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PLAIN VIEW REVISITED

Howard E. Wallin*

I. Introduction

The plain view exception, one of the more sophisticated doctrines in Fourth Amendment search and seizure jurisprudence, allows for warrantless seizures under limited circumstances.¹ In addition to various uncertainties left unresolved by the Supreme Court's initial decisions on the subject, several of the doctrine's elements proved, at times, difficult to apply practically, engendering confusing and inadequate results. Over the past several decades, much clarification has finally emerged. Nonetheless, judicial analysis and decisions remain all too frequently less than satisfactory. This piece is designed to supplement earlier efforts on the subject² by reviewing the current status of the plain view exception and examining critical, though questionable, decisions.

II. *Coolidge v. New Hampshire*

In the aftermath of *Coolidge v. New Hampshire*, the Supreme Court's seminal, though less than precise, opinion, most courts agreed that a plain view seizure is permissible when the following four conditions coalesce: (1) a prior justified intrusion; (2) the item is found in plain view; (3) it is "immediately apparent" that the find is in some fashion incriminating; and (4) the discovery is "inadvertent."³ This article will focus on these four

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

2. Howard E. Wallin, *The Uncertain Scope of the Plain View Doctrine*, 16 U. BALT. L. REV. 266 (1987).

3. See *Ruggiero v. Krzeminski*, 928 F.2d 558 (2d Cir. 1991); *United States v. Blakeney*, 942 F.2d 1001 (6th Cir. 1991); *United States v. Meyer*, 827 F.2d 943 (3d Cir. 1987); *United States v. Johnston*, 784 F.2d 416 (1st Cir. 1986); *United States v. Amuny*, 767 F.2d 1113 (5th Cir. 1985).

elements with the discussion beginning with element (3), then (4) and finally, a discussion of elements (1) and (2) together.

III. Immediately Apparent

During ensuing years, several of these requirements were either eliminated or defined more precisely. For example, in *Arizona v. Hicks*⁴ the somewhat ambiguous “immediately apparent” standard was finally authoritatively defined as nothing more than the familiar probable cause criterion.⁵ Judicial decisions interpreting that phrase as implying the need for some incremental element of certainty are, of course, no longer valid. In addition to clarifying the immediately apparent element, *Hicks*, as indicated herein, addresses several plain view issues that lower courts either had not considered or had resolved differently.

A. Supreme Court – *Arizona v. Hicks*

In *Hicks*, a police squad responded to a shooting where a person was struck by a bullet fired through the floor of an apartment above that of the victim.⁶ Upon entering the shooter’s apartment, police found and seized several weapons and a stocking-cap mask.⁷ One officer noticed two sets of expensive stereo components, which appeared out of place in the rather shabby apartment.⁸ Suspecting that they were stolen, the officer moved the components in order to read and copy the serial numbers.⁹ Upon reporting the numbers to his headquarters, he was told that several of the items were stolen.¹⁰ One piece of equipment, a *Bang and Olufsen* turntable, was taken immediately and the others were eventually seized pursuant to a valid warrant.¹¹

All of the lower courts and, eventually, the Supreme Court agreed that the warrantless entry was justified by exigent cir-

4. 480 U.S. 321 (1987).

5. *Id.* at 326-27.

6. *Id.* at 323.

7. *Id.*

8. *Id.*

9. *Hicks*, 480 U.S. at 323.

10. *Id.*

11. *Id.* at 323-24.

cumstances.¹² They disagreed, however, over whether the subsequent police actions were valid.¹³

Initially agreeing with the State, the Supreme Court unanimously ruled that a mere recording of the equipments' serial numbers would not implicate the Fourth Amendment because it was neither a search nor a seizure.¹⁴ The majority did find, however, that the moving of the *Bang and Olufsen* for the purpose of examining its serial number did constitute a search.¹⁵ Being a warrantless search, that movement would be valid only if it fell within some exception to the warrant requirement.¹⁶ The majority rejected the notion that the plain view doctrine condoned this warrantless movement because the State had not shown all of its four requisite elements; proof that the incriminating nature (the serial number) of the turntable immediately was apparent was lacking.¹⁷ "Immediately apparent," the Court explained, means only probable cause.¹⁸ Since the State had conceded that the police officer prior to his action did not have probable cause that the turntable was stolen, the plain view exception to the warrant requirement was unavailable.¹⁹ Nonetheless, the State argued that the investigating officer's "reasonable suspicion," albeit not probable cause, justified movement of the turntable under plain view.²⁰ The majority rejected that argument.²¹ It reasoned that movement of the turntable would be valid under plain view only if it could be seized under plain view.²² Seizure, in turn, would be permissible only with probable cause.²³ Given the State's concession that the officer had no probable cause, the majority concluded that the plain view exception was inapplicable.²⁴

12. *Id.* at 324.

13. *Id.*

14. *Hicks*, 480 U.S. at 324.

15. *Id.* at 324-25.

16. *Id.* at 326-27.

17. *Id.* at 328.

18. *Id.* at 326.

19. *Hicks*, 480 U.S. at 326.

20. *Id.*

21. *Id.* at 326-28.

22. *Id.* at 328.

23. *Id.*

24. *Hicks*, 480 U.S. at 327-28.

While the dissenters agreed that probable cause, synonymous with immediately apparent, is required under plain view,²⁵ it held that with reasonably, articulable suspicion, police have a right to make a cursory examination of such suspicious items as part of their investigation.²⁶ A host of federal and state court decisions permitting movement for a better view of suspect objects based solely on articulable suspicion are cited.²⁷ Presumably, under the majority's view those cases are no longer valid.

In a dissenting opinion, Justice O'Connor argued, "[e]ven if probable cause were the appropriate standard, . . . it was satisfied here."²⁸ She explained as follows:

When police officers, during the course of a search inquiring into grievously unlawful activity, discover the tools of a thief (a sawed-off rifle and a stocking mask) and observe in a small apartment *two* sets of stereo equipment that are both inordinately expensive in relation to their surroundings and known to be favored targets of larcenous activity, . . . probable cause has been satisfied.²⁹

What is puzzling about that dissenting opinion is the statement that "probable cause has been satisfied"³⁰ when, in fact, the officer had only reasonable suspicion and not probable cause, as the State had conceded.³¹ Apparently, in Justice O'Connor's view, the probable cause standard is not the investigating officer's subjective state of mind, but what a reasonable police officer would have concluded. If the court determines that objectively probable cause was present, the immediately apparent requirement has been met regardless of the State's concession otherwise. The majority clearly rejected that posi-

25. *Id.* at 333-36.

26. *Id.* at 326-27.

27. *See, e.g.*, *United States v. Marbury*, 732 F.2d 390, 399 (5th Cir. 1984); *United States v. Hillyard*, 677 F.2d 1336, 1342 (9th Cir. 1982); *United States v. Wright*, 667 F.2d 793, 796 (9th Cir. 1982); *United States v. Roberts*, 619 F.2d 379, 381 (5th Cir. 1980); *United States v. Ochs*, 595 F.2d 1247, 1257-58 n.8 (2d Cir. 1979); *People v. Dorris*, 442 N.E.2d 951 (Ill. App. Ct. 1982); *People v. Eddington*, 178 N.W.2d 686 (Mich. Ct. App. 1970), *rev'd on other grounds*, 198 N.W.2d 297 (Mich. 1972); *State v. Rieginger*, 374 N.W.2d 866 (N.D. 1985); *State v. Proctor*, 529 P.2d 472 (Wash. Ct. App. 1974); *State v. Noll*, 343 N.W.2d 391 (Wis. 1984).

28. *Hicks*, 480 U.S. at 339 (O'Connor, J., dissenting).

29. *Id.*

30. *Id.*

31. *Id.* at 326.

tion, for it stated that, in light of the State's concession, the Court was precluded from considering whether the probable cause standard had been satisfied.³²

B. *State Courts*

1. *State v. Eady*

Despite the majority, a fairly recent Connecticut case appears to endorse Justice O'Connor's position. In *State v. Eady*,³³ volunteer firefighters responded to a residential fire. After extinguishing the blaze, a team entered the house for ventilation purposes and to search for possible victims.³⁴ In the process, Fire Captain Angel L. Marrero, a member of the team, discovered a locked door.³⁵ He forced open the door leading to the owner's bedroom, but no victims were found.³⁶ Marrero opened a window to further ventilate the premises.³⁷ At that point, he observed two cigar boxes on a dresser, one of which was open. It contained a clear plastic bag with a small quantity of green leafy substance.³⁸ That information was conveyed to the fire chief in charge and then to a police officer, Sgt. Thomas Lepore, who was directing traffic.³⁹ Lepore entered and recognized the leafy substance as marijuana.⁴⁰ In addition to the marijuana, other illegal substances and miscellaneous incriminating evidence found in the cigar box were seized without a warrant.⁴¹ The homeowner, Patrick Eady, was eventually convicted of drug possession. He claimed that all of the incriminating evidence was illegally seized due to the lack of a warrant. The State's response was that the police action was justified under the plain view doctrine.⁴² While clearly the exigency justified an intrusion, defendant nonetheless argued that the "immediately apparent" or "probable cause" requirement had not been satis-

32. *Id.*

33. 733 A.2d 112 (Conn. 1999).

34. *Id.* at 115.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Eady*, 733 A.2d at 115.

39. *Id.*

40. *Id.*

41. *Id.* at 115.

42. *Id.* at 115-16.

fied because Marrero testified at the suppression hearing that he was uncertain whether the leafy substance was marijuana.⁴³ The majority found that despite his personal uncertainty, most reasonable persons in Marrero's position would have believed that it was, in fact, marijuana.⁴⁴ On that basis, in the court's

43. *Eady*, 733 A.2d at 119 n.10.

