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Fourth Amendment--The Plain Touch Exception to the Warrant Requirement

Susanne M. MacIntosh

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FOURTH AMENDMENT—THE PLAIN TOUCH EXCEPTION TO THE WARRANT REQUIREMENT

Minnesota v. Dickerson, 113 S. Ct. 2130 (1993)

I. INTRODUCTION

In *Minnesota v. Dickerson*,[1] the United States Supreme Court unanimously adopted the plain touch doctrine, thereby allowing officers to seize evidence recognized through the sense of touch during a lawful patdown without a warrant. Analogizing to the plain view doctrine developed in *Coolidge v. New Hampshire*[2] and its progeny, Justice White's opinion held plain touch seizures constitutional when three conditions are met: (1) a lawful patdown has occurred under *Terry v. Ohio*,[3] (2) the character of the item as contraband or evidence of a crime is immediately apparent, and (3) the officer has a lawful right of access to the item.[4]

The Supreme Court held that officers must stop examining an object as soon as they are satisfied that the item is not a weapon. At that point, it is impermissible for officers to further examine the item in order to determine if it is some other contraband.[5] In the case at bar, Justice White found that the officer exceeded the bounds of *Terry* by continuing to examine the object when it was clear that it was not a weapon.[6] Consequently, the Court affirmed the Minnesota Supreme Court's decision to reverse the conviction.[7]

Justice Scalia, in his concurrence, concluded that *Terry* was incorrect in holding that a protective patdown is constitutional, because patdowns were not an accepted part of police procedure when the Fourth Amendment was adopted.[8] Nevertheless, he concurred in the decision because the constitutionality of the patdown in the

1 113 S. Ct. 2130 (1993).
2 403 U.S. 443 (1971).
3 392 U.S. 1 (1967).
4 *Dickerson*, 113 S. Ct. at 2136-37.
5 *Id.* at 2139.
6 *Id.* at 2138-39.
7 *Id.* at 2139.
8 *Id.* at 2140 (Scalia, J., concurring).

instant case was not challenged.[9]

In a separate opinion, Chief Justice Rehnquist joined in the majority opinion with respect to the establishment of the plain touch doctrine.[10] He dissented, however, with respect to the treatment of the instant case. Because the findings of fact were imprecise about the extent to which the officer examined the object in Respondent's pocket, the Chief Justice would have remanded the case.[11]

This Note examines the Court's treatment of the plain view doctrine and concludes that the Court properly held that the plain touch doctrine is analogous to the plain view doctrine. This Note argues, however, that the Court provided a vague outline of the requirements of this newly recognized exception to the warrant requirement. The Court wavered between two different standards of certainty, referring to both "probable cause" and "immediately apparent." This Note argues that probable cause is the proper standard of certainty. Additionally, the Court required that the officer have lawful access to the object before seizing it, without explaining how this requirement functions in the plain touch context.[12]

This Note further argues that the Court improperly upheld the lower court's reversal. Relying on a misquote of the trial transcript, the Court determined that the officer in the instant case overstepped the boundaries of *Terry*.[13] The Court should have satisfied any doubt about the scope of the search by remanding the case for further proceedings, as Chief Justice Rehnquist suggested in his separate opinion.[14] This Note contends, however, that a proper application of the plain touch doctrine did permit seizure in the instant case.

II. Unreasonable Searches and the Warrant Requirement

The Fourth Amendment to the United States Constitution prohibits only "unreasonable" searches.[15] It is a well established rule of Fourth Amendment jurisprudence, however, that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specially established and well-deline-

9 *Id.* at 2141 (Scalia, J., concurring).

10 *Id.* (Rehnquist, C.J., concurring in part and dissenting in part).

11 *Id.* (Rehnquist, C.J., concurring in part and dissenting in part).

12 *Id.* at 2137.

13 *Id.* at 2138-39.

14 *Id.* at 2141 (Rehnquist, C.J., concurring in part and dissenting in part).

15 U.S. Const. amend. IV.

ated exceptions."[16] This warrant requirement is primarily based on the premise that a neutral and detached magistrate is a better judge of probable cause than the officer or prosecutor who is actively involved in a specific case.[17]

These considerations led the Court to conclude in *Weeks v. United States*[18] that evidence seized by federal officers without a warrant may not be introduced as evidence in a federal trial.[19] This ruling became known as the exclusionary rule, and has been extended to state trials.[20] The exclusionary rule works with the warrant requirement to forbid the use of evidence obtained without a search warrant in a criminal trial.

