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“PLAIN VIEW”—ANYTHING BUT PLAIN: COOLIDGE DIVIDES THE LOWER COURTS

In *Coolidge v. New Hampshire*,¹ the United States Supreme Court rejected the contention that evidence obtained by the search of an impounded car² was admissible under the plain view exception³ to the

1. 403 U.S. 443 (1971).

2. Petitioner Coolidge had become a suspect in the murder of a 14-year-old girl whose body was found by the side of a highway, shot and stabbed to death. After learning that the petitioner had been away from home the evening of the girl's disappearance, the police questioned him and enough evidence was obtained for the issuance of search warrants and an arrest warrant. The same day that Coolidge was arrested at his home and taken into custody, his wife was informed that their two cars which were parked in the driveway had been impounded. The cars were towed to the police station where two days later a search of one of them was conducted. Searches of the car were conducted again a year later in January, 1965, and in April, 1965. Vacuum sweepings of the car taken in these three searches helped establish that the victim had been in one of Coolidge's cars. *Id.* at 445-48.

The Supreme Court first held that the warrants signed by the State Attorney General who had conducted the investigation and who prosecuted Coolidge at the trial were defective because they had not been issued by a “neutral and detached magistrate.” *Id.* at 453. The state was therefore forced to attempt to bring the searches within the exceptions to the warrant requirement developed for searches of automobiles (*see note 7 infra*) and for searches incident to arrest (*see note 6 infra*), as well as within the plain view exception.

3. In the past, the term “plain view” has been applied to three visually similar but factually distinct situations which are often confused in discussions of the plain view doctrine. The first situation is a non-intrusive visual observation where evidence is in “open view” and seizable in an area that is not constitutionally protected, such as a city street or an open field. *See, e.g., Hester v. United States*, 265 U.S. 57, 59 (1924). Another situation is the pre-intrusion observation of evidence in open view inside a constitutionally protected area such as a house or auto from a vantage point outside that area. This visual observation is not a search. It furnishes probable cause but does not alone justify an intrusion. *See, e.g., Brown v. State*, 292 A.2d 762, 768 (Md. Ct. Spec. App. 1972). One example was pointed out in Kuipers, *Suspicious Objects, Probable Cause, and the Law of Search and Seizure*, 21 DRAKE L. REV. 252, 266 (1972):

Very frequently a constitutionally seizable object is observed in plain view within a motor vehicle. Once probable cause is shown, immediate warrantless seizure of the item is usually permissible, since exigent circumstances in the form of mobility are almost always present.

In order to avoid confusion, the court in *Scales v. State*, 284 A.2d 45, 47 n.1 (Md. Ct. Spec. App. 1971), suggested that other phrases, such as “open to public gaze,” be used in the non-intrusive situation.

The third or “true” plain view situation refers to a post-intrusion observation in which a prior, valid intrusion has been extended to those objects in plain view from a legitimate viewing point. It is this third situation with which *Coolidge* and this Comment are concerned.

warrant requirement of the fourth amendment.⁴ While Justice Stewart's plurality opinion⁵ contains important discussions of other exceptions to the warrant requirement, *i.e.*, searches incident to arrest⁶ and

4. U.S. CONST. amend. IV provides:

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

In discussing the rationale for the plain view exception, Justice Stewart emphasized the constitutional protections served by the warrant requirement. "First, the magistrate's scrutiny is intended to eliminate altogether searches not based on probable cause." 403 U.S. at 467. The second objective is to protect against general, exploratory rummaging through a person's belongings by limiting the searches as much as possible. The plain view doctrine does not conflict with the first objective since plain view does not occur unless a valid search is already underway. The doctrine is also consistent with the second objective since, given the initial intrusion, the search is not converted into a general or exploratory one merely by the seizure of an object in plain view. *Id.*

5. Only Justices Douglas, Brennan, and Marshall concurred in Part II-C of Justice Stewart's opinion which contains the discussion of plain view. Justice Harlan concurred with Parts I, II-D and III. Chief Justice Burger joined in Part III and filed a concurring and dissenting opinion. Justice Black, joined by Chief Justice Burger and Justice Blackmun, filed a concurring and dissenting opinion in a portion of Part I and in Parts II and III. Justice White filed a concurring and dissenting opinion, in which Chief Justice Burger joined. Because Part II-C was signed by only four of the Court's members, its authority has been questioned. See notes 136-40 and accompanying text *infra*.

6. The State's first theory in support of the warrantless seizure and search of the car was that it was incident to a valid arrest. Since the events took place before *Chimel v. California*, 395 U.S. 752 (1969), which restricted the scope of a search incident to arrest to the arrestee's person and the area within his immediate control, the Court applied the standard of *United States v. Rabinowitz*, 339 U.S. 56 (1950), that a warrantless search incident to arrest could extend to the area considered to be in the "possession" or under the "control" of the person arrested. The Court pointed out that even under this standard "a lawful pre-*Chimel* arrest of a suspect outside his house could never by itself justify a warrantless search inside the house." 403 U.S. at 456. It held that the result would be no different if, as in *Coolidge*, the arrest was made inside the house and the search was made outside. Furthermore, even if, for the sake of argument, the police could have searched the car at the time of arrest, they "could not legally seize the car, remove it, and search it at their leisure without a warrant." *Id.* at 457, citing *Preston v. United States*, 376 U.S. 364 (1964). Thus, the search-incident doctrine could not be used to sustain the search.

The relationship between the standards set in *Coolidge* for plain view and those set in *Chimel* for a search incident to arrest raises some important questions. In *Chimel*, the Court limited the scope of a search incident to arrest to "a search of the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." 395 U.S. at 763. The Court in *Coolidge* pointed out that the "plain view" exception was not inconsistent with *Chimel*, for when

the arresting officer inadvertently comes within plain view of a piece of evidence, not concealed, although outside of the area under the immediate control of the arrestee, the officer may seize it, so long as the plain view was obtained in the course of an appropriately limited search of the arrestee.

searches of movable vehicles,⁷ the opinion's discussion of the plain view exception⁸ has also been the subject of some controversy.⁹ With the

403 U.S. at 465 n.24. Various problems arise when police take a cursory look around other parts of a house or building for suspects or accomplices. Although these areas are outside the immediate control of the arrestee and thus seemingly beyond the scope of searches permitted by *Chimel*, some courts have justified such cursory intrusions as necessary to police safety. If the police see an incriminating object in plain view during the course of this quick inspection, may it be seized? Most courts have answered affirmatively.

In *United States v. Broomfield*, 336 F. Supp. 179 (E.D. Mich. 1972), agents of the Bureau of Narcotics and Dangerous Drugs went to the home of the defendants. Outside of the house they arrested one defendant who then indicated that he wished to go inside. Upon entering, the agents "secured the house" by looking through all of the rooms for possible accomplices. While looking into a walk-in closet, one agent saw several handguns and long guns. There was also a small shoe box containing something which appeared to be marijuana on a vanity dresser. The seizure of the marijuana was said to be justified under the plain view doctrine since there were "exigent circumstances" which would allow the agents to check the whole house for possible accomplices. *Id.* at 184-85. The court considered such factors as the prior criminal record of the defendant which indicated a propensity for violence and the credibility of the police witnesses.

Similarly, in *People v. Block*, 6 Cal. 3d 239, 499 P.2d 961, 103 Cal. Rptr. 281 (1971), the court upheld the search of some upstairs bedrooms of a house in which the defendants were arrested on the first floor. The court emphasized:

A corollary of the "plain sight" rule, and one which is pertinent to the instant case, is that "During a lawful search of premises for persons believed to be in hiding, police officers may seize contraband evidence 'in plain sight.' . . . Under such circumstances there is, in fact, no search for evidence."

Id. at 243, 499 P.2d at 963, 103 Cal. Rptr. at 283. The court, though, was cautious in pointing out that the facts and circumstances of some cases will not justify "a general exploratory search for 'possible suspects.'" *Id.*

The police officers in *State v. Vineyard*, 497 S.W.2d 821 (Mo. Ct. App. 1973), also believed that other persons might be hiding in a house where one of the suspects was arrested. Thus, the court held that they had a right to conduct a search of the premises and that the seizure of stolen shirts in plain view was lawful. *Id.* at 826. For an extensive discussion of this issue, see Note, *Search and Seizure Since Chimel v. California*, 55 MINN. L. REV. 1011, 1021-24 (1971).

7. The second theory put forth by the state was that, under *Carroll v. United States*, 267 U.S. 132 (1925), and *Chambers v. Maroney*, 399 U.S. 42 (1970), probable cause alone enabled police to search a car at the scene or even after transporting it to the police station. 403 U.S. at 458. However, the Court made clear that the automobile exception did not apply to the facts of *Coolidge* for there was

no alerted criminal bent on flight, no fleeting opportunity on an open highway after a hazardous chase, no contraband or stolen goods or weapons, no confederates waiting to move the evidence, not even the inconvenience of a special police detail to guard the immobilized automobile. In short, by no possible stretch of the legal imagination can this be made into a case where "it is not practicable to secure a warrant," . . . and the "automobile exception," despite its label, is simply irrelevant.

Id. at 462 (citation omitted).

8. 403 U.S. at 464-73.

