigg*, 878 F.2d at 1040. The *Trigg* court stated that "the adoption of an objective standard substantially diminishes the chances of discovering pretextual arrests." *Id.* Many courts continue to apply a subjective standard. See *Warren*, 816 F.2d at 1257 ("[w]here the use of misdemeanor arrest warrants as a pretext for searching people suspected of felonies to be permitted, a mockery could be made of the Fourth Amendment and its guarantees." (quoting *Taglavore v. United States*, 291 F.2d 262, 266 (9th Cir. 1961)); *Smith*, 802 F.2d at 1124 (whether arrest is pretextual turns on motivation of arresting officer).

Many state courts also continue to make an inquiry into the law enforcement agent's motivation for the arrest. See *Folly v. State*, 28 Ark. App. 98, 103, 771 S.W.2d 306, 309 (1989) (en banc) ("where the search and not the arrest is the officer's true objective, the search is not a reasonable one"); *People v. Sawczenko*, 180 Ill. App. 3d 406, 409-10, 535 N.E.2d 1105, 1108 (1st Dist.); *appeal denied*, 126 Ill. 2d. 565, 541 N.E. 2d 1113 (1989); *Blair*, 691 S.W.2d at 264; *Black v. State*, 739 S.W.2d 240, 244-45 (Tex. Crim. App. 1987) (en banc). In *Blair*, when the state asked the court not to inquire into the motives of the arresting officers due to recent Supreme Court decisions, the court replied "if the recent pronouncements of the United States Supreme Court have any applicability to the instant appeal, it is in their acknowledgment that courts can and will consider the question of good faith, or lack thereof, on the part of the police." *Blair*, 691 S.W.2d at 264.

⁴⁴ *Trigg*, 878 F.2d at 1040. The *Trigg* court cited three Supreme Court cases in determining that an objective analysis of the pretextual problem was required. See *id.* First, in *Maryland v. Macon*, 472 U.S. 463 (1985), the Supreme Court stated that the purchase of obscene magazines by an undercover police officer was not a seizure, but a *bona fide* purchase, and that "[t]he sale is not retrospectively transformed into a warrantless seizure by virtue of the officer's subjective intent to retrieve the purchase money to use as evidence." *Id.* at 471.

The second case, *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983), involved a patrol by customs officers, accompanied by Louisiana State Policemen. *Id.* at 582. The officers boarded the defendant's vessel to conduct a document check. *Id.* at 583. While on board, one of the officers smelled what he thought was burning marijuana. *Id.* He then ob-

mitted, the case law it relied on in its opinion are not directly on point.⁴⁵ Moreover, in *Colorado v. Bertine*,⁴⁶ a 1987 Supreme Court decision, the Court applied a subjective test when confronted with an alleged fourth amendment violation.⁴⁷ Specifically, the Court examined the motivation of a police officer who had conducted a search of several sealed containers.⁴⁸ The Court held that the search was reasonable because there had been no showing that the police officer had "acted in bad faith or for the sole purpose of investigation."⁴⁹ If the police officer's actions were in bad faith, the defendant's fourth amendment rights would have been violated

served burlap sacks in plain view which proved to contain marijuana. *Id.* The Supreme Court upheld the defendant's conviction, because "[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, is substantial; the type of intrusion made in this case, while not minimal, is limited." *Id.* at 593.

And in the third case, *United States v. Scott*, 436 U.S. 128 (1978), defendants moved to suppress telephone conversations intercepted by government agents. *Id.* at 132. The district court suppressed the calls, reasoning that the indiscriminate behavior of the agents was unreasonable. *Id.* at 131. Upholding the circuit court's reversal, the Supreme Court stated that "almost without exception in evaluating alleged violations of the Fourth Amendment the Court has first undertaken an objective assessment of an officer's actions in light of the facts and circumstances then known to him." *Id.* at 137.