Numerous exceptions to the warrant requirement exist.[21] One such exception was developed by the Court in *Terry v. Ohio*,[22] which held that a police officer may conduct a protective patdown search for weapons of a suspect's outer clothes based on a reasonable suspicion that the suspect has been engaged in, or is in the process of engaging in, criminal activity and may be armed.[23] Less than probable cause is sufficient to validate this warrantless search, as long as the officers conducting the search reasonably believe that their safety, or the safety of others, is in jeopardy.[24] The Court noted that due weight must be given to the specific inferences that an officer is entitled to draw based upon the specific facts of a situation and based on his training and experience.[25] Evidence may not be introduced if discovered through a search that is not reasonably limited in scope to the original justification for the search, namely the protective search for weapons.[26]

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16 Katz v. United States, 389 U.S. 347, 357 (1967) (citations omitted).

17 In Johnson v. United States, 333 U.S. 10, 14, n.3 (1948), the Court determined that close involvement in the competitive enterprise of law enforcement is incompatible with neutral determinations of probable cause because officers must act quickly under the "excitement that attends the capture of persons accused of crime" without the opportunity to weigh and consider whether a given search or seizure is permissible under the Constitution. *See also* Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979); Coolidge v. New Hampshire, 403 U.S. 443 (1971).

18 232 U.S. 383 (1917).

19 *Id.* at 398.

20 *See* Mapp v. Ohio, 367 U.S. 643 (1961).

21 *See, e.g.*, Chimel v. California, 395 U.S. 752 (1969) (authorizing a warrantless search incident to arrest); Warden v. Hayden, 387 U.S. 294 (1967) (authorizing a warrantless search following hot pursuit); United States v. Jeffers, 342 U.S. 48 (1951) (allowing search in the face of exigent circumstances); Carroll v. United States, 267 U.S. 132 (1925) (establishing an exception to the warrant requirement for motor vehicles).

22 392 U.S. 1 (1967).

23 *Id.* at 27.

24 *Id.*

25 *Id.*

26 *Id.* at 29.

Another relevant exception to the warrant requirement is the plain view doctrine, expounded in *Coolidge v. New Hampshire*.[27] The Court held in *Coolidge* that police may seize evidence discovered in plain view without a warrant specifying the item(s) in certain circumstances.[28] The Court delineated three requirements for a seizure to be valid under the plain view doctrine: (1) the initial intrusion must be justified by either a warrant or a valid exception to the warrant requirement; (2) the incriminating character of the object must be immediately apparent; and (3) the discovery of the object must be inadvertent.[29]

The first requirement of the plain view doctrine is that the initial intrusion be justified by either a warrant, or some valid exception to the warrant requirement, such as hot pursuit, search incident to arrest, or a protective search under *Terry*.[30] The Court found that it would be a "needless inconvenience," and potentially dangerous to both the evidence and the officer, to require officers to leave evidence in order to obtain a warrant in these circumstances.[31]

The second element of the plain view doctrine as delineated in *Coolidge* requires that the nature of the object as contraband or evidence of a crime be "immediately apparent" to the police.[32] However, later in the opinion, the Court commented that "[i]ncontrovertible testimony of the senses that an incriminating object is on the premises belonging to a criminal suspect may provide the fullest measure of *probable cause*."[33] This decision was not clear about which standard of certainty is required to justify seizure under the plain view doctrine, since the phrase "immediately apparent" indicates a higher degree of certainty than is required by probable cause.[34]

The Court clarified the second element of the plain view doctrine in *Texas v. Brown*.[35] The plurality commented on the ambiguous nature of the phrase "immediately apparent":

> [d]ecisions by this Court since Coolidge indicate that the use of the phrase 'immediately apparent' was very likely an unhappy choice of

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27 403 U.S. 443 (1971).

28 *Id.* at 465.

29 *Id.* at 467.

30 *Id.* In Michigan v. Long, 463 U.S. 1032 (1983), the Court upheld the seizure of evidence in plain view from a car when the initial intrusion was justified under *Terry*. *See also* United States v. Hensley, 469 U.S. 221 (1985).

31 *Coolidge*, 403 U.S. at 467-68.

32 *Id.* at 466.

33 *Id.* at 468 (emphasis added).

34 *See* Texas v. Brown, 460 U.S. 730 (1983).