9. See, e.g., LaFave, *Warrantless Searches and the Supreme Court: Further Ventures Into the "Quagmire,"* 8 CRIM. L. BULL. 9 (1972) [hereinafter cited as LaFave]; Landynski, *The Supreme Court's Search for Fourth Amendment Standards: The Extra-*

enunciation of the criteria for the application of the doctrine, the Court arguably ended¹⁰ a long history¹¹ of uncertainty as to the meaning of

ordinary Case of Coolidge v. New Hampshire, 45 CONN. B.J. 330, 336-38, 349-53 (1971) [hereinafter cited as Landynski]; *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 243-50 (1971) [hereinafter cited as *The Supreme Court*]; Comment, *Constitutional Law—Search and Seizure—Coolidge v. New Hampshire*, 6 SUFFOLK U.L. REV. 695, 699-700, 703 (1972) [hereinafter cited as *Search and Seizure*]; 1972 DICK. L. REV. 333, 338-41.

10. *But see* note 5 *supra* and notes 136-40 *infra* and accompanying text.

11. Before *Coolidge*, plain view had been a descriptive phrase which was "intimately linked with the search-incident exception." 403 U.S. at 482. *See* note 6 *supra*. The permissible extent of a search and seizure incident to arrest had alternated over a long period between broad and limited scopes. In the prohibition era case of *Marron v. United States*, 275 U.S. 192 (1927), officers executing a warrant to search for and seize contraband liquor seized a ledger from a closet in which they were searching for the liquor. The Court upheld the seizures as incident to the lawful arrest: "The authority of officers to search and seize the things by which the nuisance was being maintained extended to all parts of the premises used for the unlawful purpose." *Id.* at 199. The Court did not discuss a plain view exception to the warrant requirement, perhaps because any discussion of plain view would be superfluous in view of the virtually unlimited scope the *Marron* Court gave to a search incident to arrest. *See, e.g., Brown v. State*, 292 A.2d 762, 766 n.17 (Md. Ct. Spec. App. 1972) where the court observed that

the very notion of "plain view" is completely moot during periods of broad scope of a "search incident," since the more extensive and intensive right to make a thorough search of an entire premises subsumes the lesser right to make a mere seizure of those things in "plain view" therein.

Later, though, the Court reversed itself. In *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931), an officer had no warrant to search an office but did so after arresting the defendant. In *United States v. Lefkowitz*, 285 U.S. 452 (1932), officers with nothing more than an arrest warrant made an extensive search of the arrestee's business. In each case, the Court purported to distinguish *Marron* by stating that the items in *Marron* were in plain view and were seized as an incident of the arrest rather than in a general search. 285 U.S. at 465; 282 U.S. at 358. In each case, as Justice Stewart points out, the Court emphasized the "plain view" aspect of *Marron* "in order to avoid the implication that arresting officers are entitled to make an exploratory search of the premises where the arrest occurs." 403 U.S. at 470 n.26.

The next important case in "search incident" law was *Harris v. United States*, 331 U.S. 145 (1947), which virtually ignored *Go-Bart* and *Lefkowitz* in holding that a search may extend to the entire premises where the arrest is made. As in *Marron*, plain view was not mentioned since this notion was unnecessary in view of the Court's "broad scope" approach to searches incident to arrest. However, Justice Murphy's dissent foreshadowed the plain view doctrine by referring to a "plain sight" seizure:

Seizure may be made of articles and papers on the person of the one arrested. And the arresting officer is free to look around and seize those fruits and evidences of crime which are in plain sight and in his immediate and discernible presence.

Id. at 186 (citations omitted). Then in *Trupiano v. United States*, 334 U.S. 699 (1948), the arrest of a defendant operating an illegal distillery was held valid since the agents saw the defendant operating the distillery. However, the seizure of the still, although it was in plain view, was held invalid. The Court pointed out that the agents had known of the existence of the seized still long before the seizure and that the seizure of the still was one of the main purposes of the raid. *Id.* at 705-07. The government

plain view. The opinion held that a seizure is justified by the plain view exception only when the police have a prior justification for an intrusion,¹² when the incriminating nature of the object seized is immediately apparent,¹³ and when its discovery is inadvertent.¹⁴ This Comment focuses on the lower courts' attempt to interpret and apply two of the requirements—"immediately apparent" and "inadvertence."

I. "IMMEDIATELY APPARENT"

Even if an object is in plain view, it may not be seized unless its incriminating nature is immediately apparent.¹⁵ The extension of the prior justification for an intrusion

is legitimate only where it is immediately apparent to the police that they have evidence before them; the "plain view" doctrine may not be used to extend a general exploratory search from one object to an-

tried to argue that, based upon a long line of cases,

an arresting officer may look around at the time of the arrest and seize those fruits and evidences of crime or those contraband articles which are in plain sight and in his immediate and discernible presence.

Id. at 704. However, the Court concluded that no reason had been shown why the agents could not have obtained a search warrant. *Id.* at 708. Thus, *Trupiano* was the first case which stated the requirement of "inadvertence" in fourth amendment law.

The dissent in *Trupiano*, however, rejected this requirement:

[W]here law-enforcement agents have lawfully gained entrance into premises and have executed a valid arrest of the occupant, the vital rights of privacy protected by the Fourth Amendment are not denied by seizure of contraband materials and instrumentalities of crime in open view or such as may be brought to light by a reasonable search.

Id. at 714. It is interesting to note that this was the same argument employed by Justice White in his *Coolidge* dissent. 403 U.S. at 515.

Trupiano was in turn overruled in *United States v. Rabinowitz*, 339 U.S. 56, 66 (1950), which held that the test was "not whether it is reasonable to procure a search warrant, but whether the search was reasonable." Justice Frankfurter's *Rabinowitz* dissent laid the groundwork for the parameters of a search incident to arrest which was finally adopted in *Chimel v. California*, 395 U.S. 752 (1969). In his dissent, he distinguished between the permissibility of a seizure and the permissible scope of a search in "search incident" law:

This progressive distortion is due to an uncritical confusion of (1) the right to search the person arrested and articles in his immediate physical control and (2) the right to seize visible instruments or fruits of crime at the scene of the arrest with (3) an alleged right to search the place of arrest. It is necessary in this connection to distinguish clearly between prohibited searches and improper seizures. It is unconstitutional to make an improper search even for articles that are appropriately subject to seizure when found by legal means. . . . Thus, the seizure of items properly subject to seizure because in open view at the time of arrest does not carry with it the right to search for such items.

339 U.S. at 75. A seizure of items in plain view, then, was not a search.

12. 403 U.S. at 466.

13. *Id.*

14. *Id.* at 469-71.

15. *Id.* at 466.

other until something incriminating at last emerges.¹⁶

The lower courts have experienced many difficulties with this aspect of the opinion. First, there is the problem of determining whether or not an object is in plain view. For example, what if the object is contained in a paper bag or is a private paper which has to be read or examined more closely in order for its incriminating nature to be revealed?¹⁷ Second, there is the problem of determining the degree of "apparency" (a suspicion, probable cause, or virtual certainty) necessary in order for objects to be seized lawfully under the plain view doctrine.

A. What is "Plain View"?

Often law enforcement officers will see a container which prevents them from actually seeing the contraband that they believe is contained therein. In order to bring such situations within the plain view doctrine, some courts have introduced the phrase "constructive sight." The Tenth Circuit Court of Appeals first did so in *United States v. Welsch*.¹⁸ There the defendant had opened a suitcase full of narcotics in the presence of two undercover agents who then took a sample, ostensibly to test it before buying.¹⁹ Twenty minutes later, after determining that the sample contained narcotics, the agents returned to the room.²⁰ They arrested the defendant and pulled the suitcase out from underneath the bed where it could not be seen during the arrest.²¹ The court in upholding the seizure concluded that the case was "within the Coolidge-Chimel 'plain sight' space limitations although only in constructive sight."²² The Tenth Circuit apparently invented the term "constructive sight" to cover the facts of the case,

16. *Id.*

17. See *Stanley v. Georgia*, 394 U.S. 557, 571-72 (1969) (concurring opinion). Justice Stewart maintained in a concurring opinion joined by Justices Brennan and White that police officers who discovered and seized motion pictures while conducting a search pursuant to a valid warrant had acted unlawfully since the films were not listed in the warrant:

This is not a case where agents in the course of a lawful search came upon contraband, criminal activity, or criminal evidence in plain view. For the record makes clear that the contents of the films could not be determined by mere inspection.

Id. at 571 (footnote omitted). The majority in *Stanley* decided the case on first amendment grounds and thus did not discuss the problem of the seizure per se. *Id.* at 568.

18. 446 F.2d 220 (10th Cir. 1971).

19. *Id.* at 221.

20. *Id.*

21. *Id.* at 222.

22. *Id.* at 223.

for although the contents of the suitcase and even the suitcase itself were not visible,²³ the agents had every reason to believe that the narcotics they had previously seen were still in the suitcase.²⁴

Concededly the *Welsch* case arose from difficult and perhaps unique facts, but the court facilely transformed *Coolidge's* limited and carefully confined plain view exception²⁵ to the warrant requirement into a "no view" exception. The insertion of the cosmetic label of "constructive sight" does not diminish the peril to the *Coolidge* rule. This was pointed out in *United States v. Brewer*²⁶ where the constructive sight concept was criticized:

The real danger in supplementing the "plain sight" exception with the . . . "constructive sight" approach is that it can prove too much. If the informant in this case had told the agents that the marijuana was in a desk in the bedroom, or a closet in the bedroom, or just in the bedroom itself, and the agents could see each of these three things from the point where they arrested Brewer, then a seizure and search of the desk, closet or room would seemingly be permissible and the seizure of any evidence thereby found would have to be approved. Thus, the "plain view" and *Chimel* exceptions would be expanded beyond apparent limits.²⁷

Although some courts have not explicitly adopted a "constructive sight" doctrine, they seem to be following the *Welsch* approach.²⁸ For example, in *United States v. Rothberg*,²⁹ the police arrested and searched the defendant in his living room.³⁰ They then took him into

23. *Id.* at 222.