44. In this issue of first impression in Connecticut, its highest appellate court held in *Eady* that there is no Fourth Amendment violation when an initial exigent entry by firefighters who observe contraband in plain view is followed by a subsequent entry and seizure of the contraband by police. In so holding, it relied on the majority of courts that have permitted police to step into the shoes of firefighters to seize contraband without first obtaining a warrant. *Id.* at 121; see, e.g., *People v. Reynolds*, 672 P.2d 529, 531 (Colo. 1983); *State v. Johnson*, 413 A.2d 931, 934 (Me. 1980); *Smith v. State*, 419 So.2d 563, 568-74 (Miss. 1982); *State v. Jolley*, 321 S.E.2d 883, 886-87 (N.C. 1984); *La Fournier v. State*, 280 N.W.2d 746 (Wis. 1979); *State v. Anderson*, 599 P.2d 1225, 1229 (Or. Ct. App. 1979); *State v. Eacret*, 595 P.2d 490 (Or. Ct. App. 1979). For example, in *United States v. Green*, 474 F.2d 1385 (5th Cir. 1973), the court held that:

[o]nce the privacy of a dwelling has been lawfully invaded, to require a second officer from another law enforcement agency arriving on the scene of a valid seizure to secure a warrant before he enters the premise to confirm that the seized evidence is contraband and to take custody of it is just as senseless as requiring an officer to interrupt a lawful search to stop and procure a warrant for evidence he has already inadvertently found and seized.

Id. at 1390.

The *Eady* court applied the rule it had adopted earlier in *State v. Magnano*, which involved an initial entry by a patrol officer, observation of contraband in plain view and a subsequent entry by a detective. *State v. Magnano*, 528 A.2d 760 (Conn. 1987). There the *Magnano* court held that

when a law enforcement officer enters private premises in response to a call for help, and during the course of responding to the emergency observes but does not take into custody evidence in plain view, a subsequent entry shortly thereafter, by detectives whose duty it is to process evidence, constitutes a mere continuation of the original entry.

Id. at 764.

In reaching the decision that subsequent entry is a continuation of the original entry, the court in *Magnano* concluded that the continuation doctrine is perfectly consistent with the rationale and purpose of the plain view doctrine. In addition, *Magnano* observed that the defendant has little to complain about concerning the entry by the subsequent officers because under *Illinois v. Andreas*, the Supreme Court of the United States stated that "the plain view doctrine is grounded on the proposition that once police are lawfully in a position to observe an item first-hand, its owner's privacy interest in that item is lost; the owner may retain the incidents of title and possession but not the privacy." *Illinois v. Andreas*, 463 U.S. 765, 772 (1983); see also *Magnano*, 528 A.2d at 66.

The *Eady* court held that, "[f]or purposes of plain view doctrine analysis . . . there is no meaningful distinction between the two scenarios" even though in *Eady* the initial entry was that of a firefighter, whereas *Magnano*, the decision on which

view, the immediately apparent element was satisfied.⁴⁵

The dissent, found that the “immediately apparent” element of the plain view exception simply was not existent here.⁴⁶ For plain view to apply, police must have subjective probable cause that what they are viewing and taking is incriminating.⁴⁷ Since Marrero himself did not have probable cause that the leafy substance was marijuana he had absolutely no authority to seize it.⁴⁸ The dissent characterized the majority analysis as this: “[a]ccording to the majority, in other words, the fact that an officer does not believe that he has probable cause (and, therefore, believes that he is violating the Constitution) will not invalidate a seizure if the reviewing court determines that a hypothetical “reasonable officer” would have had probable cause.”⁴⁹

That approach, the dissent explained, is contrary to the *Hicks* majority, which held that “immediately apparent” or “probable cause” could be satisfied only if Marrero had subjectively believed, which he did not, that the leafy substance was marijuana and that belief was a reasonable one.⁵⁰ In effect, the dissent argued, the *Eady* majority was following O’Connor’s position, rejected in *Hicks*.⁵¹

the *Eady* court relied, involved two successive entries by law enforcement agents. *Eady*, 733 A.2d at 120. In *Eady*, the police entry eliminated the defendant’s expectation of privacy in the same way that the defendant’s privacy was frustrated by the lawful invasion of a firefighter in *Magnano*. Given a lawful entry, a firefighter, like a police officer, may seize incriminating evidence in plain view. *Eady* concludes, therefore, that so long as the original entry was that of a governmental agent, law enforcement authorities may properly follow it. *Id.* at 123.

Eady bolsters its decision with the common sense argument that there can be no useful or beneficial purpose served by excluding plain view evidence seized by a police officer who has stepped into the shoes of a firefighter because suppression would not encourage police to obtain warrants. *Id.* at 121. On the contrary, it could have an opposite effect by encouraging them to direct fire officials to seize the evidence themselves, thereby creating problems in the accumulation of evidence by inexperienced personnel.

45. *Id.* at 119.

46. *Eady*, 733 A.2d at 135 (Berdon, J., dissenting).

47. *Id.* at 125.

48. *Id.* at 124-25.

49. *Id.* at 126.

50. *Id.* at 128 nn.4 & 22.

51. *Eady*, 733 A.2d at 133.

2. *State v. Olah*

In *State v. Olah*,⁵² a case decided several months after *Eady*, Connecticut's intermediate appellate court appears to base its decision squarely on the *Eady* majority's rationale. While ostensibly contrary to the *Eady* dissent,⁵³ it well may be that even the *Olah* court would concur in the *Eady* holding.

Olah was suspected of having violated several statutes dealing with offenses against minors and related sex crimes. After a comprehensive investigation, Detective Benjamin Trabka obtained a warrant to search *Olah*'s bedroom for various sexually explicit photographs and related items.⁵⁴ The trial court ruled that some of the photographs and other evidence taken did not fall within the warrant's command.⁵⁵ Nonetheless, Trabka's action was deemed justified under plain view.⁵⁶ To the defendant's claim that the doctrine was unavailable here because the probable cause element was missing since Trabka subjectively believed he was seizing the evidence pursuant to the warrant, the court responded:

In discussing the "immediately apparent" aspect of the plain view doctrine and its implicit probable cause requirement, the Supreme Court has stated that "[w]hether a Fourth Amendment violation has occurred turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time . . . and not on the officer's actual state of mind at the time the challenged action was taken. . . ." Trabka's subjective belief that he was acting pursuant to the command of the warrant is, therefore, irrelevant.⁵⁷

The premise that immediately apparent or probable cause depends on an objective assessment was the majority's opinion in *Eady*. Despite the *Eady* dissent's criticism of that position and insistence that probable cause be that of the seizing officer,⁵⁸ *Olah* may be reconciled with the *Eady* dissent. In *Eady*,

52. 759 A.2d 548 (Conn. App. Ct. 2000).

53. There is no reference in *Olah* to the earlier conflict in *Eady*.

54. *Olah*, 759 A.2d at 551.

55. *Id.* at 550.

56. *Id.* at 553.

57. *Id.* (quoting *State v. Eady*, 733 A.2d 112, 118 (1999)) (internal quotation marks omitted).

58. *Eady*, 733 A.2d at 134-36; see also discussion *supra* note 41 and accompanying text.

because the firefighters had no probable cause that the leafy substance was marijuana they knew of no justification for its seizure.⁵⁹ They did not harbor a belief that they had a legal right to seize the leafy substance.⁶⁰ *Olah* is different. In relying on the warrant, Trabka did not make an assessment of probable cause.⁶¹ By the same token, since he was relying on the warrant, he believed that the evidence he took was legally seizable.⁶² Thus, the crucial differentiation between the two cases is whether the officer subjectively believed that he was acting properly.

C. Plain View Doctrine

1. *Minnesota v. Dickerson*

While the prior cases dealt primarily with clarifying plain view principles either promulgated or touched upon originally in *Coolidge*, *Minnesota v. Dickerson*⁶³ introduced a novel, related warrantless intrusion characterized as plain feel. The *Coolidge* case involved a frisk for weapons pursuant to the guidelines of *Terry v. Ohio*.⁶⁴ In *Terry*, the Supreme Court recognized that if a police officer feels non-threatening but incriminating evidence, while patting down the suspect for weapons, such evidence is seizable.⁶⁵

In *Dickerson*, police subjected the defendant to a conventional stop and frisk in an urban area notorious for drug traffic.⁶⁶ At the trial and appellate levels, the state courts unanimously agreed that both the subject's demeanor and the setting gave police requisite reasonable suspicion that criminal activity was afoot and that the party was armed and dangerous.⁶⁷ Thus, under *Terry* and its progeny, *Dickerson*'s brief detention and the frisk on the outside of his person were lawful – findings that eventually were not challenged before the Supreme Court. Although the investigating officer uncovered no

59. *Id.* at 135.

60. *Id.*

61. *Olah*, 759 A.2d at 553.

62. *Id.*

63. 508 U.S. 366 (1993).

64. 392 U.S. 1 (1968).

65. *See id.* at 27-30.

66. *Dickerson*, 508 U.S. at 368-69.

67. *Id.* at 370.

weapons during the pat-down, he detected a suspicious lump, which "felt to be a lump of crack cocaine in cellophane."⁶⁸ Indeed, the defendant had one-fifth of one gram of crack cocaine in a small plastic bag in his front pocket, providing the critical evidence in a conviction for possession of a controlled substance.⁶⁹

The Minnesota courts considered whether such contraband discovered by a sense of touch during a permissible pat-down was admissible into evidence.⁷⁰ The Minnesota Supreme Court suppressed the evidence.⁷¹ Rejecting the argument that the officer's warrantless activities were no different than a typical plain view invasion, it reasoned that suspicion developed by way of touch is quite different.⁷² First, "the sense of touch is inherently less immediate and less reliable than the sense of sight;"⁷³ second, touch implicates a more serious adverse effect on personal dignity.⁷⁴ In the Minnesota Supreme Court's view, neither consideration justified a blanket refusal to recognize the analogy between plain view and plain feel.⁷⁵

Often, touch may not be as revealing or reliable as sight, but as far back as *Terry* the Court acknowledged an officer's discretion during an ordinary frisk when the suspect is carrying a weapon.⁷⁶ So, where that very same sense encounters what the officer believes is contraband, that conclusion should be equally trustworthy.⁷⁷ Furthermore, even if touch per se is more offensive than sight, the detainee, already being frisked for weapons, is not subjected to some additional personal indignity by the officer's feel for what may be contraband.⁷⁸ "Accordingly," the Court concluded, "the suspect's privacy interests are not ad-

68. *Id.* at 369 (quoting transcript of the record at 9, *State v. Dickerson*, 469 N.W.2d 462 (Minn. App. 1991)).