35 *Id.*

> words, since it can be taken to imply that an unduly high degree of certainty as to the incriminating character of evidence is necessary for an application of the plain view doctrine.[36]

Probable cause is flexible, and merely requires that the facts available to the officer at the time of the seizure be sufficient to "warrant a man of reasonable caution" to believe that an item is contraband or evidence of a crime.[37] The Court held that probable cause is sufficient to justify a seizure under the plain view doctrine.[38]

Likewise, in *Arizona v. Hicks*[39] a majority of the Court reaffirmed that probable cause is sufficient to invoke the plain view doctrine.[40] The Court determined that if probable cause is satisfied, officers may seize evidence of crime or contraband in plain view *or* conduct a further search of that material.[41] The majority remarked that it would be "absurd" to permit seizure of an object but not allow closer examination of that object before seizure.[42] Because the state conceded in *Hicks* that it did not have probable cause to conduct a further search, the officer's act of moving a stereo to read the serial number was an impermissible further search.[43]

The third and final requirement of the plain view doctrine, as originally delineated by the *Coolidge* plurality, was that the discovery of evidence be inadvertent.[44] The Court determined that if the police expect in advance to find and seize some piece of evidence, there is no inconvenience involved in obtaining a warrant for that particular piece of evidence, and thus no valid reason for not fulfilling the warrant requirement.[45] However, the inadvertence requirement was overruled in *Horton v. California*.[46] The *Horton* Court concluded that, although inadvertence is usually a characteristic of plain view seizures, it is not a requirement.[47] The *Horton* Court determined that even-handed law enforcement is best promoted by using objective standards to judge an officer's conduct, rather than

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36 *Id.* at 741.

37 *Id.* (citing Carroll v. United States, 267 U.S. 132, 162 (1925)).

38 *Id.* at 742.

39 480 U.S. 321 (1987).

40 *Id.* at 326.

41 *Id.*

42 *Id.* In *Hicks* an officer conducting a lawful search saw a stereo system that he suspected was stolen. *Id.* at 323. He moved the stereo to see the serial number, which the Court considered a "further search." *Id.* at 324-25.

43 *Id.* at 326-28. The Court again reaffirmed that probable cause is sufficient to satisfy the plain view doctrine in Horton v. California, 496 U.S. 128 (1990).

44 *Coolidge*, 403 U.S. 443, 469 (1971).

45 *Id.* at 470.

46 496 U.S. 128 (1990).

47 *Id.* at 130.

relying on his or her subjective state of mind.[48]

The *Horton* Court added a new requirement to the plain view doctrine. It held that an officer must have lawful access to the object for seizure to be permissible under the plain view exception to the warrant requirement.[49] The Court did not discuss the purpose or function of this additional requirement. The only guidance the Court provided was a brief, footnoted reference to some pre-*Coolidge* cases, all of which held evidence inadmissible when officers committed trespass in order to seize the evidence.[50]

While the plain view cases all involved visual perception of incriminating evidence, many have contained language referring to the use of other senses. For example, in *Coolidge*, the Court commented that "[i]ncontrovertible testimony of the *senses* . . . may establish the fullest possible measure of probable cause."[51] Based on such language, a number of lower courts have allowed the seizure of evidence based upon the officer's sense of touch.[52] There is no general consensus among the courts that have accepted the plain touch doctrine as to what the requirements of this exception should be. In *State v. Richardson*,[53] an officer discovered illegal drugs while conducting a lawful protective patdown.[54] The court held that the officer's tactile sensation during the patdown, combined with the surrounding circumstances, provided the officer with probable cause to search the contents of the suspect's pocket.[55] By contrast,

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48 *Id.* at 138.

49 *Id.* at 137.

50 *Id.* at 137 n.7 (citing Chapman v. United States, 365 U.S. 610 (1961); Jones v. United States 357 U.S. 493 (1958); McDonald v. United States, 335 U.S. 10 (1948); Trupiano v. United States, 334 U.S. 699 (1948); Johnson v. United States, 333 U.S. 10 (1948); Taylor v. United States, 286 U.S. 1 (1932).

51 Coolidge v. New Hampshire, 403 U.S. 443, 468 (1971) (emphasis added). *See also Horton*, 496 U.S. at 137; Texas v. Brown, 460 U.S. 730, 740 (1983); Ybarra v. Illinois, 444 U.S. 85 (1979).