24. *Id.*

25. See text accompanying notes 12-14 *supra*.

26. 343 F. Supp. 468 (D. Hawaii 1972). In this case, the police arrested the defendant at his door. From this vantage point they could see two footlockers in the bedroom. It was only when the lockers were opened that marijuana came into view. The government argued that "because the footlockers were in plain view and the agents were told that they contained marihuana, ergo the marihuana should be considered as if in fact it was in plain view." *Id.* at 474. The court distinguished *Welsch* since in that case the agent's knowledge of the object seized was based upon firsthand observation, there was a short time lapse involved and the suitcase in *Welsch* was "within the ambit of *Chimel*." *Id.*

27. *Id.* at 474 n.4.

28. In *United States v. Candella*, 469 F.2d 173, 175 (2d Cir. 1972), the court held that the defendants had consented to the seizure of guns contained in a box. In addition, however, the guns were admissible because

in practical effect they were in "plain view" of the agents. . . . Here, once the appellee told the agents where the guns were, they were no longer "concealed" and it was reasonable for the agents to seize them.

Id.

29. 345 F. Supp. 1331 (E.D.N.Y. 1971).

30. *Id.* at 1333.

the kitchen where a suitcase was seen near the kitchen door.³¹ The arresting officer, who had been told by an informer before entering the home of the defendant that the suitcase contained hashish,³² seized the suitcase,³³ opened it,³⁴ and found the hashish.³⁵ The court held that the plain view exception applied since the officers had "definite knowledge"³⁶ that the suitcase contained hashish. Holding that the search and seizure was proper under *Coolidge*, the court maintained:

To permit the officers to seize that suitcase but not to allow them to open it when they knew that it contained hashish and did not have time to obtain a search warrant seems to this court an untenable distinction.³⁷

Another court employed a similar approach in determining when an object is in plain view under the rubric of "totality of the circumstances." In *State v. Palmer*,³⁸ a paper bag "challenged" a police officer's attention.³⁹ The totality of the circumstances, such as the defendant's fumbling with the paper bag⁴⁰ and the impracticability of obtaining a search warrant,⁴¹ furnished probable cause for the seizure of the contents of the paper bag.⁴² The court stated that it was "a case of satisfying a lawful curiosity arising in the course of performance of [the officer's] duty."⁴³ Such reasoning, however, ignores the *Coolidge* emphasis in discussing the "immediately apparent" requirement that "the 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges."⁴⁴ This approach also overlooks the simple fact that it is the container, and not its contents, that is in plain view. The linguistic bootstrapping advanced by phrases such as "totality of the circumstances" and "constructive sight" cannot obscure the obvious: the

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 1334.

37. *Id.* at 1334-35. Even though the court believed the seizure was proper under *Coolidge*, it was uncertain of the search. It concluded, though, that even if the *Coolidge* exception was inapplicable, the search had been consented to by the defendant. *Id.* at 1335.

38. 487 P.2d 627 (Wash. Ct. App. 1971).

39. *Id.* at 630.

40. *Id.*

41. *Id.*

42. *Id.* at 631.

43. *Id.*

44. 403 U.S. at 466.

Welsch and *Palmer* courts simply evaded the plain view requirement. One can but wonder if they would employ even more picturesque evasions if confronted with slightly more complex facts. Had the *Welsch* suitcase contained in turn a briefcase, for example, the language might have been enriched by a term such as "constructive constructive sight." On the other hand, had the suitcase been found in a closet, it would seem not too difficult to classify the closet, if not the very room, as just one more container in "constructive sight."

Some courts have rejected the "totality of the circumstances" and "constructive sight" approaches for reasons such as the above. For example, in *Erickson v. State*,⁴⁵ the Alaska Supreme Court held that the plain view exception did not apply even when a private citizen said that he had seen marijuana inside a suitcase which he delivered to the police.⁴⁶ The court pointed out that "the contraband was not in plain view so as to obviate a search."⁴⁷ Similarly, in *United States v. Babich*,⁴⁸ the court held that marijuana was not in plain view even though officers could smell it.⁴⁹ The California Supreme Court has vacillated on the issue. The court first took a strict approach to the problem of plain view and closed containers. In *People v. Marshall*,⁵⁰ the police had heard from an informant that marijuana in a brown paper bag was to be found in the defendant's apartment.⁵¹ Without a search or arrest warrant, but with probable cause to arrest the defendant,⁵² the officers picked the lock and entered the apartment.⁵³ No one was in the apartment,⁵⁴ but "[o]ne officer detected a sweet odor similar to that of the marijuana defendant had given the informant."⁵⁵ The marijuana was found in a closet inside a closed brown paper bag.⁵⁶ The court rejected the state's contention that the odor, together with the informant's report, gave the officer a justification for the seizure without a warrant:

This contention overlooks the difference between probable cause to believe contraband will be found, which justifies the issuance of a

45. 407 P.2d 508 (Alas. 1973).

46. *Id.* at 513.

47. *Id.*

48. 347 F. Supp. 157 (D. Nev. 1972).

49. *Id.* at 160.

50. 69 Cal. 2d 51, 442 P.2d 665, 69 Cal. Rptr. 585 (1968).

51. *Id.* at 54, 442 P.2d at 667, 69 Cal. Rptr. at 587.

52. *Id.*

53. *Id.* at 55, 442 P.2d at 667, 69 Cal. Rptr. at 587.

54. *Id.*

55. *Id.*

56. *Id.*

search warrant, and observation of contraband in plain sight, which justifies seizure without a warrant. However strongly convinced officers may be that a search will reveal contraband, their belief whether based on the sense of smell or other sources, does not justify a search without a warrant.⁵⁷

The opinion went on to discuss why officers could rely on a sense of smell only to confirm an observation of visible contraband and not to justify the warrantless seizure of invisible contents:

To hold, however, that an odor, *either alone or with other evidence* of invisible contents can be deemed the same as or corollary to plain view, would open the door to snooping and rummaging through personal effects. Even a most acute sense of smell might mislead officers into fruitless invasions of privacy where no contraband is found.⁵⁸

Thus, *Marshall* clearly held that the odor, even if it was accompanied by other evidence, such as the knowledge of the contents gained beforehand from the informant, was not the equivalent of plain view.⁵⁹

However, the California Supreme Court has seemingly overruled *Marshall* in a more recent decision, *Guidi v. Superior Court*.⁶⁰ There police officers had been informed that the suspects were at an apartment with twenty bricks of hashish wrapped in plastic bags inside a

57. *Id.* at 57, 442 P.2d at 668, 69 Cal. Rptr. at 558. The court continued:

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers.

Id. at 57, quoting *Johnson v. United States*, 333 U.S. 10, 13-14 (1948).

58. 69 Cal. 2d at 59, 442 P.2d at 669-70, 69 Cal. Rptr. at 589-90 (emphasis added).

59. *Id.*

60. 10 Cal. 3d 1, 513 P.2d 908, 109 Cal. Rptr. 684 (1973). The opinion of the *Guidi* court (joined on this point by only three justices) disclaimed any overruling of *Marshall*:

Our decision in the instant case is based on grounds not raised or argued by the parties in *Marshall* and consequently not considered by the court in its opinion therein—the power of the police to seize as “mere evidence” a bag previously described as having borne contraband, when such a bag is properly viewed in plain sight. To the extent that *People v. Marshall* is inconsistent with the views stated herein, it is no longer to be followed.

Id. at 17 n.18, 513 P.2d at 919 n.18, 109 Cal. Rptr. at 695 n.18 (citation omitted).

It would seem that this distinction is untenable, for *Marshall* specifically stated that “an odor, *either alone or with other evidence* of invisible contents is not ‘plain view.’” 69 Cal. 2d at 59, 442 P.2d at 669-70, 69 Cal. Rptr. at 589-90 (emphasis added). The “other evidence” category could presumably include an officer's prior knowledge of the contents of such a container. Thus, the distinction is not viable and the concurring

brown grocery bag.⁶¹ The police entered without an arrest or search warrant and arrested the suspects.⁶² One officer saw a shopping bag behind the kitchen counter and said that he became aware of the "distinctive odor of hashish."⁶³ The court reasoned that the bag itself would have been "relevant evidence of the presumably disputed fact that the accused had as alleged offered the drugs for sale."⁶⁴ However, the court did not uphold the seizure on this point alone. Instead, it considered the "total circumstances"⁶⁵ which included the prior knowledge of the bag gained by the officers,⁶⁶ the neatly folded appearance of the bag,⁶⁷ and the odor of hashish.⁶⁸ The court then held that all of these circumstances taken together made the seizure reasonable.⁶⁹

The court, though, recognized the dangers of such an approach and attempted to formulate a standard:

Where contraband is believed to be hidden among several items within a container, such as a suitcase or a dresser drawer, seizure of the container may well be more difficult to justify. The type of container which may reasonably be seized as evidence of a transaction involving narcotics is a container which reasonably appears to hold contraband and little else. Moreover, the less portable a container, the less subject it should be to warrantless seizure as evidence merely by virtue of its role as a container of contraband.⁷⁰

Surely the description of some containers as "less portable" is not a sufficiently definite test. How portable is a purse? Is a suitcase sufficiently "less portable" than a briefcase? It would seem that the very vagueness of the term commits the California court to a "totality of the circumstances" approach with the danger that the result will be, as Chief Justice Traynor warned in *Marshall*, "fruitless invasions of pri-

opinion which was signed by a total of four Justices, a majority of the court, was correct in calling for "a forthright overruling of *Marshall*" in light of the conclusion of the court's opinion. 10 Cal. 3d at 19, 513 P.2d at 922, 109 Cal. Rptr. at 698. Furthermore, since four of the seven Justices of the court signed the concurring opinion, *Marshall* is presumably overruled.