Of these three cases, *Villamonte-Marquez* dealt with the pretext question most directly. See *Villamonte-Marquez*, 462 U.S. at 584 n.3. The Court, quoting *United States v. Arra*, 630 F.2d 836, 846 (1st Cir. 1980), affirmed that "[w]e would see little logic in sanctioning such examinations of ordinary, unsuspect vessels but forbidding them in the case of suspected smugglers." *Villamonte-Marquez*, 462 U.S. at 584 n.3. Consistent with *Villamonte-Marquez*, *Arra* involved a document check of a vessel by federal agents who are statutorily authorized to board any vessel at any time, even without the suspicion of any wrongdoing. *Arra*, 630 F.2d at 839. The Supreme Court, however, made an important distinction between stops of vessels at sea, and cars on highways: "It seems clear that if the customs officers in this case had stopped an automobile on a public highway near the border, rather than a vessel in a ship channel, the stop would have run afoul of the Fourth Amendment because of the absence of articulable suspicion." *Villamonte-Marquez*, 462 U.S. at 588. It is asserted that the *Trigg* court erred in its application of this case to its own facts, since the police had no articulable suspicion to stop *Trigg* for narcotics possession. See *Trigg*, 878 F.2d at 1038.

⁴⁵ *Trigg*, 878 F.2d at 1039; 2 W. LAFAVE, *supra* note 2, § 5.2(e), at 458. "[T]he Supreme Court has never directly confronted the issue of pretextual arrests." *Trigg*, 878 F.2d at 1039; see also *United States v. Hawkins*, 811 F.2d 210, 213 (3d Cir.) ("[w]e have found no direct Supreme Court authority on this issue"), *cert. denied*, 484 U.S. 833 (1987).

⁴⁶ 479 U.S. 367 (1987).

⁴⁷ *Id.* at 372.

⁴⁸ *Id.* at 373. The Court also utilized a subjective test in *Maryland v. Garrison*, 480 U.S. 79, 85 (1987). The *Garrison* Court held that the search would have been invalid "if the officers had known [that the warrant was overbroad]." *Id.* (emphasis added).

⁴⁹ *Bertine*, 479 U.S. at 372.

and the search found invalid.⁵⁰ It is submitted that this same subjective standard should be applied when determining if an arrest was in fact pretextual.

III. REASONABLE OFFICER TEST

Most courts that have rejected a subjective intent approach have implemented a "reasonable officer" test.⁵¹ Under the reasonable officer test, the court makes an objective assessment of the officer's conduct in light of the facts and circumstances confronting him at the time of the arrest.⁵² An arrest, according to this test, would not be invalid because the arresting officer was motivated by the hope of finding evidence of an unrelated offense; rather, it would be invalid if a reasonable officer would not have made the arrest without the additional motive.⁵³ In other words, in determining whether an arrest is pretextual, the proper inquiry is not whether the arresting officer *could* validly have made the investigatory stop, but whether a reasonable officer *would* have made the

⁵⁰ See *id.*

⁵¹ Compare *United States v. Guzman*, 864 F.2d 1512, 1515 (10th Cir. 1988) (expressly adopted *Smith* reasonable officer test); *United States v. Wilson*, 853 F.2d 869, 871 (11th Cir. 1988) (to determine if stop is pretext, ask whether reasonable officer would have made stop in absence of ulterior motivation) (following *United States v. Smith*, 799 F.2d 704, 708 (11th Cir. 1986)), *cert. denied*, 109 S. Ct. 866 (1989); and *United States v. Hawkins*, 811 F.2d 210, 215 (3d Cir.) (stop was objectively reasonable), *cert. denied*, 484 U.S. 833 (1987) with *United States v. Nersesian*, 824 F.2d 1294, 1316 (2d Cir.) (valid search not rendered invalid by fact police resorted to pretext to continue search and detention), *cert. denied*, 484 U.S. 957 (1987).

The Fifth Circuit, in *United States v. Judge*, 864 F.2d 1144 (5th Cir. 1989), *cert denied*, 110 S.Ct. 1946 (1990), stated that a reasonable objective test should be applied to both inventory searches and pretext arrests. *Id.* at 1146 & n.3. The *Judge* court, examining the reasonableness of a container search, followed *Bertine*: "[s]pecifically, we must ask whether the agents' actions, when viewed from an objective standpoint, can reasonably be said to have an administrative or safety motivation, as opposed to an evidentiary one." *Id.* at 1146. The court stated that this test was analogous to the analysis used to determine if an arrest was pretextual. *Id.* at 1146 n.3. Ultimately, the court held that "if an objective observer would conclude that the only legitimate purpose for opening a container found in a vehicle could have been to find evidence, the opening of the container was an illegal search." *Id.* at 1146 (emphasis added).

Most state courts also apply a reasonable officer test. See, e.g., *Kehoe v. State*, 521 So. 2d 1094, 1096 (Fla. 1988) (followed *Smith* reasonable officer test); *People v. Howard*, 162 Cal. App. 3d 8, 14, 208 Cal. Rptr. 353, 357 (1984) ("reasonableness of the search becomes critical") (emphasis in original). But see *supra* note 43 (examples of states that apply subjective standard).