52 *See, e.g.*, United States v. Payton, No. 91-3061, 1992 U.S. App. LEXIS 6195 (D.C. Cir. Mar. 27, 1992); United States v. Coleman, 969 F.2d 126 (5th Cir. 1992); United States v. Amparo, 961 F.2d 288 (1st Cir. 1992); United States v. Buchannon, 878 F.2d 1065 (8th Cir. 1989); United States v. Williams, 822 F.2d 1174 (D.C. Cir. 1987); United States v. Norman, 701 F.2d 295 (4th Cir. 1983); United States v. Portillo, 633 F.2d 1313 (9th Cir. 1980); United States v. Diaz, 577 F.2d 821 (2d Cir. 1978); Jackson v. State, 804 S.W.2d 735 (Ark. Ct. App. 1991); People v. Chavers, 658 P.2d 96 (Cal. 1983); People v. Hughes, 767 P.2d 1201 (Colo. 1989); Dickerson v. State, No. 228, 1992, 1993 Del. LEXIS 12 (Del. Jan. 26, 1993); Walker v. State, 610 A.2d 728 (Del. 1992); Doctor v. Florida, 596 So. 2d 422 (Fla. 1992); State v. Ortiz, 683 P.2d 822 (Haw. 1984); State v. Lee, 520 So. 2d 1229 (La. Ct. App. 1988); State v. Vanacker, 759 S.W.2d 391 (Mo. Ct. App. 1988); State v. Guy, 492 N.W.2d 311 (Wis. 1992).

53 456 N.W.2d 830 (Wis. 1990).

54 *Id.* at 144.

55 *Id.* at 146. *See also* State v. Guy, 492 N.W.2d 311 (Wis. 1992); People v. Lee, 240 Cal. Rptr. 32 (Cal. Ct. App. 1987).

the court in *United States v. Williams*[56] required the higher "reasonable certainty" standard rather than probable cause.[57] Other courts have accepted the doctrine without any discussion of what level of certainty an officer must satisfy in order to uphold the seizure.[58] Still other courts have explicitly rejected the extension of the plain view doctrine to tactile sensation.[59] The Supreme Court attempted to resolve this conflict in *Minnesota v. Dickerson.*

III. Facts and Procedural History

On the evening of November 9, 1989, Officer Vernon Rose and his partner were conducting a routine patrol of the area around 10th Avenue and Morgan Avenue North in Minneapolis, Minnesota in a marked squad car.[60] They observed Timothy Dickerson exit through the front door of 1030 Morgan Avenue shortly after 8 p.m.[61] Dickerson walked towards the officers until he noticed the squad car and made eye contact with one of the officers.[62] At this point, Dickerson abruptly turned around and began walking down an alley located beside the building he had just left.[63]

Dickerson's seemingly evasive behavior upon his exit from a building commonly known to be a crackhouse aroused the officers' suspicions.[64] They drove into the alley and ordered Dickerson to

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56 822 F.2d 1174 (D.C. Cir. 1987).

57 *Id.* at 1184-85. *See also* Dickerson v. State, 1993 Del. LEXIS 12 (Del. Jan. 26, 1993).

58 *See, e.g.*, United States v. Buchannon, 878 F.2d 1065 (8th Cir. 1989); United States v. Portillo, 633 F.2d 1313 (9th Cir. 1980).

59 *See, e.g.*, United States v. Moore, 1992 U.S. Dist. LEXIS 16440 (N.D. Ill. 1992); People v. Diaz, 612 N.E.2d 298 (N.Y. 1993); Commonwealth v. Marconi, 597 A.2d 616 (Pa. Super. Ct. 1991); State v. Rhodes, 788 P.2d 1380 (Okla. Crim. App. 1990); McDaniel v. State, 555 So. 2d 1145 (Ala. Crim. App. 1989); State v. Collins, 679 P.2d 80 (Ariz. Ct. App. 1983); State v. Broadnax, 654 P.2d 96 (Wash. 1982).

60 Transcript of Proceedings at 6, State v. Dickerson, No. 89067687 (Hennepin County, Minn. Feb. 20, 1990), *rev'd*, 469 N.W.2d 462 (Minn. Ct. App. 1991), *aff'd*, 481 N.W.2d 840 (Minn. 1991), *aff'd*, 113 S. Ct. 2130 (1993) [hereinafter Record]. The author is grateful to Assistant District Attorney Beverly Wolfe of the Hennepin County District Attorney's Office for providing her with pertinent parts of the trial transcript. This information is also available in the reported decisions.

When this case went to trial, Officer Rose was a fourteen year veteran of the Minneapolis Police Department, and in recent years had participated in the execution of 75 drug related search warrants, resulting in 50-75 arrests. A number of these searches occurred at 1030 Morgan Avenue, a notorious 24 hour-a-day crackhouse, and resulted in the seizure of both drugs and weapons. Police were monitoring this building due to complaints of drug sales in the hallways. Record at 4-7.

61 *Id.* at 8.