61. 10 Cal. 3d at 5, 513 P.2d at 910, 109 Cal. Rptr. at 686.

62. *Id.*

63. *Id.* Dr. Forest Tennant, a noted drug expert, stated that he could not smell hashish in an airtight container; only a dog or an extraordinary human could do so.

64. *Id.* at 14, 513 P.2d at 917, 109 Cal. Rptr. at 693.

65. *Id.* at 17, 513 P.2d at 919, 109 Cal. Rptr. at 695.

66. *Id.* at 16, 513 P.2d at 919, 109 Cal. Rptr. at 695.

67. *Id.*

68. *Id.* at 17, 513 P.2d at 919, 109 Cal. Rptr. at 695.

69. *Id.* at 16-17, 513 P.2d at 919, 109 Cal. Rptr. at 695.

70. *Id.* at 17-18, 513 P.2d at 920, 109 Cal. Rptr. at 696.

vacy."⁷¹

Problems similar to those encountered in the area of containers also arise when the object seized is a private paper⁷² that needs to be read or, at least, inspected closely in order for its incriminating nature to be apparent. In *Stanley v. Georgia*,⁷³ Justice Stewart's concurring opinion maintained that where police officers had a warrant to search for certain items and during the course of the search came upon some motion picture films not listed in the warrant, the films were unlawfully seized.⁷⁴

This is not a case where agents in the course of a lawful search came upon contraband, criminal activity, or criminal evidence in plain view. For the record makes clear that the contents of the film could not be determined by mere inspection.⁷⁵

Similarly, the contents of private papers cannot be determined unless the papers are read. The analogy to the *Stanley* motion pictures is clear, and, therefore, the seizure of such papers should not be upheld under the plain view doctrine.⁷⁶

The Wisconsin Supreme Court has, in effect, put limits on the right of officers to seize documents which have to be read before their inculpatory nature is revealed. In *State v. Pires*,⁷⁷ police officers received a report that the bodies of a child and a semi-conscious woman were to be found at defendant's address.⁷⁸ However, an ambulance had already left by the time the police arrived,⁷⁹ and no one was left at the home.⁸⁰ The officers began to search for victims and went into the bedroom finding no one.⁸¹ Later the officers went into the bedroom again and saw a clipboard with writing on it.⁸² Some of the pages on the clipboard contained the inculpatory statements of

71. See text accompanying note 58 *supra*.

72. For a discussion of what the concept "papers" includes, see Comment, *The Search and Seizure of Private Papers: Fourth and Fifth Amendment Considerations*, 6 Loy. L.A.L. Rev. 274, 301 (1973) [hereinafter cited as *Search*].

73. 394 U.S. 557 (1969).

74. *Id.* at 571-72.

75. *Id.* at 571.

76. As one commentator noted: "The idea that agents have the right to read a letter merely because it is in plain view is a dangerous extension of the plain view doctrine and a dangerous inroad on the particularity requirement of the Fourth Amendment." *Search, supra* note 72, at 298 n.140.

77. 201 N.W.2d 153 (Wis. 1972).

78. *Id.* at 155.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 156.

the defendant.⁸³ The trial court⁸⁴ and the Wisconsin Supreme Court⁸⁵ held that the second warrantless search was unconstitutional. Although the officers had a right to be in the room, the seizure was unlawful since it was "only after [the officer] picked the documents up and read them did he realize their contents."⁸⁶

A federal district court has also limited the seizure of papers that required close inspection and careful reading in order to establish them as evidence of criminal activity. In *In re Calandra*,⁸⁷ the police had a search warrant for bookmaking records and wagering paraphernalia.⁸⁸ They searched the offices of the company and found stock certificates and other records and forms.⁸⁹ The court held that the case was close to the facts discussed in Justice Stewart's concurring opinion in *Stanley v. Georgia*,⁹⁰ wherein the criminal nature of the evidence was not plainly apparent: "[O]nly after carefully examining each and every item in this drawer could the agents determine that they may be evidence of a criminal activity."⁹¹ On the other hand,

83. *Id.*

84. *Id.*

85. *Id.* at 159.

86. *Id.*

87. 332 F. Supp. 737 (N.D. Ohio 1971), *aff'd sub nom.*, *United States v. Calandra*, 465 F.2d 1218 (6th Cir. 1972), *rev'd on other grounds*, 414 U.S. 338 (1974). The United States Supreme Court did not discuss whether the search and seizure was unlawful since the government did not seek review of that issue.

88. 332 F. Supp. at 744.

89. *Id.* at 745.

90. *See* note 17 *supra*.

91. 332 F. Supp. at 745. Similarly, in *United States v. Henkel*, 451 F.2d 777 (3d Cir. 1971), police had a search warrant for a safe deposit box believed to contain money stolen during a bank robbery. At the same time the officers checked the serial numbers against a list of bills taken during another bank robbery. The court upheld the search:

Had the serial numbers been memorized by the agent, he would immediately have recognized the money as evidence of another crime in plain view. The mere fact that the numbers were recorded on a piece of paper in his pocket rather than on his memory does not control the validity of the search.

Id. at 781 (footnote omitted).

Another case in which the criminal nature of a seized paper was not plainly apparent is *People v. LaRocco*, 496 P.2d 314 (Colo. 1972), wherein an alleged forged driver's license and a blank license form were seized during the course of a search for various other items. The court held that, even if the license and form had been in plain view, the police had no way of knowing that they were evidence of criminal activity. *Id.* at 315-16.

Similarly, in *United States v. Smith*, 462 F.2d 456 (8th Cir. 1972), the court upheld the seizure of personal papers of the defendant discovered during the course of a search for other items specified in the warrant. The papers, it was argued, tended to show that defendant had control of the premises being searched. Again, the court did not consider the question of whether the officer had to read the papers in order to ascertain their use as evidence.

some cases have ignored the possibility of constitutional limitations on the seizure of private papers and are noteworthy only for their lack of discussion of the issue.⁹²

It is evident that a person's privacy could be easily threatened by the search and seizure of papers justified under the plain view doctrine. One commentator has suggested a solution:

Whatever the deficiencies of the plain view doctrine as applied to non-documentary items, its application to papers would appear to encourage continued exploratory searches through private papers. One means of guaranteeing that private papers will remain private is to limit the incentive for such searches by denying admittance to papers found in plain view. Such a limitation would not seriously hamper honest law enforcement since, even though a paper may be in "plain view," its contents ordinarily cannot be ascertained without close scrutiny.⁹³

Thus, the seizure of papers which must be read in order for their incriminating nature to be revealed should not be upheld under the plain view doctrine since it is not "immediately apparent to the police that they have evidence before them."⁹⁴

B. *The Quantum of Evidence Needed to Justify a Seizure*

The *Coolidge* Court seemed to assume that everyone would understand when the incriminating nature of an object was "immediately apparent." However, the interpretation of this standard has produced wide variations.⁹⁵ The standard has ranged from mere suspicion to probable cause to virtual certainty that an item has evidentiary value. Not all courts, though, have discussed this requirement, even when from the facts there is some doubt as to whether or not there was any "nexus" between the item and the crime.⁹⁶

92. See, e.g., *United States v. Leal*, 460 F.2d 385, 389 (9th Cir. 1972) (seizure of unendorsed traveller's checks seen in an open suitcase upheld without discussion of necessity to inspect checks to determine if incriminating); *State v. Fassler*, 503 P.2d 807, 813 (Ariz. 1972) (seizure of address book with name of defendant from office of co-defendant upheld without comment as to how officer knew it would contain defendant's name); *People v. Sirhan*, 7 Cal. 3d 710, 740, 497 P.2d 1121, 1141, 102 Cal. Rptr. 385, 405 (1972) (since defendant's objection to admission of notebooks and envelope was "on grounds other than that [they] were 'communicative' or 'testimonial' in nature," the court would not review it on appeal). See generally ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 1.03 (Tent. Draft No. 3, 1970).

93. *Search*, *supra* note 72, at 304.

94. 403 U.S. at 466.