69. *Id.*

70. *See id.* at 369-71.

71. *Dickerson*, 508 U.S. at 370-71.

72. *Id.*

73. *Id.* at 370 (quoting *State v. Dickerson*, 481 N.W.2d 840, 845 (Minn. 1992)).

74. *Id.*

75. *Id.* at 376-77.

76. *Dickerson*, 508 U.S. at 376.

77. *Id.*

78. *Id.* at 377-79.

vanced by a categorical rule barring the seizure of contraband plainly detected through the sense of touch.”⁷⁹

Despite the recognition of a plain feel doctrine, the Court agreed that suppression of the contraband incriminating *Dickerson* was warranted.⁸⁰ In effect, it held that the immediately apparent element had not been satisfied. As developed in Minnesota’s courts, the facts indicated that the wary officer did not immediately identify the suspicious lump as crack cocaine.⁸¹ It was only after “squeezing, sliding and otherwise manipulating the contents of the defendant’s pocket,” which clearly harbored no weapon, that the lump was identified as an illegal substance.⁸² Had he made that very same determination in the course of his initial pat-down, plain touch would have justified extraction and seizure.⁸³ However, once a limited weapons search is complete, further or more intense exploration no longer bearing any relationship to the object of the initial recognized warrantless intrusion is reminiscent of the abhorrent general warrant and wholly unacceptable.⁸⁴

Support for the majority analysis in *Dickerson* may be found in *Arizona v. Hicks*.⁸⁵ Like the detection of a less than innocent item occurred in the wake of a legitimate justified intrusion on the suspect’s premises in *Hicks*, investigating police in *Dickerson*, during an analogous acceptable exception to the warrant requirement, encountered what could conceivably constitute an illegal substance.⁸⁶ In both instances, however, that suspicion could neither be confirmed nor dispelled without a further warrantless invasion of the defendant’s privacy interests. Just as the *Hicks* Court found that moving an object for closer scrutiny without either the authority of a warrant or some recognized warrantless exception was unconstitutional,⁸⁷ the *Dickerson* Court also analogized that a more intense war-

79. *Id.* at 377.

80. *Id.* at 379.

81. *Dickerson*, 508 U.S. at 379.

82. *Id.* at 378 (quoting *State v. Dickerson*, 481 N.W.2d 840, 844 (Minn. 1992)).

83. *Id.*

84. *Id.* at 378-79.

85. 480 U.S. 321 (1987). See *supra* notes 4-29 and accompanying text.

86. *Dickerson*, 508 U.S. at 369.

87. *Hicks*, 480 U.S. at 326-27.

rantless and exploratory frisk was equally as offensive.⁸⁸ In either event, the incremental search was simply unjustified.

An issue raised by *Dickerson* is the precise nature of the requisite immediately apparent element. By illustration, a problem arises when the investigating officer conducting a legitimate *Terry* frisk perceives no weapon, feels no actual contraband, but from what is felt concludes that the item he is touching contains contraband.⁸⁹ In *Stevenson*, after being lawfully stopped, police officers conducted a pat-down search of the defendant based on reasonable suspicion.⁹⁰ The officer felt three hard packages of folded paper or cardboard in the defendant's pants and subsequently testified that he knew or believed that the packages contained cocaine.⁹¹ Upon retrieval, it was determined that the packages did, in fact, contain cocaine.⁹² Although there was nothing about the feel of the packages that indicated its contents, the officer made his conclusion based on the fact that, on previous occasions, he had seen cocaine packaged in that fashion.⁹³

2. *In re Stevenson/R.A.*

In *Stevenson/R.A.*, again after a lawful stop followed by the frisk of R.A., a minor, a Pennsylvania trooper felt what appeared to be a cigarette or a cigar as well as an object similar to a pill bottle in the lining of his jacket.⁹⁴ The trooper testified that he believed that R.A. was carrying contraband because he was experienced in drug enforcement and had previously encountered instances in which narcotics were concealed in pill bottles and cigars.⁹⁵ Upon removal and visual inspection, it was determined that the cigar was in fact hollowed out and contained marijuana and the pill bottle, which had a pop off lid,

88. *Dickerson*, 508 U.S. at 378-79.

89. See, e.g., *Commonwealth v. Stevenson/R.A.*, 744 A.2d 1261 (Pa. 2000) (a consolidated appeal where appellants Reuben Stevenson and R.A., a minor, contended that the Superior Court improperly upheld the trial court's denial of their motions to suppress physical evidence obtained pursuant to a stop and frisk).

90. *Id.* at 1263.

91. *Id.*

92. *Id.*

93. *Id.* at 1268.

94. *Stevenson/R.A.*, 744 A.2d at 1264.

95. *Id.*

contained crack cocaine.⁹⁶ Notwithstanding the trooper's belief that R.A. was carrying contraband, the Supreme Court of Pennsylvania concluded that suppression was in order because the trooper did not "plainly feel" the drugs.⁹⁷ Since in both instances the officers did not actually physically perceive contraband, their actions did not fall within the *Dickerson* plain feel rule.

3. *Commonwealth v. Zhahir*

Unfortunately, a few months after *Stevenson/R.A.* the Pennsylvania Supreme Court appears to have taken a contrary position in *Commonwealth v. Zhahir*.⁹⁸ There, based on information from an unknown source, two officers initiated a surveillance of Zhahir.⁹⁹ Although no drugs were seen, Zhahir's actions were consistent with that of one trafficking narcotics. He was approached by the two officers and the ensuing scene was described thusly:

Officer Singletary got out of the vehicle and approached Zhahir, who turned to face the officer with his left hand in his jacket pocket. Officer Singletary asked Zhahir what was in his pocket, immediately grabbed Zhahir's left hand and pocket at the same time, and "felt what formed the consistency of a bundle of caps" (vials of cocaine). Officer Singletary then seized a plastic bag from Zhahir's jacket pocket, which contained 98 vials of crack cocaine, the total weight of which was 3.70 grams.¹⁰⁰

The lower court held that police officers properly seized the contraband under the plain feel doctrine as it occurred during a legitimate frisk for weapons.¹⁰¹ Based on Officer Singletary's professional experiences, he could reasonably conclude that what he was feeling contained contraband.¹⁰² Citing *Stevenson/R.A.* in support of its conclusion, the Pennsylvania Supreme Court agreed.¹⁰³

96. *Id.*

97. *Id.* at 1268.

98. 751 A.2d 1153 (Pa. 2000).

99. *Id.* at 1155-56.

100. *Id.* at 1156.

101. *Id.*

102. *Id.*

103. *Zhahir*, 751 A.2d at 1163.

A dissenting jurist, citing *Stevenson/R.A.* as well, disagreed and held that plain feel was wholly inapposite.¹⁰⁴ He could find no distinction between the facts in *Zhahir* and those in *Stevenson/R.A.*¹⁰⁵ In none of the cases was contraband actually detected by the officers' sense of touch.¹⁰⁶ They felt only material that could be used for packaging controlled substances.¹⁰⁷

The dissent's point is well taken, for ostensibly all three cases appear to be similar. However, while the majority does not directly address the dissent's serious concerns, it does make the following observation:

In the present case, police were responding to a tip involving narcotics and observed behavior corroborative of the tip's allegation. Furthermore, the frisk occurred in an area noted for drug activity and the officer felt what he immediately perceived as numerous (98) vials of cocaine, which was consistent with cocaine packaging he had encountered in previous narcotics cases. Significantly, given the number and nature of the containers, their presence was not equally consistent with legitimate purposes.¹⁰⁸

Thus, the majority views the background in *Zhahir* as being different from *Stevenson/R.A.* in several different ways. Unlike the latter two cases, here the suspect's personal activities as well as where the activity transpired were indicative of drug-dealing.¹⁰⁹ Moreover, what the officer encountered was not one or two suspicious objects, but numerous items indicating drug possession.¹¹⁰ It may well be that these two factual differences provide the Pennsylvania court with a basis for its legal conclusion.

IV. Inadvertence

A. *Horton v. California*

In addition to *Hicks*, which definitively clarified the immediately apparent element of the plain view doctrine as contem-

104. *Id.* at 1164-66 (Zappala, J., dissenting).

105. *Id.* at 1164.

106. *Id.*

107. *Id.*

108. *Zhahir*, 751 A.2d at 1163.

109. *Id.* at 1157.

110. *Id.* at 1156.

plated by *Coolidge*, there is *Horton v. California*,¹¹¹ which dealt with perhaps the most controversial aspect of the *Coolidge* opinion, i.e., inadvertence. In the aftermath of *Coolidge*, three different approaches to that subject had been developed. One line of cases took the position that inadvertence was never an indispensable requirement of plain view because it was demanded by only a plurality of the *Coolidge* Court.¹¹²

All other courts read *Coolidge* requiring inadvertence as binding precedent.¹¹³ In most jurisdictions where there was probable cause to believe certain evidence would be found, the discovery was held not to be inadvertent.¹¹⁴ Inasmuch as a warrant could have been obtained those courts found plain view unavailable. Another tack was that probable cause was not enough to invalidate a plain view seizure. Even in situations where a warrant could have been obtained, the find was deemed inadvertent if the law enforcement authorities acted innocently and the procedure was not a mere subterfuge.¹¹⁵ Sometimes it is difficult to discern which of the latter two positions a particular jurisdiction endorses.¹¹⁶

111. 496 U.S. 128 (1990).