62 *Id.*

63 *Id.*

64 *Id.* (Officer Rose testified, "I thought it was strange and suspicious that the party would change his direction just because he saw a police car").

stop.[65] Officer Rose then conducted a protective patdown of the outer surfaces of Dickerson's clothing.[66] This search uncovered no weapons, but Officer Rose detected a small lump in Dickerson's thin nylon jacket pocket that felt like it was wrapped in cellophane.[67] Based on his experience in law enforcement, Officer Rose determined that the lump was crack cocaine.[68]

Officer Rose then removed the object from Dickerson's pocket and arrested him.[69] Later testing revealed that the object was in fact .20 grams of cocaine.[70] Dickerson was charged in Hennepin County with possession of a controlled substance.[71] He moved to suppress the cocaine, but the trial court allowed it to be admitted into evidence.[72] The trial court first reasoned that the stop and frisk were justified under *Terry v. Ohio*.[73] In a memorandum, the court then justified the seizure under the "plain feel" exception by drawing an analogy to the plain view exception to the Fourth Amendment warrant requirement, which allows contraband observed in plain view to be searched further or seized without a warrant.[74] Thus, the court concluded that the seizure did not violate the Fourth Amendment and Dickerson was found guilty of possession of cocaine.[75]

On appeal, the Minnesota Court of Appeals reversed the conviction.[76] The appellate court agreed that both the stop and the protective patdown were justified.[77] However, the court held that Officer Rose's actions exceeded the constitutional limitations outlined in *Terry v. Ohio*.[78] Refusing to accept the plain touch exception, the court held that an object may only be seized during a protective patdown if it reasonably resembles a weapon.[79]

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65 *Id.* at 9.

66 *Id.*

67 *Id.*

68 *Id.*

69 *Id.*

70 *Id.*

71 Minnesota v. Dickerson, 113 S. Ct. 2130, 2134 (1993).

72 State v. Dickerson, No. 89067687 (Hennepin County, Minn. March 6, 1990) (findings of fact, conclusions of law and order, and memorandum), *rev'd*, 469 N.W.2d 462 (Minn. Ct. App. 1991), *aff'd*, 481 N.W.2d 840 (Minn. 1991), *aff'd*, 113 S. Ct. 2130 (1993) [hereinafter Trial Court Findings] (available in Appendix C of the Petition For A Writ of Certiorari, Minnesota v. Dickerson, 113 S. Ct. 2130 (1993) (No. 91-2019)).

73 *Dickerson*, 113 S. Ct. at 2134 (citing Terry v. Ohio, 392 U.S. 1 (1968) (a limited patdown search for weapons is permissible in order to protect officers)).

74 Trial Court Findings, *Dickerson*.

75 *Dickerson*, 113 S. Ct. at 2134.

76 State v. Dickerson, 469 N.W.2d 462, 463 (Minn. Ct. App. 1991).

77 *Id.* at 465.

78 *Id.* (citing Terry v. Ohio, 392 U.S. 1 (1967)).

79 *Id.* at 466.

The Minnesota Supreme Court affirmed the decision of the court of appeals, refusing to accept the plain touch doctrine as a corollary to the plain view doctrine on the grounds that tactile sensations are less immediate and reliable than visual sensations, and necessarily more intrusive.[80] The court commented in a footnote that even if it were to recognize a plain feel exception, an officer must stop examining an object upon determining that it is not a weapon.[81] The court noted that the search of Dickerson's pocket would not qualify under this criteria, because the testimony indicated that Officer Rose manipulated the object in Dickerson's pocket after determining that it was not a weapon.[82]

The United States Supreme Court granted Minnesota's petition for a writ of certiorari[83] to consider whether Officer Rose's seizure violated the Fourth Amendment prohibition against unreasonable searches and seizures.

IV. THE SUPREME COURT OPINIONS

A. THE MAJORITY OPINION

In an opinion written by Justice White,[84] the Supreme Court affirmed the decision of the Minnesota Supreme Court.[85] The Court held that contraband detected through the sense of touch during a lawful patdown search may be admitted into evidence, so long as the officer does not exceed the limits set forth in *Terry v. Ohio*.[86] The Court found, however, that because Officer Rose exceeded the limits of *Terry*, the seizure of cocaine from Respondent's pocket was unconstitutional.[87]

After a brief review of relevant Fourth Amendment precedent, Justice White determined that the plain view doctrine is analogous to tactile discoveries of contraband that occur during otherwise lawful searches.[88] Adopting the requirements of the plain view doc-

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80 State v. Dickerson, 481 N.W.2d 840, 845 (Minn. 1991).

81 *Id.* at 844 n.1.

82 *Id.* at 844 n.1. The court misquoted Officer Rose's testimony as "I examined it with my fingers and slid it." *Id.* at 842.