95. See notes 97-126 *infra* and accompanying text.

96. See, e.g., *People v. Meneley*, 29 Cal. App. 3d 41, 55, 105 Cal. Rptr. 432, 436 (1972) (upholding seizure of clothing with no explanation of why police suspected the

The plain view doctrine has been used to justify the seizure of items that, although innocent-looking, are also "suspicion arousing." In *United States v. Hill*,⁹⁷ police officers saw defendant outside of a building on a deserted, industrial dead-end street.⁹⁸ The officers' suspicions were aroused,⁹⁹ and they arrested him.¹⁰⁰ At that point they saw some keys on the ground in plain view.¹⁰¹ They then opened the building's garage door with the keys and inside observed tires, batteries, and automobiles in a stripped condition.¹⁰² The court upheld the admission of the evidence at a probation revocation hearing¹⁰³ on the ground that defendant's actions, while not producing probable cause, did arouse suspicion.¹⁰⁴ The police, though, had no idea that the keys found in plain view could even be used to open the garage, and even after the garage door was opened, the "plain view" of the automobile parts gave the officers only "suspicion" that the items were stolen.¹⁰⁵ As the dissent pointed out, "the fact that the automobile parts were in 'plain view' once the door was opened, did not validate the seizure."¹⁰⁶ This unfortunate extension of the plain view doctrine is a clear violation of Justice Stewart's caveat in *Coolidge* that the plain view doctrine should not "be used to extend a general exploratory search from one object to another until something incriminating

clothing had been worn at the time of a murder or had any evidentiary value); *Caine v. Commonwealth*, 491 S.W.2d 824, 828 (Ky. Ct. App. 1973) (seizure of stolen wallet on defendant's table upheld even though it was unclear that police knew a wallet had been stolen at the time).

97. 447 F.2d 817 (7th Cir. 1971). Other cases which approved the seizure of items based on a suspicion that they constituted evidence or which at least adopted some standard that fell short of probable cause include: *United States v. White*, 463 F.2d 18, 21 (9th Cir. 1972) (in the course of executing search warrant for other items, FBI agents "saw" bottles of pills); *State v. Anderson*, 489 P.2d 722, 724 (Ariz. Ct. App. 1971) (policeman's "belief" that seeds in bottle were marijuana was sufficient for seizure); *People v. Shepherd*, 33 Cal. App. 3d 866, 109 Cal. Rptr. 388 (1973) (police officer observed debris "believed" to be marijuana and this belief entitled him to look more closely to confirm it); *Presley v. State*, 284 N.E.2d 526, 529 (Ind. Ct. App. 1972) (seizure of camera with the "belief" that it was stolen held lawful); *State v. Hoffman*, 190 S.E.2d 842, 849 (N.C. 1972) (gun was seized lawfully since it was a "suspicious object"); *Commonwealth v. Watkins*, 292 A.2d 505, 507 (Pa. Super. Ct. 1972) (police officer "suspected" that a vial and bottle had been used to cut and mix narcotics).

98. 447 F.2d at 817.

99. *Id.*

100. *Id.* at 818.

101. *Id.*

102. *Id.*

103. *Id.* at 819.

104. *Id.*

105. *Id.*

106. *Id.* at 821.

at last emerges."¹⁰⁷

The supreme courts of Idaho, Colorado, and Alabama, however, have rejected the *Hill* notion that a mere suspicion is sufficient to comply with the "immediately apparent" requirement. In *State v. Harwood*,¹⁰⁸ two defendants had met an Idaho conservation officer after they had been hunting one day. The officer, after talking to the defendants, formed a suspicion that the mountain goat which was in defendant's car had been killed outside the area in which hunting was permitted.¹⁰⁹ He then seized it.¹¹⁰ The court held that mere suspicion was insufficient¹¹¹ and that probable cause should be the standard:

"It is not enough that the officer suspects in good faith, his suspicion must be reasonable. . . . if contraband may be legally seized when the officer does not have reasonable grounds to believe it is such, it will lead to many interferences with property when the officer's groundless suspicions are wrong."¹¹²

Similarly, in *People v. LaRocco*,¹¹³ the Colorado Supreme Court affirmed the lower court's order to suppress a forged driver's license and blank license form seized during a search pursuant to a warrant for other items.¹¹⁴ At the time it was seized, the court pointed out that the license was merely suspected of being forged.¹¹⁵ Thus:

To countenance seizure of evidence not specified in the warrant and unrelated to the criminal matters under investigation would open wide the doors to general searches and seizures based upon mere suspicion but not upon probable cause as constitutionally required.¹¹⁶

Finally, in *Shipman v. State*,¹¹⁷ the Alabama Supreme Court held unlawful the seizure of plastic bags from the occupant of a car stopped by a police officer who observed the occupant shift the bags to his boot top since the action only aroused suspicion.¹¹⁸ The court empha-

107. 403 U.S. at 466.

108. 495 P.2d 160 (Idaho 1972).

109. *Id.* at 161.

110. *Id.*

111. *Id.* at 165.

112. *Id.* at 164, quoting *State v. Elkins*, 422 P.2d 250, 254-55 (Ore. 1966). In *Elkins*, a police officer found white pills on the person of the arrestee during the course of a search incident to arrest. *Id.* at 251. He only suspected that they were contraband. *Id.*

113. 496 P.2d 314 (Colo. 1972).

114. *Id.* at 315.

115. *Id.* at 316.

116. *Id.*

117. 282 So. 2d 700 (Ala. 1973).

118. *Id.* at 704.

sized what the consequences of a standard of "mere suspicion" would be:

It would open the door to unreasonable confiscation of a person's property while a minute examination of it is made in an effort to find something criminal. . . . Ex post facto justification of a seizure made on mere groundless suspicion is totally contrary to the tenets of the Fourth Amendment.¹¹⁹

Furthermore, the court noted that one of the greatest dangers lies in the possibility that an accused would be held until a determination could be made as to whether or not an object was actually contraband or stolen.¹²⁰

Many other courts have adopted the standard of "probable cause" or "reasonable cause" in the determination of when it is immediately apparent that an object is incriminating.¹²¹ These courts have rea-

119. *Id.*

120. *Id.*

121. In addition to *Shipman v. State*, 282 So. 2d 700 (Ala. 1973) (discussed at text accompanying notes 117-20 *supra*), *State v. Harwood*, 495 P.2d 160 (Idaho 1972) (discussed at text accompanying notes 108-12 *supra*), and *People v. LaRocco*, 496 P.2d 314 (Colo. 1972) (discussed at text accompanying notes 113-16 *supra*), the following cases have adopted the standard of probable cause: *United States ex rel Myles v. Twomey*, 352 F. Supp. 180, 182 (N.D. Ill. 1973) (in the course of executing a search warrant, police officer may seize outwardly innocent items that are "reasonably believed" to be stolen); *United States v. Hamilton*, 328 F. Supp. 1219, 1223 (D. Del. 1971) (seizure of a sawed-off shotgun held lawful where officers had probable cause to believe it was contraband); *Thomas v. Superior Court*, 22 Cal. App. 3d 972, 976-80, 99 Cal. Rptr. 647, 649-52 (1972) (seizure of a hand-rolled cigarette which was only a suspicious object unlawful because probable cause not present); *State v. Turner*, 504 P.2d 168, 172 (Kan. 1972) (during search pursuant to warrant for other items, seizure of stereo lawful with probable cause); *State v. Jackson*, 269 So. 2d 465, 468 (La. 1972) (because of shape and size of packet of heroin seen around neck of defendant, officer had probable cause to believe it was contraband); *Hebron v. State*, 281 A.2d 547, 555-56 (Md. Ct. Spec. App. 1971) (seizure of television and clothing found in plain view proper since officer had probable cause to believe they were fruits of crime); *Commonwealth v. Haefeli*, 279 N.E.2d 915, 921 (Mass. 1972) (seizure of check-cashing card and checks lawful since police had "reasonable cause" to believe they were stolen); *People v. Trudeau*, 187 N.W.2d 890, 891 (Mich. 1971), *cert. denied*, 405 U.S. 965 (1972) (seizure of defendant's shoe unlawful when based on mere suspicion that it was heel print left at scene of murder); *People v. Romano*, 192 N.W.2d 271, 274 (Mich. Ct. App. 1971) (seizure of manila envelope was lawful when inspection led to "reasonable conclusion" it contained narcotics); *Wright v. State*, 499 P.2d 1216, 1219-21 (Nev. 1972) (seizure of gun lawful when probable cause existed to believe it was the instrumentality or evidence of a crime); *State v. Young*, 501 P.2d 1001, 1004 (Ore. Ct. App. 1972) (seizure of part of plant sheriff reasonably believed was contraband was proper); *State v. Redeman*, 496 P.2d 230, 231-32 (Ore. Ct. App. 1972) (only those items out of the total contents of defendant's apartment which the police had probable cause to believe stolen were admissible); *Armour v. Totty*, 486 S.W.2d 537, 539-40 (Tenn. 1972) (officer had reasonable belief that plastic bag contained mar-

soned that, since the plain view doctrine is an exception to the warrant requirement, probable cause, at the very least, should be required.