112. See *North v. Superior Court of Riverside County*, 502 P.2d 1305, 1308-09 (Cal. 1972); *State v. Poutier*, 518 P.2d 969, 974 (Idaho 1974); *State v. King*, 191 N.W.2d 650, 655 (Iowa 1971); *State v. Mitchell*, 266 S.E.2d 605, 609 (N.C. 1980). The Supreme Court of Iowa in *King* mistakenly refers to the *Coolidge* plurality as a "minority" opinion. *King*, 191 N.W.2d at 655.

113. LAFAYETTE, CRIMINAL PROCEDURE, § 3.4(K). See, e.g., *Texas v. Brown*, 460 U.S. 730, 737 (1983); *United States v. Liberti*, 616 F.2d 34, 36 (2d Cir. 1980); see also *Horton*, 496 U.S. at 145, App. A at 149-53 (Brennan, J., dissenting).

114. *United States v. Hare*, 589 F.2d 1291, 1294 (6th Cir. 1979); *State v. Howard*, 448 So. 2d 713, 718 (La. Ct. App. 1984); *Commonwealth v. Cefalo*, 409 N.E.2d 719, 724 n.6 (Mass. 1980); *Commonwealth v. Casuccio*, 454 A.2d 621, 630-31 (Pa. Super. Ct. 1982). One jurist has aptly observed in these "traditional roles on the issue of probable cause" are oddly reversed because the defendant will urge and the state disclaim the presence of probable cause. *Liberti*, 616 F.2d at 38.

115. See *United States v. Johnson*, 707 F.2d 317, 321 (8th Cir. 1983); *United States v. Wright*, 641 F.2d 602, 605-06 (8th Cir. 1981); *State v. Oliver*, 341 N.W.2d 744, 746 (Iowa 1983). This interpretation of inadvertency appears designed to prevent police from obtaining a warrant "in bad faith" or using plain view to "evade the warrant requirement." See *Johnson*, 707 F.2d at 321; *Wright*, 641 F.2d at 605-06; *Oliver*, 341 N.W.2d at 746.

116. In analyzing, for example, a host of plain view decisions rendered in Maryland, despite the fact that Maryland appears to endorse the position that inadvertency hinges on whether there was probable cause, *Wiggins v. State*, 554 A.2d 356, 365 (Md. 1989), this writer has detected both confusion and inconsistency. See Wallin, *supra*, note 1, at 282-85.

In a sense, *Horton v. California*¹¹⁷ resolved the issue by eliminating the inadvertency element. There, in an armed robbery masked men took jewelry and cash.¹¹⁸ Somehow the victim was able to detect the distinctive nature of the suspect Horton's voice and eventually police, after further investigation, applied for a search and seizure warrant.¹¹⁹ Although the affidavit made reference to the specific weapons used, the perpetrators' clothing and all of the ill-gained proceeds, the warrant listed only three distinctive rings of the victim.¹²⁰ This stolen property was never discovered, but other stolen items and the weapons employed were observed in plain view and seized.¹²¹ Defendant argued that given the recital in the affidavit, the finds were clearly anticipated, making their seizure unlawful.¹²²

A majority of the Court disagreed.¹²³ After exploring the questionable precedential effect of the *Coolidge* discussion related to inadvertence,¹²⁴ the Court concluded that heretofore it will no longer be a necessary factor for a plain view seizure. As a practical matter, the Court reasoned, investigating officers have no incentive for deliberately omitting an item they might or expect to find.¹²⁵ In terms of privacy interests, even in the absence of inadvertency, the scope of a warrant is already limited by the Fourth Amendment's insistence on particularity with respect to "the place to be searched and the person or things to be seized."¹²⁶ Similarly, the bounds of warrantless invasions are defined by the exigencies justifying the intrusion. Thus, apprehension over the prospect of general-type warrants in no way justifies the demand for inadvertency for "[s]crupulous adherence to [those] requirements serves the interests in limiting the area and duration of the search that the

117. 496 U.S. 128 (1990).

118. *Id.* at 130-31.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Horton*, 496 U.S. at 131.

123. *Id.* at 138-41.

124. *Id.* at 134-37.

125. *Id.* at 138 n.9 (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 577 (1971) (White, J., concurring and dissenting)).

126. *Id.* at 139 (quoting *Maryland v. Garrison*, 480 U.S. 79, 84 (1987); *Steel v. United States No. 1*, 267 U.S. 498, 503 (1925) (citing U.S. CONST. amend. IV).

inadvertence requirement inadequately protects.”¹²⁷ Inadvertency in the Court’s view is simply superfluous.¹²⁸

In a real sense, *Horton* is a boon to investigating officers. Each and every item they anticipate, or have probable cause to suspect will be revealed by a warrant, no longer needs to be enumerated therein. Their expectations are not a consideration. By the same token, it should not encourage less than thoughtful draftsmanship. As the *Horton* Court notes, had the rings, the only pieces of evidence listed in the warrant, been seized as soon as they entered Horton’s home, the authority to search any further would have immediately ceased.¹²⁹ Investigators would thereafter be in no position to accumulate other fruits of the crime such as the weapons used. Similarly, had the warrant listed only the cumbersome weapons such as the machine gun or the stunning device, the search team would have been foreclosed from rummaging in places like furniture drawers, relatively small containers or pockets of clothing that could not conceivably hide that evidence. Hence, the opportunity to detect such fruits of the crime such as the small rings would have been lost even under the plain view exception. Clearly, the greater and more diverse the scope of a warrant, the greater the advantage for law enforcement officers.

In addition, the teachings of *Hicks*,¹³⁰ dealing on its face only with the conduct of a search, should not be overlooked by applicants for a warrant. By way of illustration, suppose police officers come across items like a radio, recorder, or camera in the course of serving a warrant. If the serial numbers on these items are not visible and the police have merely a slight suspicion that they may be stolen, *Hicks* prevents them from being moved for further inspection. If the warrant lists only evidence that, owing to its configuration could not be concealed either inside, under, or behind the suspicious object, investigators would have no legal basis for allaying or confirming their suspicion. On the other hand, if the warrant is sufficiently broad and/or detailed, it would authorize official handling of the find in order to seek the subjects enumerated therein. Therefore, the lifting

127. *Horton*, 496 U.S. at 140.

128. *Id.* at 140-41.

129. *Id.* at 141.

130. See *supra* notes 4-29 and accompanying text.

or moving of such items would then reveal the critical identifying numbers, which may be recorded even without resorting to plain view. In any event, both *Hicks* and *Horton* should encourage the artful drafting of search and seizure warrants.

V. Prior Justification

While dealing with other significant aspects of the plain view doctrine, none of the three major decisions reviewed and analyzed herein discusses the prior justification requirement. It is however precisely this particular aspect of plain view that has consistently been either misunderstood or misapplied by courts generally. As explained in *Coolidge*, prior justification may come in several forms. The justification for entry may be pursuant to consent, a warrant or based on some recognized exception to the warrant requirement such as hot pursuit or search incident to arrest.¹³¹

A. *Open v. Plain View*

Appreciation of the prior justification element necessitates a clear understanding of the analytical framework for the plain view exception. Judge Moylan points out that:

[t]he hardest conceptual problem attending the plain view doctrine is to grasp that it is not a universal statement of the right of a policeman to seize after seeing something in open view; it is rather a limited statement of the right in one of several instances — following a valid intrusion.¹³²

1. *Open View*

Judge Moylan then identifies two types of observations that are not covered by the plain view doctrine.¹³³ The first is a situation where the police see items where privacy is not protected by the Constitution. So, for example, items on a public street or in an open field are seizable not by virtue of the plain view doctrine, but because they are not protected by the Fourth Amend-

131. *Coolidge*, 403 U.S. at 465-66.

132. Charles E. Moylan, *The Plain View Doctrine: Unexpected Child of the Great "Search Incident" Geography Battle*, 26 MERCER L. REV. 1047, 1096 (1975).

133. *Id.* at 1097.

ment.¹³⁴ A second scenario is that of police officers standing outside a constitutionally-protected location observing items within that protected area. While they may employ the information they have garnered through their observation, for example in seeking a warrant, the view in and of itself does not justify an intrusion into the protected area.¹³⁵ Simply because they have seen an item that they have a legitimate right to observe does not justify a warrantless intrusion into an otherwise constitutionally-protected area. Such observations are, therefore, characterized by courts as open view, but not plain view.¹³⁶

2. *Plain View*

Plain view, on the other hand, deals only with those circumstances where an officer has already justifiably intruded into a constitutionally-protected area, spots and then removes incriminating evidence. It refers only to seizures but not to searches. In explaining that plain view is a recognized justification for warrantless seizures, not warrantless searches, the Supreme Court in *Horton* made the following observations:

The right to security in person and property protected by the Fourth Amendment may be invaded in quite different ways by searches and seizures. A search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property. The "plain view" doctrine is often considered an exception to the general rule that warrantless searches are presumptively unreasonable, but this characterization overlooks the important difference between searches and seizures. If an article is already in plain view, neither its observation nor its seizure would involve any invasion of privacy. A seizure of the article, however, would obviously invade the owner's possessory interest. If "plain view" justifies an exception from an otherwise applicable warrant requirement, therefore, it must be an exception that is addressed to the concerns that are implicated by seizures rather than by searches.¹³⁷

Hence, unlike other warrantless exceptions, plain view is not an "independent exception" to the warrant requirement. Rather,

134. *Id.*

135. *Id.* at 1100.

136. See, e.g., *State v. Clark*, 859 P.2d 344, 349 (Idaho Ct. App. 1993); *Brown v. State*, 292 A.2d 762, 778 (Md. Ct. Spec. App. 1972).