83 Minnesota v. Dickerson, 113 S. Ct. 53 (1992).

84 Justice White delivered the opinion for a unanimous Court with respect to Parts I and II, and the opinion of the Court with respect to Parts III and IV, in which Justices Stevens, O'Connor, Scalia, Kennedy and Souter joined. Justice Scalia filed a concurring opinion. Chief Justice Rehnquist filed an opinion concurring in part and dissenting in part, in which Justices Blackmun and Thomas joined.

85 Minnesota v. Dickerson, 113 S. Ct. 2130, 2139 (1993).

86 *Id.* at 2136 (citing Terry v. Ohio, 392 U.S. 1 (1967)).

87 *Id.* at 2139.

88 *Id.* at 2137.

trine as enumerated in *Horton v. California*,[89] Justice White determined that contraband detected through the sense of touch may be seized without a warrant when an "officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent."[90]

Justice White determined that the seizure of evidence plainly detected through the sense of touch is justified by the same rationale as the plain view exception to the warrant requirement.[91] One rationale for the plain view doctrine is the theory that no search independent of the initial lawful intrusion occurs when contraband is left in open view and is observed from a lawful vantage point.[92] A further justification is the impracticality of requiring an officer to resort to a neutral magistrate in these circumstances.[93] Justice White noted that requiring an officer to obtain a search warrant when contraband presents itself in this manner would do little to promote the objectives of the Fourth Amendment.[94] According to Justice White's analogy, no further invasion of a suspect's privacy occurs when an officer is performing a lawful pat down of the suspect's clothing and feels an object whose identity as contraband is immediately apparent.[95] Additionally, Justice White concluded that the same practical considerations that vindicate warrantless seizure when contraband is discovered in plain view apply to tactile discoveries.[96] Although he did not reveal what these practical considerations are, an important concern is the possibility that evidence may be destroyed or hidden by the time an officer returns with a search warrant.[97]

Justice White rejected the Supreme Court of Minnesota's contention that the sense of touch is less immediate and reliable than sight.[98] He pointed out that *Terry* itself was based upon the supposition that the sense of touch is capable of revealing the identity of an object with enough reliability to justify a weapon seizure.[99] Further, Justice White reasoned that even if tactile sensation is less reliable

89 496 U.S. 128 (1990).

90 *Dickerson*, 113 S. Ct. at 2137 (citing Horton v. California, 496 U.S. at 136-37). Justice White emphasized that under the plain view doctrine, an object may not be seized if its incriminating character is not immediately apparent. *Id.*

91 *Id.*

92 *Id.*

93 *Id.*

94 *Id.*

95 *Id.* at 2138.

96 *Id.* at 2137.

97 Coolidge v. New Hampshire, 403 U.S. 443, 467-68 (1971).

98 *Dickerson*, 113 S. Ct. at 2137.

99 *Id.*

than sight, that only means that fewer seizures will be justified by the plain touch doctrine than by the plain view doctrine.[100] Moreover, since the Fourth Amendment mandates that officers have probable cause to believe that an object is contraband before seizing it, excessively speculative seizures will be prevented.[101]

The Court also rejected the Minnesota Supreme Court's reasoning that touch is necessarily more intrusive than sight, remarking that this concern is inappropriate because the feared intrusion would already be authorized by *Terry*.[102] The Court further noted that "[t]he seizure of an item whose identity is already known occasions no further invasion of privacy," and that the suspect's privacy interests are not enhanced by a rule banning the seizure of contraband "plainly detected through the sense of touch."[103]

In applying the plain touch doctrine to the specific facts of the *Dickerson* case, the Court concluded that the seizure was unconstitutional.[104] The majority held that Officer Rose overstepped the strictly limited search for weapons allowed under *Terry* because his "continued exploration of Respondent's pocket after having concluded that it contained no weapon was unrelated to 'the sole justification of the search [under *Terry*:] . . . the protection of the police officers and others nearby.' "[105] Justice White analogized Officer Rose's actions to those of the officers in *Arizona v. Hicks* to conclude that the officer's continued touching of the suspicious lump in Dickerson's pocket constituted a "further search," and was not authorized by the plain touch exception.[106] Consequently, the Court affirmed the judgment of the Minnesota Supreme Court.[107]

B. JUSTICE SCALIA'S CONCURRENCE

In his concurrence, Justice Scalia pondered the validity of the Court's holding in *Terry*. He focused on the principle that the Fourth Amendment prohibition against unreasonable searches and seizures must be interpreted "in the light of what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted."[108] Applying this principle, he concluded that only the

100 *Id.*
101 *Id.*
102 *Id.* at 2138.
103 *Id.* (citations omitted).
104 *Id.* at 2139.
105 *Id.* at 2138-39 (quoting Terry v. Ohio, 392 U.S. 1, 29 (1967)).
106 *Id.* at 2139 (citing Arizona v. Hicks, 480 U.S. 321 (1987)).
107 *Id.*
108 *Id.* (Scalia, J., concurring) (quoting Carroll v. United States, 267 U.S. 132, 149 (1925)).