⁵² See *Hawkins*, 811 F.2d at 214; *Smith*, 799 F.2d at 709.

⁵³ See *Guzman*, 864 F.2d at 1518; *Smith*, 799 F.2d at 710.

stop under the same conditions without the improper motive.⁵⁴

IV. DUAL SUBJECTIVE-OBJECTIVE TEST

The precedent for a dual subjective-objective test emanated from the Supreme Court's holding in *Colorado v. Bertine*.⁵⁵ In *Bertine*, the Court analyzed the actions of a Colorado police officer both objectively *and* subjectively.⁵⁶ It is asserted that a similar test, combining both the subjective intent approach and the reasonable officer test applied to pretextual arrests, would be the most effective standard in evaluating pretextual arrests.

In determining if an arrest was pretextual, it is essential to ascertain the police officer's motivation for the arrest. As a practical matter, however, such a determination is almost impossible.⁵⁷ Few police officers can be expected to testify that their motives were improper, especially since such testimony would result in the suppression of evidence.⁵⁸ This problem, however, could be averted by utilizing the reasonable officer test in concert with a subjective test, since the reasonable officer test is not concerned with an officer's motivation for acting unreasonably, only that he did act unreasonably.⁵⁹ A court, however, should not rely solely on the reasonable officer test either since this test may incorrectly validate a pretextual arrest when the facts justify the arrest,⁶⁰ despite the

⁵⁴ See *Smith*, 799 F.2d at 711.

⁵⁵ 479 U.S. 367, 372 (1987).

⁵⁶ See *id.* The Court also appears to have adopted a subjective-objective test in *Maryland v. Garrison*, 480 U.S. 79, 85 (1987) (search would be invalid "if the officers *had known*, or even if they should have known [that the warrant was overbroad]") (emphasis added).

⁵⁷ See *Guzman*, 864 F.2d at 1516. The *Guzman* court stated that an inquiry into an officer's motivation would be unproductive. See *id.*; see also Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 436-37 (1974) (subjective inquiry into police officer's motivation in making arrest would fail since proper motivation "can be fabricated all too easily and undetectably").

⁵⁸ See Burkoff, *supra* note 39, at 377 ("[o]nly the use of a subjective pretext test serves to deter those police officers who have no intention of following the law, but are nonetheless 'savvy' enough to make their conduct appear (objectively) as if it is lawful") (emphasis in original); Amsterdam, *supra* note 57, at 437. "Motivation is . . . a self-generating phenomenon; if a purpose to search for heroin can legally be accomplished only when accompanied by a purpose to search for a weapon, knowledgeable officers will seldom experience the first desire without a simultaneous onrush of the second." *Id.*

⁵⁹ See *Guzman*, 864 F.2d at 1517.

⁶⁰ See *United States v. Hawkins*, 811 F.2d 210, 215 (3d Cir.), *cert. denied*, 484 U.S. 833 (1987). "[D]espite the courts' general disapproval of police officers' resort to pretext, the outcome of suppression motions has generally depended on objective factors." *Id.*

fact that the initial arrest was admittedly a pretext.⁶¹ If the reasonable officer test complemented the subjective test, unfair uses of pretext would be avoided.⁶²

CONCLUSION

In *United States v. Trigg*, the Seventh Circuit determined that a search incident to arrest will always be valid where the initial arrest was based on probable cause and the arresting officer was authorized to make the subsequent custodial arrest. By choosing this objective standard over a subjective or reasonable officer standard, the court has essentially eliminated the possibility of proving that an arrest was pretextual. This Comment has suggested that a subjective analysis of the arresting officer's motivation, coupled with the reasonable officer test, would prevent unjust circumvention of the fourth amendment warrant requirement. It seems clear, on the other hand, that the standard adopted by the Seventh Circuit will not adequately protect an individual's fourth amendment rights.

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⁶¹ See *id.* ("We conclude that the fact that a pretext was given does not render invalid an otherwise constitutional search").

⁶² See *Warren v. City of Lincoln*, 816 F.2d 1254, 1258 (8th Cir. 1987), *cert. denied*, 109 S. Ct. 2431 (1989); *United States v. Smith*, 799 F.2d 704, 711 (11th Cir. 1986) (subjective test would declare arrests with ulterior purposes invalid).