137. *Horton v. California*, 496 U.S. 128, 133-34 (1990) (citations omitted).

the doctrine is better understood as an extension of the officer's prior justification for access to the object because plain view merely provides grounds for the seizure of the item in question. A typical example of a plain view seizure is the situation where police have a warrant to search for some article in a given location and, in the course of that search, run across some other object of incriminating nature. That article is seizable under plain view. Moreover, the initial intrusion need not necessarily be by way of a warrant. Even if the article comes into plain view as a result of some recognized exception to the warrant requirement, the seizure may likewise be valid. Thus, if for example police are searching a vehicle under the *Carroll* doctrine¹³⁸ based on probable cause to believe that it contains a weapon, and in the course of that search discover contraband, it is seizable under plain view.

a. *Coolidge v. New Hampshire*

Evidence coming into view during a search incident to arrest or during the hot pursuit of a fleeing suspect also may be seized under the plain view doctrine. Based on those cases, Justice Stewart in *Coolidge* articulates the following proposition:

What the "plain view" cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came . . . across a piece of evidence incriminating the accused. The doctrine serves to supplement the prior justification – whether it be a warrant for another object, hot pursuit, search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused – and permits the warrantless seizure.¹³⁹

Since the doctrine only supplements a prior justified invasion, it does not in and of itself legitimize an intrusion. What usually takes place, therefore, is the observation of incriminating evidence after police have already lawfully entered a constitutionally-protected environment. However, that may not always be the case.

138. The *Carroll* doctrine states that "a reasonable search may be made of a vehicle which is easily and quickly movable, without a warrant and in the absence of a prior arrest, so long as there is probable cause to believe that the vehicle contains contraband." *United States v. Brown*, 411 F.2d 478, 479 (5th Cir. 1969).

139. *Coolidge*, 403 U.S. at 466.

b. *Washington v. Chrisman*

*Washington v. Chrisman*¹⁴⁰ provides an excellent illustration of a plain view observation occurring before a valid intrusion. There, a student was arrested for illegal possession of alcohol on a university campus.¹⁴¹ Accompanied by the arresting officer, the student returned to his dormitory room to obtain proof of identity, while the officer waited outside.¹⁴² Standing in the doorway, he peered into the interior of the room and saw what he believed to be marijuana seeds and a marijuana pipe on a desk inside the room.¹⁴³ He immediately entered the room, confirmed that his perception had been accurate and arrested the student for the drug violations.¹⁴⁴ The Supreme Court of Washington found that this warrantless entry and the subsequent seizures were illegal.¹⁴⁵

The Supreme Court of the United States, however, reversed and validated the initial seizure of the marijuana seeds and the pipe under the plain view doctrine.¹⁴⁶ The defendant had claimed that the doctrine was inapposite because the officer's initial observations were not made after a legitimate intrusion into the dormitory room, but instead took place from outside the room.¹⁴⁷ Therefore, he argued, plain view could not justify either entry or seizure of the incriminating items.¹⁴⁸ A majority of the Supreme Court, rejecting the argument, responded that regardless of the officer's position, he had a legal right to enter the room whenever he considered it essential.¹⁴⁹ Authority to enter the room did not cease simply because the officer had cho-

140. 455 U.S. 1 (1982).

141. In the recital of the facts it appears the officer "stopped" Chrisman's roommate. *Id.* at 3. However, the opinion later states that the roommate was "under lawful arrest." *Id.* at 6. Earlier, the Supreme Court of Washington had approved the trial court's determination that the defendant had been arrested. *State v. Chrisman*, 619 P.2d 971, 974 (Wash. 1980), *rev'd*, 455 U.S. 1 (1992).

142. *Id.*

143. *Id.* at 4.

144. After confirming his suspicions, he obtained consent from the defendant and his roommate to a search, which yielded additional controlled substances. *Id.*

145. *Chrisman*, 619 P.2d 971 at 975 (1980), *rev'd*, 455 U.S. 1 (1992).

146. *Chrisman*, 455 U.S. at 8.

147. *Id.* at 6-7.

148. *Id.* at 6.

149. *Id.* at 9.

sen not to exercise it.¹⁵⁰ Instead of immediately accompanying the arrestee into the room, the officer exercised his right to enter after he observed the marijuana seeds and the pipe.¹⁵¹

Although *Chrisman* permitted a plain view observation to occur before the valid intrusion, it nonetheless remains consistent with the theory of *Coolidge*. As in *Coolidge*, the view made before entry did not authorize an intrusion. Intrusion was permitted because the officer had a preexisting right to accompany the arrestee in order to preserve the integrity of the arrest.¹⁵² The seizure was thus justified only because it took place after that *right* to intrude had attached.¹⁵³ The *Coolidge* Court distinguishes *Chrisman* from those cases where an officer happens to pass an open doorway to a residence and observes what he believes to be contraband inside the room.¹⁵⁴ In that situation, inasmuch as the officer has no legal basis for making a warrantless entry, his open view would not provide him with an independent right to intrude without a warrant. *Chrisman*, of course, is different. There the officer had the authority to enter not because of what he saw in the room but because the entry was justified to preserve the integrity of the arrest. Thus even had he seen nothing, his right of entry attached.

What emerges from this background is that, except for the unique situation presented in *Chrisman*, the view of contraband or incriminating evidence from outside a constitutionally-protected area does not legitimize a warrantless entry. Appellate courts in some jurisdictions so specifically have held. For instance, in Maryland, some three decades ago, its intermediate appellate court dealt at length with this issue.¹⁵⁵ There, police, while investigating a breaking and entering, identified Willie Lee Brown as a suspect.¹⁵⁶ Despite the fact that he had refused to allow a search of his room or belongings, the police proceeded to the rooming house in which he resided.¹⁵⁷ The police

150. *Id.* at 8-9.

151. *Chrisman*, 455 U.S. at 8-9.

152. *Id.* at 8.

153. *Id.* at 8-9.

154. *Id.* at 9 n.5. See, e.g., *Payton v. New York*, 445 U.S. 573, 585-89 (1980); *Johnson v. United States*, 333 U.S. 10, 14-15 (1948).

155. *Brown v. State*, 292 A.2d 762 (Md. Ct. Spec. App. 1972).

156. *Id.* at 777.

157. *Id.*

team was invited in by the owner, who led them through a front room and narrow hallway.¹⁵⁸ While walking down the hallway, the owner indicated that one of the rooms with an open door was the one occupied by Mr. Brown.¹⁵⁹ From the hallway, they were able to see clearly a cardboard box which appeared to contain several items very similar to the ones that had been taken in the burglary under investigation. Without actually entering the room, a Deputy Sheriff reached in, pulled the bag into the hallway and confirmed their suspicion.¹⁶⁰

Defendant argued that those items should not be admissible because their warrantless seizure was invalid.¹⁶¹ The trial judge, however, ruled that since the police had probable cause to believe that what they had seen plainly inside the room were stolen goods, they had a right to enter and seize them under the plain view doctrine.¹⁶² The appellate panel disagreed.¹⁶³ It explained that the police had no separate or independent justification for entering Mr. Brown's protected area of privacy.¹⁶⁴ Inasmuch, therefore, as the doctrine serves only to supplement a prior justification, but is not, in and of itself, an exception to the warrant requirement, what they observed in the room must be characterized as open view that could not justify an intrusion.¹⁶⁵

c. *State v. Griffin*

Some ten years later, the Supreme Court of Minnesota in *State v. Griffin*¹⁶⁶ likewise made a logical, well-documented analysis of the significant difference between open and plain view. The case, decided before both *Hicks* and *Horton*, is clearly consistent with the rationale of both *Coolidge* and *Chrisman*. In *Griffin*, while waiting to catch a bus, a sixty-year-old woman was attacked by a young man who hit her in the face, grabbed

158. *Id.*

159. *Id.*

160. *Brown*, 292 A.2d at 777.

161. *Id.* at 776.

162. *Id.* at 777-78.

163. *Id.* at 779.

164. *Id.* at 778.

165. *Brown*, 292 A.2d at 778-79.

166. 336 N.W.2d 519 (Minn. 1983).

her purse and fled.¹⁶⁷ Police called to the scene followed the robber's tracks in freshly fallen snow to a nearby rooming house.¹⁶⁸ The landlady, who answered the door, told police she had a roomer named Griffin who fit the description given by the victim.¹⁶⁹ Police knocked on the rear door of the house where the footprints led, and the defendant answered the door. When questioned on his whereabouts the defendant stated that he had been in all evening.¹⁷⁰ The victim was brought to the back door and immediately identified her assailant. After arresting the defendant in the hallway, the officers gave him the Miranda warning and asked him which room was his.¹⁷¹ At trial one officer testified that the purpose of asking the defendant to identify his room was to allow them to gather up his shoes and a jacket so they could take him to the station. This same officer stated that before he entered the room he saw a brown coin purse on the bed, and he knew that the victim was missing such a coin purse, among other items. The officer also testified that after he entered the room he noticed that there was a lady's purse on the floor of an open closet and that the purse was open and appeared to have been "gone through."¹⁷² In addition, he saw a jacket and dark-colored stocking cap, both of which were wet. Upon checking the shoes of the defendant, they were found to match the footprints in the snow that led the police to the rooming house.¹⁷³ A second officer offered somewhat different testimony. This officer stated that after he saw the coin purse and jacket he then walked into the room to examine them, and that the decision to get the shoes and the coat was probably made after they had already entered the room and before they took the defendant out of the house.¹⁷⁴

The defendant argued that the purse, coin purse, cap, jacket and shoes should all be suppressed on Fourth Amendment grounds.¹⁷⁵ The issue for the court was whether the police

167. *Id.* at 521.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Griffin*, 336 N.W.2d at 521.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 522.

had a valid reason for crossing the threshold of the defendant's room without a warrant after validly arresting him in the common hallway of the building.¹⁷⁶ The court held that the seizure of the items was valid because at some point in time, the police would have had to enter the room to get the defendant's shoes and coat and at that time they would have seen the items in plain view and the seizure would have been justified.¹⁷⁷ Thus, the seizure was made after the police officers had the authority to make a valid intrusion.¹⁷⁸

d. *Other courts*

More recently, the Court of Appeals of Idaho in *State v. Clark*,¹⁷⁹ without as much discussion, articulated the theoretical and practical distinctions between open and plain view.¹⁸⁰ In other jurisdictions the decisions are less than consistent. An analysis of selected cases in New Jersey and Pennsylvania demonstrates such inconsistencies. Several years ago, an appellate panel in New Jersey was presented with a legal issue which should have been easily and readily resolved.¹⁸¹ Instead, it produced judicial controversy and what appears to be an incorrect majority opinion. In *Ford*, officers from the Camden Police De-

176. *Griffin*, 336 N.W.2d at 523.