"stop" portion of the "stop and frisk" authorized by *Terry* is valid.[109] When the Fourth Amendment was adopted it was considered reasonable at common law to stop suspicious individuals and demand that they "give an account of themselves."[110] However, Justice Scalia found precedent only for a full search subsequent to arrest, not for a physical search of a person temporarily detained.[111] Nevertheless, because the constitutionality of the frisk itself was not challenged, Justice Scalia joined the majority opinion in its entirety.[112]

C. CHIEF JUSTICE REHNQUIST'S OPINION

Chief Justice Rehnquist[113] joined in the majority opinion with respect to the establishment of the plain touch doctrine.[114] However, because he believed that the lower courts' findings were imprecise regarding whether Officer Rose was acting within the bounds of *Terry* when "he gained probable cause to believe that the lump in respondent's jacket was contraband," the Chief Justice would have vacated the judgment and remanded the case for further proceedings consistent with the majority opinion.[115]

V. ANALYSIS

This Note concludes that the Supreme Court properly recognized the plain touch doctrine as a constitutional exception to the Fourth Amendment warrant requirement. However, this Note argues that the Court presented an ambiguous, sparse enumeration of the elements of this newly recognized doctrine. This Note further contends that the Court improperly affirmed the Minnesota Supreme Court's decision to exclude the crack discovered by Officer Rose during his patdown of Respondent Dickerson.

A. THE PLAIN TOUCH DOCTRINE IS THE PROPER COROLLARY TO THE PLAIN VIEW DOCTRINE

The plain touch doctrine is the natural corollary to the plain view doctrine; the same considerations that led the Court to develop

109 *Id.* at 2140 (Scalia, J., concurring).
110 *Id.* (Scalia, J., concurring).
111 *Id.* (Scalia, J., concurring).
112 *Id.* at 2141 (Scalia, J., concurring).
113 Chief Justice Rehnquist was joined in this opinion by Justice Blackmun and Justice Thomas.
114 *Dickerson*, 113 S. Ct. at 2141 (Rehnquist, C.J., concurring in part and dissenting in part).
115 *Id.* (Rehnquist, C.J., concurring in part and dissenting in part).

the plain view doctrine also apply to tactile discoveries. In *Coolidge v. New Hampshire*,[116] the Court determined that no further intrusion on a suspect's Fourth Amendment rights occurs when officers seize evidence discovered in plain view if the officers remain within the bounds of the original search.[117] Allowing seizure of evidence in plain view does not threaten to turn a narrow search into a general exploratory search because evidence is not admissible under this doctrine if officers exceed the limits of the original search.[118] Since officers invoking the plain touch doctrine must also stay within the bounds of the original lawful search, this rationale applies equally well to tactile discoveries of contraband.[119]

The practical considerations that justify the plain view doctrine also justify a plain touch exception. The *Coolidge* Court permitted the plain view exception to the warrant requirement because resort to a neutral magistrate is an unnecessary and impractical inconvenience when the character of an object as contraband or evidence of a crime is already known, and because exclusion of such evidence does little to enhance the protection provided by the Fourth Amendment.[120] These practical considerations also apply to plain touch seizures.[121] In both plain view and plain touch situations, the officer would be forced to leave the suspect with the evidence in order to obtain a warrant. The probability that the evidence would still be in the location where the officer originally discovered it is low. The suspect would have a strong motivation to destroy or conceal the evidence upon realizing that the officer has noticed it. One alternative would be to detain the suspect until a warrant is approved; however, lengthy detainment without arrest and arraignment is a greater intrusion upon a suspect's rights than seizure of an object that the officer already has probable cause to believe is contraband or evidence of a crime.[122]

Further, language used by the Supreme Court in many of the plain view cases suggests a willingness to extend the plain view doctrine to the use of other senses. In a number of these cases, the Court specifically employed language that implied acceptance of discoveries based on all senses, instead of confining its decisions to

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116 403 U.S. 443 (1971).

117 *Id.* at 467-68.

118 *Id.*

119 *Dickerson*, 113 S. Ct. at 2137.

120 *Coolidge*, 403 U.S. at 467-68.

121 *Dickerson*, 113 S. Ct. at 2137.