In *United States v. Smollar*,¹²² the court went even further and held that:

Government officers must have more than mere probable cause that what they see is seizable. The court adopts this standard because it is obvious that a probable cause standard would undermine the warrant requirement. For if government officers could seize anything they happened to see where they only had probable cause to search or seize it, there would be no need to obtain warrants to authorize seizures of objects likely to be found where officers had a right to be.¹²³

The court pointed out that the rationale of the rule of *Marron v. United States*,¹²⁴ that warrants must particularly describe the things to be seized, is "that, even where an officer has probable cause to believe that an item is seizable, there is an independent value in his presenting his evidence to a neutral magistrate prior to the seizure."¹²⁵ A fortiori it would seem appropriate that a standard stricter than probable cause be invoked when the magistrate's scrutiny is entirely lacking. It might well be argued that the very words "plain view" call for a standard more rigorous than that of probable cause.¹²⁶

The confusion created by these conflicting interpretations could easily be resolved if the Supreme Court would adopt one of the competing standards. It is submitted that the plain view doctrine is an exception to the warrant requirement and the whole purpose of Justice Stewart's opinion in *Coolidge* was to put limits upon the doctrine so that it would be consistent with the constitutional protections served by the warrant requirement.¹²⁷ It would be a strange logic that would substitute a

ijuana); *State v. Murray*, 509 P.2d 1003, 1008 (Wash. Ct. App. 1973) (seizure of television set unlawful when based upon mere suspicion); *State v. Day*, 503 P.2d 1098, 1101 (Wash. Ct. App. 1972) (officer could seize pistol he had reasonable cause to believe was contraband).

122. 357 F. Supp. 628 (S.D.N.Y. 1972).

123. *Id.* at 632.

124. 275 U.S. 192 (1927). See note 11 *supra*.

125. 357 F. Supp. at 632.

126. *But see United States v. Drew*, 451 F.2d 230 (5th Cir. 1971). There the court pointed out that "the plain view exception would be worthless if officers had to be 'absolutely certain' that what they saw was seizable." *Id.* at 233. In *Drew*, the police who had stopped a car for a traffic violation noticed a blue opaque plastic folder on the floor of the car with what appeared to be the bulging outline of a pistol. Here, the "belief" of the officers that the pistol existed was sufficient to justify the seizure. *Id.*

127. 403 U.S. at 467. In *Warden v. Hayden*, 387 U.S. 294 (1967), the police, while searching a house for the defendant, discovered clothing which they believed was worn

standard of less than probable cause for an exception to a warrant requirement which itself includes within its very statement the requirement of probable cause.

II. THE "INADVERTENCE" RULE

Another requirement of the plain view doctrine, as stated in *Coolidge*, is that the discovery of the evidence must be inadvertent:

The rationale of the exception to the warrant requirement, as just stated, is that a plain-view seizure will not turn an initially valid (and therefore limited) search into a "general" one, while the inconvenience of procuring a warrant to cover an inadvertent discovery is great. But where the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it, the situation is altogether different. The requirement of a warrant to seize imposes no inconvenience whatever, or at least none which is constitutionally cognizable in a legal system that regards warrantless searches as "*per se* unreasonable" in the absence of "exigent circumstances."¹²⁸

by the defendant during a robbery. The defendant argued that the clothing was not subject to seizure since it was mere evidence. In the course of holding that the clothing was seizable, the Court stated:

There must, of course, be a nexus—automatically provided in the case of fruits, instrumentalities or contraband—between the item to be seized and criminal behavior. Thus in the case of "mere evidence," probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction.

Id. at 307. Thus, the standard which the Court would favor would be one that either provided for a "nexus" between the item seized and the crime or used the phrase "probable cause."

128. 403 U.S. at 469-71. Justice Stewart went on to explain that his discussion of the case and his rationale corresponded to that given in *Trupiano v. United States*, 334 U.S. 699 (1948). See note 11 *supra*. In *Trupiano*, federal officers raided an illegal distillery, arrested the defendant and seized contraband distillery equipment in plain view. In *Coolidge*, as in *Trupiano*, the determining factors were "advance police knowledge of the existence and location of evidence, police intention to seize it, and the ample opportunity for obtaining a search warrant." 403 U.S. at 482. However, *Trupiano* was not to be reinstated since the police need not obtain a warrant if they believe they will find evidence during a search of the person of an arrestee and of the area under his immediate control, the scope of a valid search incident to an arrest outlined in *Chimel v. California*, 395 U.S. 752 (1969). In addition, it was noted that *Trupiano* would be inconsistent with the recent cases in the area of auto searches. 403 U.S. at 482.

The dissenting opinions of Justice Black (403 U.S. at 505-10) and of Justice White (*Id.* at 513-22) were highly critical of the inadvertence requirement. Justice Black contended that the Court had, in effect, abolished seizures incident to arrest, for

[o]nly rarely can it be said that evidence seized incident to an arrest is truly unexpected or inadvertent. . . . The relevant test is not the reasonableness of the opportunity to procure a warrant, but the reasonableness of the seizure under all the circumstances.

Id. at 509. Justice Hugo L. Black cited *Ker v. California*, 374 U.S. 23 (1963), where

Most courts have accepted the "inadvertence" requirement.¹²⁹ The

the police went to the defendant's apartment to arrest him. They did so and saw a block of marijuana while looking into the kitchen. Justice Black argued that the discovery could not have been inadvertent. 403 U.S. at 507. However, the plurality pointed out that *Ker* was upheld because the seizure was incident to the arrest: "[The marijuana] was in the immediate proximity of the Kers at the moment of their arrest so that the seizure was unquestionably lawful under the search-incident law of the time, and might be lawful under the more restrictive standard of *Chimel v. California* . . ." 403 U.S. at 473 n.28 (citation omitted). Furthermore, Justice Stewart emphasized that the majority opinion did not suggest "that the police must obtain a warrant if they anticipate that they will find specific evidence during the course of such a search [incident to an arrest]." *Id.* at 482.

129. The following courts cite *Coolidge* favorably and apply the inadvertence rule: *United States v. Lisznyai*, 470 F.2d 707, 709-10 (2d Cir. 1972), *cert. denied*, 410 U.S. 987 (1973) (although agents had seen incriminating laboratory equipment prior to its seizure, discovery was inadvertent due to lack of time to procure warrant); *United States v. Pacelli*, 470 F.2d 67, 70-71 (2d Cir. 1972), *cert. denied*, 410 U.S. 983 (1973) (seizure of incriminating evidence of illegal drug activity during search pursuant to valid warrant lawful since no prior knowledge or intent on part of agent); *Martinez v. Turner*, 461 F.2d 261, 264-65 (10th Cir. 1972) (discovery of defendant's coat not inadvertent when police had prior knowledge of it); *United States v. Drew*, 451 F.2d 230, 232 (5th Cir. 1971) (discovery of firearms in defendant's vehicle during stop for improper lighting held inadvertent); *United States v. Forlano*, 358 F. Supp. 56, 59 (S.D.N.Y. 1973) (evidence obtained from lawful wiretap which did not name defendant was inadvertent); *United States v. Smollar*, 357 F. Supp. 628, 632-33 (S.D.N.Y. 1972) (inadvertence rule does not apply to contraband, stolen, or dangerous objects); *Robbins v. Bryant*, 349 F. Supp. 94, 95-96 (W.D. Va. 1972) (seizure inadvertent even though defendant deputy sheriff in civil rights action seized items not included in the search warrant but of which he had been aware); *United States v. Pointer*, 348 F. Supp. 600, 604 (W.D. Mo. 1972) (discovery of shotgun lying on seat of service station truck inadvertent because no prior knowledge); *United States v. Lazar*, 347 F. Supp. 225, 229 (E.D. Pa. 1972) (evidence discovered inadvertently before objects of warrant are found is admissible); *United States v. Babich*, 347 F. Supp. 157, 160 (D. Nev. 1972), *aff'd on other grounds*, 477 F.2d 242 (9th Cir. 1973) (police came upon truck in desert inadvertently but marijuana found in truck was not in plain view); *United States ex rel. Herhal v. Anderson*, 334 F. Supp. 733, 734-36 (D. Del. 1971) (during course of search pursuant to search warrant, police inadvertently found dirt on underside of car); *United States v. Hamilton*, 328 F. Supp. 1219, 1221 (D. Del. 1971) (officers conducting lawful search inadvertently came upon shotgun in plain view); *People v. Eastin*, 289 N.E.2d 673, 678-79 (Ill. App. Ct. 1972) (seizure of evidence not inadvertent when police had prior knowledge); *Presley v. State*, 284 N.E.2d 526, 530 (Ind. Ct. App. 1972) (discovery of stolen camera was inadvertent during inspection of house for accomplices); *Caine v. Commonwealth*, 491 S.W.2d 824, 827-28 (Ky. Ct. App. 1973) (seizure of wallet lawful when there was no prior knowledge of its location); *State v. Jackson*, 269 So. 2d 465, 468 (La. 1972) (police officer came upon package of heroin inadvertently); *Neam v. State*, 286 A.2d 540, 543 (Md. Ct. Spec. App. 1972) (while looking for defendant's wallet, officer inadvertently came upon incriminating identification cards); *Commonwealth v. Rand*, 296 N.E.2d 200, 203 (Mass. 1973) (discovery of evidence found in vehicle taken to police station for purpose of search not inadvertent); *State v. Gallagher*, 509 P.2d 852, 857 (Mont. 1973) (police called by woman to defendant's home had no prior knowledge that evidence of crime would be found); *Barnato v. State*, 501 P.2d 643, 647 (Nev. 1972) (seizure

Iowa Supreme Court, however, indicated that the *Coolidge* discussion of plain view might not be of binding force,¹³⁰ and the California Supreme Court explicitly rejected *Coolidge* in *North v. Superior Court*.¹³¹ In *North*, the defendant was arrested in his apartment one day after his kidnapping victim described him and his car for the police.¹³² After the defendant was arrested, the police seized and searched his car.¹³³ Although the police knew the car's location and that it was probably the instrumentality used in the crime of kidnapping, no search warrant had been obtained.¹³⁴ The court held that the seizure was valid under the plain view doctrine,¹³⁵ but admitted that, "[i]f

of marijuana plant after two previous observations was not inadvertent); *People v. Palozzi*, 346 N.Y.S.2d 595, 600 (Monroe County Ct. 1973) (seizure of defendant's telephone conversations intercepted under a warrant for another's conversations was not inadvertent since police suspected and intended to seize them); *People v. Avasino*, 338 N.Y.S.2d 73, 80 (N.Y. Crim. Ct. 1972) (seizure of pornographic books not inadvertent where there was advance police knowledge, intent to seize them and ample opportunity to obtain a warrant); *Morris v. State*, 507 P.2d 1327, 1329 (Okla. Ct. Crim. App. 1973) (discovery of marijuana during arrest of defendant in home was inadvertent); *State v. Young*, 501 P.2d 1001, 1004 (Ore. Ct. App. 1972) (deputy sheriff called during fire found marijuana plant inadvertently); *State v. Wilson*, 297 A.2d 645, 648 (R.I. 1972) (discovery of gun barrel protruding from seat of car was inadvertent); *State v. Day*, 503 P.2d 1098, 1101 (Wash. Ct. App. 1972) (officer inadvertently discovered pistol in defendant's possession); *State v. Dimmer*, 497 P.2d 613, 615 (Wash. Ct. App. 1972) (discovery of prescription bottles found during course of search for other items was inadvertent).