177. *Id.* at 524.

178. *Id.*

179. 859 P.2d 344 (Idaho Ct. App. 1993).

180. Police officers there were dispatched to answer a complaint about a loud party possibly involving drugs and alcohol. Upon reaching the residence, one officer looked into the window and witnessed some of the occupants with drug paraphernalia on a table in plain view. *Id.* at 346. The officer also overheard one of the occupants state, "That's good speed," or words to that effect. The officer then made his way to the front door from which he could see the same table with the drug paraphernalia he had earlier observed. *Id.* Defendants argued that when the officer looked through the window, his observation constituted an illegal search. *Id.* at 347. The court in rejecting this argument stated that while the officer was pursuing a legitimate police purpose, i.e., investigating a complaint of an excessively loud party, the officer's view through the corner window constituted a valid "open view." As a result, the observation implicated no Fourth Amendment interests. *Id.* at 348. In distinguishing between open and plain view, the court explained: "A plain view analysis would be appropriate if the defendants were challenging the validity of the seizure of evidence inside the residence without regard to Deputy Soumas' view through the corner window." *Id.* at 349 n.4. Plain view would justify the seizure if the police were permitted to enter the residence. However, the court reasoned, had the officers not had permission to enter, the seizure would not have been valid under the plain view doctrine for lack of a prior justified intrusion.

181. *State v. Ford*, 651 A.2d 103 (N.J. Super. Ct. App. Div. 1995).

partment, while conducting an undercover drug stakeout, saw the defendants selling drugs which had been stored in a hole at the side of a private house.¹⁸² The defendant, Ford, was observed reaching inside the hole, pulling out a clear plastic bag, removing a small item and replacing the bag in the hole.¹⁸³ The police subsequently recovered the bag, which contained thirty-seven clear plastic bags of suspected cocaine.¹⁸⁴ Although the trial court suppressed that evidence,¹⁸⁵ the appellate court found that it was admissible under the plain view doctrine.¹⁸⁶ The court reasoned that the police had sufficient probable cause to believe that the large plastic bag stashed in the hole contained contraband.¹⁸⁷ Nonetheless, since it was "lawfully exposed to view of the law enforcement officers, the clear plastic bag and its clearly bagged contents remained subject to the plain view rationale."¹⁸⁸

To the contrary, the dissent held that the prior justified intrusion element remained unsatisfied.¹⁸⁹ As it explained, "there is no question but that these observations would provide a lawful basis for obtaining a warrant."¹⁹⁰ Nonetheless, the observations did not provide an independent justification to lawfully access the area from which the contraband was seized.¹⁹¹ In essence what took place was clearly open view, as opposed to plain view and therefore, should have been suppressed.

e. *State v. Lewis*

A valid application of the plain view doctrine, on the other hand, may be found in *State v. Lewis*.¹⁹² In *Lewis*, a police officer, based on information provided by a reliable informant, went to the home of Lewis who was suspected of drug dealing.¹⁹³

182. *Id.* at 104-05.

183. *Id.* at 105.

184. *Id.*

185. *Id.*

186. *Ford*, 651 A.2d at 106.

187. *Id.*

188. *Id.*

189. *Id.* at 108-09.

190. *Id.* at 108 (Conley, J., dissenting) (citations omitted).

191. *Ford*, 651 A.2d at 108.

192. 561 A.2d 1153 (N.J. 1989).

193. *Id.* at 1155.

The officer knocked on the door and Lewis answered.¹⁹⁴ Upon seeing the uniformed officer in the hallway, Lewis attempted to close the door, but was prevented from doing so when the officer placed his foot in the door.¹⁹⁵ It was at that point where the officer observed narcotics and other incriminating evidence.¹⁹⁶ All nefarious items were seized.¹⁹⁷ The legal issue troubling the trial court, as well as the various levels of appellate tribunals, was whether the plain view doctrine applied.¹⁹⁸ The answer to this legal issue nonetheless hinged on whether or not a warrantless intrusion into the apartment was justified by the exigency of the situation.¹⁹⁹ Accordingly, the Supreme Court of New Jersey correctly stated that the plain view doctrine was inapplicable because there was no prior justification for entering Lewis' apartment.²⁰⁰ The court not only found that the exigencies were insufficient to warrant their entry,²⁰¹ but also found that plain view alone is never enough to independently justify such an entry.²⁰² Although their observation from the hallway was perfectly legitimate, given that it was made from a public vantage point, nonetheless the doctrine did not apply.

f. *State v. Boynton*

Lewis was distinguished in a subsequent case, but the distinction is not a sound one. In *State v. Boynton*,²⁰³ the police were looking for an individual for whom an arrest warrant had been issued on a domestic violence matter.²⁰⁴ The person sought was known to frequent a particular bar.²⁰⁵ After unsuccessfully searching the bar, police entered the restroom to see if the subject was located therein.²⁰⁶ Upon entering the restroom, they saw Boynton and another individual involved in what ap-

194. *Id.*

195. *Id.*

196. *Id.*

197. *Lewis*, 561 A.2d at 1156-57.

198. *Id.*

199. *Id.* at 1156.

200. *Id.* at 1160.

201. *Id.*

202. *Lewis*, 561 A.2d at 1158.

203. 688 A.2d 145 (N.J. Super. Ct. App. Div. 1997).

204. *Id.* at 146.

205. *Id.*

206. *Id.*

peared to be a narcotics transaction.²⁰⁷ A bag held by Boynton was eventually taken from him based on probable cause that it contained narcotics.²⁰⁸ After lengthy discussion on the issue, the court ultimately decided that since the common area of the restroom was open to the public the defendant had no expectation of privacy therein and the police officer had a perfect right to enter like any other member of the public.²⁰⁹ Inasmuch as the officer occupied a public, as opposed to a constitutional vantage point, there was no constitutional intrusion and his observation was merely open view.²¹⁰ Therefore, seizure of the bag could not be validated under the plain view doctrine. Nonetheless, the New Jersey court reasoned that since the officer "was rightfully present in the restroom,"²¹¹ he had a right to seize the plastic bag under plain view.²¹²

In support of his motion to suppress, Boynton had argued that the plain view doctrine was inapplicable based on the court's decision in *Lewis*.²¹³ The court, however, explained that Boynton's reliance on *Lewis* was misplaced.²¹⁴ It reasoned that the plain view exception did not apply in *Lewis*, "because the officer was not lawfully in the viewing area."²¹⁵ Here, unlike *Lewis*, a private residence was not involved, but the officer was rightfully present in the restroom as he had the same right to enter and remain in the restroom as any other member of the general public.²¹⁶ Those facts, however, do not really distinguish it from *Lewis* because the officer there was likewise rightfully present in the hallway outside of Lewis' apartment. Being in such location amounts only to open view. Thus, neither in *Boynton* nor in *Lewis* was there plain as distinguished from open view.

207. *Id.*

208. *Boynton*, 688 A.2d at 147.

209. *Id.* at 150-51.

210. *Id.* at 150.

211. *Id.* at 151.

212. *Id.*

213. *Boynton*, 688 A.2d at 151.

214. *Id.*

215. *Id.*

216. *Id.*

g. *State v. Sansotta*

A similar error in the analysis of the plain view doctrine may be found in *State v. Sansotta*,²¹⁷ a case involving an encounter between a police officer and the defendant, a suspect in causing the sudden illness of a young lady. As the defendant was getting into the police car the officer on the scene noticed a huge bulge underneath his shirt.²¹⁸ Thus the officer patted him down, confirmed that the item was not a weapon but was a clear "Aquafina" water bottle half-full with a clear liquid.²¹⁹ Suspecting that the water bottle might have had some connection to the sick woman, the officer seized it and eventually had it analyzed at a state police laboratory.²²⁰ The results of the laboratory test indicated that the clear liquid contained what is commonly known as an illicit "date rape" substance.²²¹

The defendant, who was eventually convicted of possession of that illegal substance, argued that the warrantless seizure of the bottle was unlawful.²²² The State responded that there was probable cause to believe that the bottle contained some unlawful drug, thereby making it seizable under the plain view doctrine.²²³ The court eventually agreed with the defendant that there was insufficient probable cause.²²⁴ What is troubling about the decision is that even if there had been adequate probable cause to believe that the colorless liquid contained some illicit drug, plain view would still be unavailable because the police observation was only open view and therefore would not constitute a prior justified intrusion.

h. *Pennsylvania cases*

Decisions in Pennsylvania likewise reflect great confusion and misunderstanding over the prior justification element. On the one hand, it has been explained that plain view cases fall

217. 769 A.2d 1108 (N.J. Super. Ct. App. Div. 2001).

218. *Id.* at 1110.

219. *Id.*

220. *Id.*

221. The substance was Gamma Hydroxybutyrate (GHB), a colorless liquid soluble in water which may cause one to vomit, pass out or become comatose. *Id.* at 1109.

222. *Sansotta*, 769 A.2d at 1110.

223. *Id.*

224. *Id.* at 1111.

into two distinct categories.²²⁵ The first line of cases involve those situations where a view takes place after a legal intrusion.²²⁶ If the intrusion is under some justified exception to the warrant requirement, items in plain view will be admissible.²²⁷ In the second line of cases, "the view takes place *before* any intrusion into a constitutionally protected area."²²⁸ The observation in that second line of cases which, in effect amounts to open view, does not justify a constitutional intrusion.²²⁹ While in theory the distinction is sound, subsequent cases appear to blur the two separate lines of cases. Two typical examples are *Commonwealth v. Wells*²³⁰ and *Commonwealth v. Robinson*.²³¹ In *Wells*, police officers, after making a valid automobile stop, observed, on the driver's seat, a plastic supermarket bag filled with illicit narcotics.²³² Similarly, in *Robinson*, the officers, after making a valid automobile stop, were able to see a gun lying on the floor beside the driver's seat.²³³ The court permitted seizure under the plain view doctrine in both instances. These cases, however, fall within the second line of cases enumerated in *Chiesa*. Hence, plain view of the incriminating items from the public

225. *Commonwealth v. Chiesa*, 478 A.2d 850 (Pa. Super. Ct. 1984).

226. *Id.*

227. *See, e.g., Commonwealth v. Lassiter*, 321 A.2d 902 (Pa. 1973) (Police were given permission to enter a home where they observed a knife which eventually turned out to be the murder weapon. Seizure was deemed valid under the plain view doctrine.); *Commonwealth v. Davenport*, 308 A.2d 85 (Pa. 1973) (Defendant was lawfully arrested in his home and requested that he be allowed to dress before being taken to the police station. When an officer accompanied defendant into a bedroom, he observed blood stained clothing which was relevant to the murder charge for which the defendant had been arrested.); *Commonwealth v. Rota*, 292 A.2d 496 (Pa. 1972) (during a legal arrest of defendant in his apartment, police officer in a search incident to that arrest found an envelope in plain view on a nearby table containing drugs).

228. *Id.* at 852; *see e.g., United States v. Lee*, 274 U.S. 559, 563 (1927) (Coast Guard patrol boat on the high seas approached a rum runner's launch to examine her with a search light); *Commonwealth v. Hernley*, 263 A.2d 904 (Pa. 1970) (FBI agents observed defendant involved in gambling activities through the window of the printing shop that he operated); *Commonwealth v. DeJesus*, 310 A.2d 323 (Pa. 1973) (police observed, with the aid of a flashlight, a revolver located in the defendant's vehicle).

229. *Id.*

230. 657 A.2d 507 (Pa. Super. Ct. 1995).

231. 600 A.2d 957 (Pa. Super. Ct. 1991).

232. *Wells*, 657 A.2d at 508.

233. *Robinson*, 600 A.2d at 958.

vantage point could not justify the entries into the respective vehicles.

i. *Texas v. Brown*

While the reasoning is flawed, the end result is valid under *Texas v. Brown*.²³⁴ *Brown* involved a routine stop of an automobile at a driver's license checkpoint. The officer shined his flashlight into the car and saw the defendant holding an opaque green party balloon knotted about one-half inch from the tip.²³⁵ After the defendant dropped the party balloon onto the seat, the officer reached into the car, picked up the balloon, and noticed a powdery substance within the tied off portion.²³⁶ Cognizant of the fact that narcotics are frequently packaged in such balloons, the officer examined the automobile's interior a little more closely and observed plastic vials, loose white powder, and an open bag of party balloons.²³⁷ The suspect then was arrested.²³⁸ Subsequent tests verified that the seized knotted balloons contained heroin.²³⁹ The Court of Criminal Appeals of Texas held that the plain view doctrine was inapplicable because the incriminating nature of the balloons was not "immediately apparent."²⁴⁰ The Supreme Court of the United States reversed, finding that Texas had interpreted "immediately apparent" too strictly.²⁴¹

Justice Rehnquist, writing for the plurality, explained that the prior justification requirement was satisfied because the officer's initial foray into the car was valid based on the "*Carroll* automobile exception."²⁴² The automobile was lawfully stopped for a traffic check, the balloon was in the officer's view, and the officer had probable cause to believe that the car contained contraband.²⁴³ Consequently, the officer's entry into the automo-

234. 460 U.S. 730 (1983).

235. *Id.* at 733.

236. *Id.* at 733-34.

237. *Id.* at 734.

238. *Id.*

239. *Brown*, 460 U.S. at 735.

240. *Brown v. State*, 617 S.W.2d 196, 200 (Tex. Crim. App. 1981), *rev'd*, 460 U.S. 730 (1983).

241. *Brown*, 460 U.S. at 741-42.

242. *Id.* at 741 n.6.

243. *Id.* at 742-43.

bile was a valid intrusion.²⁴⁴ Justice Rehnquist explained that although the officer in *Brown* did not have probable cause to enter the car until after he saw the balloon, once he saw that balloon he had the right to enter under the *Carroll* doctrine and to then seize the balloon under the plain view seizure doctrine.²⁴⁵ As in *Chrisman*, it was deemed a prior justified intrusion by virtue of the fact that the officer had developed a legal right to enter the automobile, although he chose not to exercise that authority.

j. *Maryland cases*

As noted earlier, Maryland cases decided soon after *Coolidge* reflect a clear perception of prior justified principles. Unfortunately, more recent decisions, upon close analysis, appear contrary to those guiding principles. While as a practical matter some of the results can conceivably be justified on other grounds, the courts' plain view analyses may be incorrect.

(i) *Riddick v. State*

In *Riddick v. State*,²⁴⁶ the defendant Quincy Riddick, also known as Quincy Latimer, disembarked one afternoon from a Metroliner at Penn Station that he had boarded in New York City. He was accosted by several Baltimore City detectives, resulting eventually in his arrest and conviction of narcotics offenses.²⁴⁷ It appears that in the hopes of interdicting drug traffic emanating from New York, police officers were routinely assigned to Penn Station for the purposes of questioning suspicious individuals. Riddick was singled out because, in the police officers' recollection, he was nervous as he was walking, continually looking around the station, preceding at a very fast pace, and because of the luggage that he was carrying (a duffle bag slung from his shoulder).²⁴⁸ After identifying themselves and displaying their badges, the officers explained that they were associated with Baltimore Drug Enforcement, and that they

244. *Id.* at 743-44.

245. *Id.* at 744.

246. 571 A.2d 1239 (Md. 1990).

247. *Id.* at 1240.

248. *Id.* at 1241.

wished to speak with him.²⁴⁹ During routine questioning, regarding where he was coming from and how long he was going to be in the area, Riddick continued acting nervously, shaking, looking and moving around.²⁵⁰ At this point, Riddick agreed to accompany the officers into a place that was more private than the middle of the train station lobby.²⁵¹

The police brought Riddick to an area known as the interview room. It was described as an Amtrak office, generally closed to the public, about twenty-five feet by fifteen feet.²⁵² The room was well lit by a fluorescent fixture and contained a conference-type table as well as a telephone.²⁵³ Upon entering the interview room, Riddick placed his duffle bag on the table.²⁵⁴ One of the police officers asked him whether he “knew about the drug problems” to which Riddick responded by opening his bag, pulling out a sweatshirt and saying, “I don’t have anything.”²⁵⁵ Peering inside the open bag, the questioning officer saw a quarter-gram silver measuring spoon with white powder on it. From his training and experience, the police officer knew that it was common for those involved in drugs to use spoons²⁵⁶ instead of scales because it was less time consuming.²⁵⁷ Within the next several seconds, the police officer reached into the bag, removed the spoon, and examined it more closely.²⁵⁸ Convinced that the whitish powder was drug residue, Riddick was placed under arrest.²⁵⁹ Almost simultaneously, a second police officer noticed an unusual bulge in Riddick’s pants.²⁶⁰ Unconvinced by Riddick’s explanation for the bulge, which felt soft and cylindrical, he reached into Riddick’s pants and removed plastic ziplock bags.²⁶¹ The bags contained a white

249. *Id.*

250. *Id.*

251. *Riddick*, 571 A.2d at 1241.

252. *Id.* at 1247.

253. *Id.*

254. *Id.*

255. *Id.* at 1247.

256. “The spoon is used to measure the quantity of the narcotic to place in a bag for sale.” *Riddick*, 571 A.2d at 247.

257. *Id.*

258. *Id.* at 1247-49.

259. *Id.*

260. *Id.* at 1249.

261. *Riddick*, 571 A.2d at 1249.

powder, which upon subsequent chemical analysis, turned out to be heroin.²⁶² Despite defense objections, the drugs and drug paraphernalia subsequently were admitted at Riddick's criminal trial and served as a basis for his convictions.²⁶³

On appeal, the court divided the foregoing narrative into three distinct legal phases: the accosting, the retreat into an interview room, and the events in the interview room.²⁶⁴ The trial judge held that the accosting of Riddick in no way violated his constitutional rights and, somewhat reluctantly, found that Riddick validly consented to accompany the police into the interview room.²⁶⁵ The court of appeals, on the other hand, remained unconvinced that these two phases, the accosting and the retreat into an interview room, did not present significant constitutional difficulties.²⁶⁶ Nonetheless, it assumed, *arguendo*, that the accosting of Riddick was reasonable and that he voluntarily accompanied the officers into the more private interview room.²⁶⁷ It disagreed, however, with the trial court's conclusion that the seizure of both the measuring spoon and the heroin was legal.²⁶⁸

Focusing on the events that transpired within the interview room, the trial judge made two key findings of fact. Initially, the judge found that "the opening of the bag and exposing its contents was a scheme thoughtfully and knowingly carried out by the exercise of Riddick's free will, unfettered by coercion in any way."²⁶⁹ That consent was limited in nature in that while it allowed the officers to peer into the bag's interior, it did not include consent for a physical invasion into the bag.²⁷⁰ Based on the relevant testimony, the lower court likewise concluded that the mere presence of the spoon was insufficient to give the officer probable cause to believe that Riddick was engaged in the illegal drug trade.²⁷¹ It was only after the spoon

262. *Id.*

263. *Id.*

264. *Id.* at 1242-44.