Other cases have cited with approval to the *Coolidge* statement of the inadvertence rule without relating the *Coolidge* rule to the facts before them. See, e.g., *United States v. Gargotto*, 476 F.2d 1009, 1013 (6th Cir. 1973); *United States v. Sheard*, 473 F.2d 139, 144 (D.C. Cir. 1973); *United States v. Candella*, 469 F.2d 173, 175 (2d Cir. 1972); *United States v. Botelho*, 360 F. Supp. 620, 624 n.4 (D. Hawaii 1973); *United States v. Ciaccio*, 356 F. Supp. 1373, 1378 (D. Md. 1972); *United States ex rel. Myles v. Twomey*, 352 F. Supp. 180, 182 (N.D. Ill. 1973); *United States v. Brewer*, 343 F. Supp. 468, 473 (D. Hawaii 1972); *State v. Caldwell*, 512 P.2d 863, 866 (Ariz. Ct. App. 1973); *State v. Krause*, 301 A.2d 234, 237 (Conn. 1972); *Lowe v. State*, 195 S.E.2d 919, 921 (Ga. 1973); *State v. Hills*, 283 So. 2d 220, 222 (La. 1973); *Brown v. State*, 292 A.2d 762, 775-76 (Md. Ct. Spec. App. 1972); *Commonwealth v. Haefeli*, 279 N.E.2d 915, 921 (Mass. 1972); *Wright v. State*, 499 P.2d 1216, 1219 (Nev. 1972); *State v. Person*, 298 N.E.2d 922, 926 (Ohio Mun. Ct. 1973); *Commonwealth v. Davenport*, 308 A.2d 85, 89 (Pa. 1973); *Commonwealth v. Rota*, 292 A.2d 496, 498-99 (Pa. Super. Ct. 1973); *State v. Larkin*, 202 N.W.2d 862, 865 (S.D. 1972); *Armour v. Totty*, 486 S.W.2d 537, 538 (Tenn. 1972); *State v. Murray*, 509 P.2d 1003, 1006 (Wash. Ct. App. 1973); *Ball v. State*, 205 N.W.2d 353, 359 (Wis. 1973); *State v. Pires*, 201 N.W.2d 153, 159 (Wis. 1972).

130. *State v. King*, 191 N.W.2d 650 (Iowa 1971) (as officers approached automobile to arrest suspects they saw burglary tools in plain view).

131. 8 Cal. 3d 301, 502 P.2d 1305, 104 Cal. Rptr. 833 (1972).

132. *Id.* at 304, 502 P.2d at 1306, 104 Cal. Rptr. at 834.

133. *Id.* at 304-05, 502 P.2d at 1306, 104 Cal. Rptr. at 834.

134. *Id.* at 305-06, 502 P.2d at 1308, 104 Cal. Rptr. at 836.

135. *Id.* at 308, 502 P.2d at 1309, 104 Cal. Rptr. at 837.

the plurality opinion in *Coolidge* were entitled to binding effect as precedent, we would have difficulty distinguishing its holding from the instant case, for the discovery of petitioner's car was no more 'inadvertent' than in *Coolidge*.¹³⁶ However, it continued, only four members of the court signed Part II-C of the opinion.¹³⁷

The California Supreme Court ignored the concurrence of a fifth member of the Court, Justice Harlan, in Part II-D of Justice Stewart's opinion wherein he criticized much of Justice White's dissent and, in so doing, gave support to the basic theme of Part II-C on the plain view exception.¹³⁸ Justice Sullivan of the California court recognized this in his *North* dissent, pointing out that Part II-D of *Coolidge* was "addressed primarily to Mr. Justice White's dissenting opinion which 'marshals the arguments that can be made against our interpretation of the 'automobile' and 'plain view' exceptions to the warrant requirement.'" ¹³⁹ As Justice Sullivan maintained, "Justice Harlan's limited concurrence sweeps more broadly than the majority would allow."¹⁴⁰

In addition to the problem of clarifying *Coolidge's* precedential force, two other significant problems have arisen in the lower courts' interpretations of the inadvertence requirement. The first concerns the degree of expectation which is required on the part of the police in order for a discovery to be inadvertent. After *Coolidge* was first decided, some commentators formulated the various interpretations that might result.¹⁴¹ One author argued:

If the rule is taken to mean that a plain-view discovery will be held invalid, because not inadvertent, only when the police have probable cause to believe that the evidence would be found, it will be of limited effect. . . .

The inadvertence rule will be far more significant if it is interpreted as requiring the invalidation of discoveries when the police have an ex-

136. *Id.* at 307, 502 P.2d at 1308, 104 Cal. Rptr. at 836.

137. *Id.*

138. 403 U.S. at 444.

139. 8 Cal. 3d at 316, 502 P.2d at 1315, 104 Cal. Rptr. at 843.

140. *Id.* at 317, 502 P.2d at 1315, 104 Cal. Rptr. at 843. In *People v. McKinnon*, 7 Cal. 3d 899, 500 P.2d 1097, 103 Cal. Rptr. 897 (1972), the California Supreme Court made the same argument in regard to Part II-B of *Coolidge* which "purported to narrow the Carroll-Chambers rule." The court concluded that "the judgment of an equally divided United States Supreme Court 'is without force as precedent.'" *Id.* at 911, 500 P.2d at 1105, 103 Cal. Rptr. at 905. The California court's reasoning has not gone without criticism. See, e.g., Note, *People v. McKinnon—A New Move in Search and Seizure*, 24 HASTINGS L.J. 393, 408 n.96 (1973).

141. LaFave, *supra* note 9, at 29-30; *Search and Seizure*, *supra* note 9, at 699-700; *The Supreme Court*, *supra* note 9, at 244-45.

pectation that evidence will be discovered on the premises but lack probable cause to search.¹⁴²

The prediction was that the courts would narrowly interpret the inadvertence rule, applying it only when the police had probable cause to believe that evidence would be found.¹⁴³ This has been borne out by the cases in which it is discussed.¹⁴⁴ Surprisingly, though, this particular aspect of the inadvertence requirement has not been as controversial among the lower courts as it was among commentators.¹⁴⁵ This may be either because it is obvious when the police know of evidence beforehand and plan to seize it or because the courts have chosen to disregard the requirement and thus fail to discuss it at all.¹⁴⁶

The second major problem that has arisen in this area has been in trying to determine whether the inadvertence requirement should only apply to "evidence," but not to contraband and stolen or dangerous goods. In the *Coolidge* opinion, Justice Stewart described the rationale for the requirement:

If the initial intrusion is bottomed upon a warrant that fails to mention a particular object, though the police know its location and intend to seize it, then there is a violation of the express constitutional require-

142. *The Supreme Court*, *supra* note 9, at 244-45.

143. *Id.* at 250. In *State v. Alexander*, 495 P.2d 51 (Ore. Ct. App. 1972), the police had an arrest warrant for the defendant who had sold methamphetamine to an undercover officer. The officer entered the apartment at the invitation of defendant and through a room divider saw some baggies which he concluded contained marijuana. Other officers were alerted and came to the apartment, arrested the defendant, and seized the marijuana. The court upheld the seizure on the ground that it was in the officer's plain view but did not discuss the inadvertence requirement. *Id.* at 53-54. The dissenting judge, however, argued that the seizure was not inadvertent, as the officer had testified that he had been in the apartment several times before and had seen marijuana there. He also pointed out that "equating non-inadvertence with probable cause may be the most reasonable reading of Justice Stewart's opinion." *Id.* at 55 n.2.

144. For example, in *Lewis v. Cardwell*, 476 F.2d 467 (6th Cir. 1973), the court held that "when law enforcement officers have prior knowledge amounting to *probable cause* establishing the nexus between the article sought and the place of seizure a warrant must be obtained in order to protect the fourth amendment principle that warrantless seizures are *per se* unreasonable in the absence of exigent circumstances." *Id.* at 470 (emphasis added). There the police dispatched a wrecker to a place where they believed an automobile was parked. The warrantless seizure could not be justified under the plain view doctrine since the officers never observed the vehicle at all. *Id.*

145. See LaFave, *supra* note 9, at 25-26, 29; Landynski, *supra* note 9, at 349-53; *The Supreme Court*, *supra* note 9, at 243-46.