265. *Id.* at 1244.

266. *Riddick*, 571 A.2d at 1244.

267. *Id.*

268. *Id.* at 1251.

269. *Id.* at 1250.

270. *Id.* at 1250.

271. *Riddick*, 571 A.2d at 1250.

was removed from the bag's interior and examined closely, that it became readily apparent to the police officer that the residue was from a dangerous controlled substance.²⁷² In the lower court's opinion, those facts satisfied the requisite elements of the plain view exception, justifying the arrest of Riddick, and the seizure of the dangerous controlled substances.²⁷³ While the court of appeals acquiesced in the trial judge's factual findings, it rejected the legal reasoning, and concluded that the plain view doctrine was inapplicable in this case.²⁷⁴

Distilling the discussions in a myriad of Supreme Court decisions, the court listed what were then the three requirements for a plain view seizure. They are described as follows:

- (1) The police officer must lawfully make an *initial intrusion* or otherwise properly be in a position from which he can view a particular area.
- (2) The officer must discover incriminating evidence *inadvertently*, which is to say, he may not know in advance the location of certain evidence or contraband and intend to seize it, relying on the plain view doctrine only as a pretext.
- (3) It must be *immediately apparent* to the police that the items they observe may be evidence of a crime, contraband, or otherwise subject to seizure.²⁷⁵

With respect to the third element, the court explained that the phrase "immediately apparent" has been interpreted by the Supreme Court to mean that the intruding officer must have at least probable cause to believe that the item he seeks to see is associated with some criminal conduct.²⁷⁶ That had long been the position of Maryland's appellate courts.²⁷⁷

Analyzing the sequence of events in the interview room in light of this background, the court concluded that the first two requirements were clearly satisfied.²⁷⁸ Inasmuch as the trial judge had concluded that Riddick knowingly and voluntarily exposed the interior of his bag to the officers present, the "initial intrusion" of the viewing officer "namely his merely looking into

272. *Id.* at 1250-51.

273. *Id.*

274. *Id.* at 1251.

275. *Id.* at 1245 (citations omitted). Under *Horton v. California*, 496 U.S. 128 (1990) inadvertency is no longer a requisite element.

276. *Riddick*, 571 A.2d at 1245-46.

277. *Id.* at 1245.

278. *Id.* at 1250.

the open bag, was lawful.”²⁷⁹ In addition, the incriminating silver spoon was discovered inadvertently inasmuch as the officer “did not know in advance that the spoon was in the bag and did not intend to seize it, using the ‘plain view’ doctrine only as a pretext.”²⁸⁰ Thus, with respect to these two elements, the appellate court agreed with the trial judge.

However, the appellate court concluded that the third requirement had not been met.²⁸¹ The court found that the officer peering into Riddick’s bag had only a “mere suspicion” that the spoon constituted evidence of some crime.²⁸² The police officer developed the requisite probable cause only after removing the spoon and examining it more closely.²⁸³ Consequently, the plain view exception could not justify the interference with Riddick’s possession, namely the spoon, because prior to that seizure the officer had only a mere suspicion, and not probable cause that Riddick’s bag contained an illegal substance.

Apparently, if the peering officer had probable cause prior to the physical intrusion into Riddick’s bag, the court would have condoned the seizure. That result, however, is untenable. Riddick enjoyed a reasonable expectation of privacy in the contents of his belongings. While the opening of the bag, and its exposure to public scrutiny, allowed for a visual examination of its interior and contents, it in no way constituted an invitation to rummage about in the interior. Thus, even with adequate probable cause on the part of the peering officer, there would be no legal justification for physically intruding into Riddick’s sphere of privacy. Where a police officer, from a public vantage point, sees incriminating evidence in a private environment exposed to public scrutiny, that view, in and of itself, does not allow, absent exigent circumstances, a physical intrusion into the private sphere of privacy. Similarly, the police officer’s observation of what would constitute incriminating evidence would not justify a warrantless entry.

Both the trial court and the Court of Appeals of Maryland were nevertheless of the opinion that a view from a public van-

279. *Id.*

280. *Id.* at 1251.

281. *Riddick*, 571 A.2d at 1251.

282. *Id.* at 1250-51.

283. *Id.* at 1250.

tage point would satisfy the initial intrusion element contemplated by the plain view doctrine. Thus, the appellate court determined that this element is satisfied when the police officer makes either "an initial intrusion" or he is "in a position from which he can view a particular area."²⁸⁴ The view of the police officer may be perfectly legitimate, but it does not concomitantly trigger the plain view exception for there has been no lawful constitutional intrusion.

The court then makes the identical error in its analysis of the given facts. It reasoned that the prior justified intrusion requirement was met by the officers "looking into the open bag."²⁸⁵ Again, that observation was perfectly justified in light of Riddick's specific consent. He did not, however, consent to a physical intrusion. In effect, this court would allow what amounts to open view to justify an intrusion into a constitutionally-protected area. That is not only incorrect but is likewise contrary to earlier Maryland decisions on the subject.

(ii) *Hippler v. State*

A few months after *Riddick* the Court of Special Appeals of Maryland, in *Hippler v. State*,²⁸⁶ may have misapplied the prior justification element. A police officer encountered Hippler while in the process of serving a search warrant for dangerous controlled substances.²⁸⁷ He was preparing to move temporarily into a residence listed in the warrant and happened to be at the time installing tile in the basement.²⁸⁸ Entering the residence the police officer detected the powerful odor of PCP, phencyclidine.²⁸⁹ Thus, when he entered the basement and observed Hippler, he asked him to "take a prone position against the wall."²⁹⁰ Hippler complied.²⁹¹ The officer immediately noticed a red cap or top, which he believed to be that of either a vanilla extract or food coloring bottle, protruding from the right

284. *Id.* at 1245.

285. *Id.* at 1250.

286. 574 A.2d 348 (Md. Ct. Spec. App. 1990).

287. *Id.* at 349.

288. *Id.*

289. *Id.*

290. *Id.*

291. *Hippler*, 574 A.2d at 349.

front pocket of Hippler's pants.²⁹² As soon as he saw the red cap, the officer later testified, he was quite certain that it was an extract bottle used to carry liquid PCP.²⁹³ Based on what he saw and smelled he removed the bottle from Hippler's pocket, believing that it in fact contained PCP.²⁹⁴ A subsequent analysis confirmed his suspicion.²⁹⁵

In Hippler's trial on a controlled dangerous substance charge, Hippler objected to the admission of the extract bottle, claiming that its warrantless seizure was unconstitutional. A three judge appellate panel rejected the argument, finding that the plain view doctrine condoned the police action.²⁹⁶ The issue in the opinion was whether or not there was probable cause to believe that the bottle in Hippler's pocket contained an illegal substance.²⁹⁷ The panel decided that the valid initial intrusion requirement easily was met "since the officers had obtained a warrant to enter the house."²⁹⁸ That reasoning is not sound. With respect to incriminating items discovered in the residence, the initial entry would constitute the requisite valid constitutional intrusion. However, entry into the premises alone would in no way justify invasion of Hippler's person. What the police officers saw in Hippler's pocket from their vantage point in the residence was no more than open view and therefore would not justify a search of Hippler's person.

On the other hand, while the court did not so specifically reason, the facts may provide a basis for a valid plain view seizure. If the scenario had been one where the police officer had not yet made a valid constitutional intrusion, nor was he at that time authorized to make such an entry, it would amount to open view. However, what took place was that the officer either was securing Hippler or already searching him when he came upon the bottle of contraband.²⁹⁹ It was not, therefore, the officer's observation which authorized the constitutional invasion.

292. *Id.*

293. *Id.* 349-50.

294. *Id.* at 350.

295. *Id.*

296. *Hippler*, 574 A.2d at 350-51.

297. *Id.*

298. *Id.* at 351.

299. *Id.* at 351-52.

He already was engaged in a valid constitutional intrusion when he made his observation.³⁰⁰

VI. Conclusion

In the last two decades, the Supreme Court of the United States has rendered several major decisions bearing on the plain view doctrine.³⁰¹ Much earlier uncertainty has been clarified. Plain feel, a concept closely akin to plain view now has been recognized.³⁰² What remains problematic are applications of Supreme Court decisions. The probable cause element with respect to both plain view and plain feel is often applied inconsistently. The most elusive, and oftentimes misunderstood, element is prior justification. It is the hope of this author that this piece will provide clarification and guidance when navigating this sometimes murky area of the law.

300. There may be a second justification for the result in *Hippler*. As a general proposition where police have probable cause to effect an arrest, they may conduct a search of the arrestee even prior to the formal arrest. *Rawlings v. Kentucky*, 448 U.S. 98, 110-11 (1980). Hence, based on the police observation there was probable cause to believe that *Hippler* was in possession of contraband. That probable cause gave them authority to arrest *Hippler*. Had the police made the arrest, the search incident thereto would have been valid. Given that satisfactory probable cause, they likewise were permitted to search moments before the actual arrest – making introduction of that contraband permissible.

301. See e.g., *Arizona v. Hicks*, 480 U.S. 321 (1987) (clarifying the “immediately apparent” standard as meaning probable cause on the part of law enforcement authorities that the item revealed is in some way incriminating); *Horton v. California*, 496 U.S. 128, 146 (1990) (the plain view doctrine does not require that the find be inadvertent); see also *supra* notes 4-32, 111-29 and accompanying text.

302. *Minnesota v. Dickerson*, 508 U.S. 366 (1993); see also *supra* notes 63-88 and accompanying text.