146. One extreme example is the case of *State v. Knapp*, 501 P.2d 264 (Utah 1972), where the Utah Supreme Court did not cite any cases in its opinion. In that case, a sheriff went to the home that defendant was constructing. He recognized a door and some other items as being stolen. The next day the sheriff returned and removed some copper tubing from the house. Clearly, the discovery was not inadvertent and it would seem that there was sufficient time in which to obtain a search warrant.

ment of "Warrants . . . particularly describing . . . [the] things to be seized." The initial intrusion may, of course, be legitimated not by a warrant but by one of the exceptions to the warrant requirement, such as hot pursuit or search incident to lawful arrest. But to extend the scope of such an intrusion to the seizure of objects—*not contraband nor stolen nor dangerous in themselves*—which the police know in advance they will find in plain view and intend to seize, would fly in the face of the basic rule that no amount of probable cause can justify a warrantless seizure.¹⁴⁷

Thus, the reasoning behind the inadvertence rule is that it is simply preferable to have " 'advance judicial approval of searches and seizures.' "¹⁴⁸ However, an advance judicial decision does not seem to be required if the police anticipate that they will find contraband or stolen or dangerous goods.¹⁴⁹ One commentator has suggested a possible explanation:

The exception for contraband might be explained on the ground that the margin of error is slight, but it is unclear on what basis the exception for stolen goods could be explained. Perhaps the notion is that if the goods are stolen, the police will not have interfered with lawful possession, but this misses the point that the question to be decided is whether the items are in fact stolen, which is not always obvious.¹⁵⁰

The courts that have considered this issue have divided. In *United States v. Smollar*,¹⁵¹ the court held that the "inadvertence" requirement applied only to objects that are "not contraband nor stolen nor dangerous in themselves."¹⁵² In *Smollar*, a postal inspector rode in the car of the defendant whom he had just arrested for mail theft. At that time, the agent saw a book which had a credit card protruding from it.¹⁵³ The court upheld the seizure under the plain view doctrine,¹⁵⁴ reasoning that since it was immediately apparent that the credit card was stolen, the inadvertence rule simply did not apply.¹⁵⁵

Another court, however, has taken the position that the seizure of contraband is subject to the inadvertence requirement. In *Barnato v. State*,¹⁵⁶ an animal control officer, while placing a trap for a wild

147. 403 U.S. at 471 (emphasis added).

148. LaFave, *supra* note 9, at 27.

149. See note 128 *supra* and accompanying text.

150. LaFave, *supra* note 9, at 26 n.61.

151. 357 F. Supp. 628 (S.D.N.Y. 1972).

152. *Id.* at 633.

153. *Id.* at 630.

154. *Id.* at 632.

155. *Id.* at 633.

156. 501 P.2d 643 (Nev. 1972).

cat on defendant's property (at the defendant's request),¹⁵⁷ saw plants which he believed were marijuana.¹⁵⁸ The following day the control officer and a deputy sheriff surreptitiously entered the defendant's yard and took one of the leaves from the plant.¹⁵⁹ Believing that the entry was unlawful,¹⁶⁰ the District Attorney's deputy suggested that they make another visit to check the trap with the consent of the defendant.¹⁶¹ During this visit, another leaf was taken.¹⁶² The Nevada Supreme Court held that the situation was no different in principle from that in *Coolidge* in that the discovery of the evidence on the second seizure was not inadvertent.¹⁶³ Here "the discovery was anticipated, the location of the marijuana was known in advance and the police intended to seize it."¹⁶⁴ Thus, the court applied the inadvertence requirement even when contraband was involved.

The inadvertence requirement, then, has been accepted by the majority of courts that cite *Coolidge* in discussing the plain view doctrine.¹⁶⁵ The lower courts have all but ignored the arguments that have been made against this rule. One argument has been made that, since the police must have a prior justification for being in a place where incriminating objects can be seen in plain view,

the inadvertence rule does *not* protect against an invasion of privacy, but only against intrusion upon a possessory interest in personality, admittedly (in Justice Stewart's words) a "minor peril to Fourth Amendment protections."¹⁶⁶

One commentator believed that "inadvertence" burdened the warrant system¹⁶⁷ and that "mischief" might result from its application.¹⁶⁸ But his fear that evidence which is otherwise lawfully obtained might be

157. *Id.* at 644.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 645.

163. *Id.* at 647.

164. *Id.* See also *People v. Eastin*, 289 N.E.2d 673 (Ill. App. Ct. 1972).

165. See note 129 *supra*.

166. LaFave, *supra* note 9, at 26.

167. *Id.* at 28.

168. *Id.* at 29. The possible mischief is that upon a motion to suppress, there will be an inquiry as to whether or not the discovery was inadvertent:

Such an after-the-fact inquiry into what the officer intended or knew, especially when it is to his advantage to claim a lack of such knowledge or intent, is no more likely to be fruitful here than in other contexts.

Id. However, the courts have not seemed to experience difficulty with this rule as the cases cited in note 129 *supra* demonstrate.

excluded due to a failure to obtain a warrant is not persuasive for a number of reasons.

First, the *Coolidge* Court emphasized its preference for warrants, declaring that whenever possible a magistrate should decide whether an item is properly subject to seizure.¹⁶⁹ Second, the courts are reasonable in looking to the circumstances surrounding a failure to obtain a warrant for a particular item that the police expect to find.¹⁷⁰ Finally, the *Coolidge* opinion made clear that the inadvertence requirement did not apply to items found during a lawful search incident to arrest under the *Chimel* limitations.¹⁷¹ Thus, it would not be an overwhelming burden on the police to obtain a warrant.¹⁷² When one balances the improbable risk of losing evidence with the constitutional protections furthered by this requirement, the inadvertence rule does not work "mischief."

CONCLUSION

In *Coolidge v. New Hampshire*, the United States Supreme Court defined the limits of the plain view exception to the warrant requirement of the fourth amendment.¹⁷³ Emphasizing the constitutionally mandated preference for a warrant issued upon probable cause,¹⁷⁴ the Court attempted to limit the circumstances under which the application of the plain view exception would permit deviation from the warrant requirement.¹⁷⁵ The Court held that a plain view seizure is proper only when the object seized was inadvertently discovered in plain

169. See note 128 *supra* and accompanying text.

170. A good example of this is *United States v. Lisznyai*, 470 F.2d 707 (2d Cir. 1972), *cert. denied*, 410 U.S. 987 (1973). In that case, federal narcotics agents knocked at the door of defendant's apartment which was under surveillance. They claimed to be police officers who were in search of a fugitive and who needed to use the telephone. The agents observed laboratory equipment. Later in the day the agents believed that defendant was about to flee the apartment, so they arrested him and seized the equipment. The court held that

Coolidge does not require suppression of evidence seized in plain view during an arrest where the circumstances have become exigent merely because prior knowledge of the evidence was acquired shortly before the seizure.

Id. at 710.

171. See note 6 *supra*. For example, in *United States v. Davis*, 461 F.2d 1026 (3d Cir. 1972), the court held that, even though agents obviously believed that they would find heroin near the person whom they arrested, the seizure was lawful under *Chimel*. The inadvertence rule did not apply in such a case. *Id.* at 1034-35.

172. 403 U.S. at 469-70.

173. *Id.* at 464-73.

174. *Id.* at 467. See note 4 *supra*.

175. 403 U.S. at 468-71.

view¹⁷⁶ and only when its incriminating nature was immediately apparent.¹⁷⁷ The Court thus manifested a clear purpose of narrow construction and strict application of the plain view exception.

Some lower courts, however, have not followed the Court's lead.¹⁷⁸ They have hedged the requirement of physical plain view by inventing such broadening concepts as "constructive sight"¹⁷⁹ and "totality of the circumstances."¹⁸⁰ Similarly, the requirement that the incriminating nature of the object in plain view be immediately apparent has been circumscribed by those courts adopting a standard of less than probable cause.¹⁸¹ The inadvertence requirement has been rejected outright by at least one court¹⁸² while others have been unable to agree on whether its application should be confined to the discovery of "evidence"¹⁸³ or extended to those objects which are contraband, stolen or dangerous.¹⁸⁴

It is clear from the response of the lower courts that the *Coolidge* effort to clarify the plain view doctrine has not achieved complete success. It is submitted that the very expression of the doctrine needs clarification in view of the "constructive sight" extension of the literal meaning of the term "plain view." A further question is the permissibility, not to mention the logic, of the adoption by some courts of a standard of less than probable cause for the invocation of an exception to a warrant requirement itself hinged on probable cause. The Court also must clarify the application of the inadvertence requirement to stolen, contraband, and dangerous objects. Finally, and most basically, the authority of the *Coolidge* opinion must be clarified in view of its questioning by the supreme court of the nation's most populous state.

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176. *Id.* at 469-71.

177. *Id.* at 466.

178. See notes 18-71 *supra* and accompanying text.

179. See notes 18-28 *supra* and accompanying text.

180. See notes 38-44 *supra* and accompanying text.

181. See notes 97-106 *supra* and accompanying text.

182. See notes 131-37 *supra* and accompanying text.

183. See notes 151-55 *supra* and accompanying text.

184. See notes 157-64 *supra* and accompanying text.