122 *See* Larry E. Holtz, *The "Plain Touch" Corollary: A Natural and Foreseeable Consequence of the Plain View Doctrine*, 95 DICK. L. REV. 521, 532 n.64 (1991); Petitioner's Brief on the Merits at 22, Minnesota v. Dickerson, 113 S. Ct. 2130 (1993) (No. 91-2019).

discoveries based only upon sight. In *Coolidge v. New Hampshire*, the earliest of the plain view cases, the Court noted that "incontrovertible testimony of the *senses*" may provide probable cause for seizure of evidence.[123] The possibility of extending the exception to the use of senses other than sight was also implied in *Texas v. Brown*,[124] in which the Court referred to the "rule that if, while lawfully engaged in an activity in a particular place, police officers *perceive* a suspicious object, they may seize it immediately."[125] Further, the *Horton* Court, borrowing the *Coolidge* language, reaffirmed that probable cause to seize evidence may be based upon "incontrovertible testimony of the *senses*."[126]

The Court also specifically implied that the sense of touch can be relied upon to provide probable cause in *Ybarra v. Illinois*.[127] In a footnote, the *Ybarra* Court suggested that so long as the original patdown is valid under *Terry*, officers may seize objects that they have acquired probable cause to believe are contraband through the sense of touch.[128] In *Ybarra*, an officer discovered a cigarette pack containing narcotics during a patdown.[129] Because the original patdown was not authorized by *Terry*, the Court held that the evidence was inadmissible.[130] Implicit in this opinion, as the *Dickerson* Court noted, is the Court's willingness to allow the seizure as long as the patdown *is valid*, thereby accepting the extension of the plain view doctrine to cases in which contraband is discovered through the sense of touch.[131] *Ybarra* is almost identical to the instant case, which also involved seizure of drugs based upon an officer's tactile observation of the evidence during a patdown. Unlike *Ybarra*, however, the original patdown in *Dickerson* was authorized by *Terry*.

Opponents to the plain touch doctrine argue that the plain view doctrine should not be extended to encompass probable cause based on touch because touch is more intrusive than sight,[132] be-

123 *Coolidge*, 403 U.S. at 468 (emphasis added).

124 460 U.S. 730 (1983).

125 *Id.* at 740 (emphasis added).

126 Horton v. California, 496 U.S. 128, 137 (1990) (emphasis added).

127 444 U.S. 85 (1980).

128 *Id.* at 93 n.5.

129 *Id.* at 89.

130 *Id.* at 92-93. The Court stated "[w]e need not decide whether or not the presence on Ybarra's person of a 'cigarette pack with objects in it' yielded probable cause to believe Ybarra was carrying any illegal substance." *Id.* at 93 n.5.

131 Minnesota v. Dickerson, 113 S. Ct. 2130, 2137 (1993).

132 *See, e.g.*, State v. Dickerson, 481 N.W.2d 840, 844 (Minn. 1992); David L. Haselkorn, Comment, *The Case Against a Plain Feel Exception to the Warrant Requirement*, 54 U. CHI. L. REV. 683, 693-96 (1987); Brief for the American Civil Liberties Union and Minnesota Civil Liberties Union as Amicus Curiae in Support of Respondent at 16, Min-

cause establishment of the plain touch doctrine will cause a further erosion of Fourth Amendment rights,[133] because people express a greater expectation of privacy when they carry contraband on their persons,[134] and because touch is less accurate than sight.[135] These arguments are flawed in many respects.

First, the Minnesota Supreme Court declined to accept the plain touch doctrine because it believed that touch is necessarily more intrusive than sight.[136] The court decided that a patdown is more intrusive than a search of property, because a patdown necessarily entails touching the suspect's body.[137] Because the plain view doctrine does not typically involve physical contact with the suspect, while the plain touch doctrine frequently does, some argue that the two doctrines are distinguishable. However, this argument has little force, both because the initial intrusion must already be authorized, and because the plain touch doctrine does not permit the search to exceed the initial intrusion. The United States Supreme Court recognized that this argument "is inapposite in light of the fact that the intrusion the [Minnesota Supreme] court fears has already been authorized by the lawful search for weapons."[138]

Second, the concern that the plain touch exception will either cause a further erosion of Fourth Amendment rights by turning limited patdown searches into general exploratory searches, or lead to speculative seizures,[139] is allayed by the requirement that the search not exceed the bounds of the original justification for the intrusion without probable cause. Again, since no search not already authorized by law is allowed under the plain touch doctrine, no erosion of Fourth Amendment rights will occur.[140]

A third argument is that people express a heightened expecta-

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nesota v. Dickerson, 113 S.Ct. 2130 (1993) (No. 91-2019) [hereinafter ACLU Amicus Brief]; Respondent's Brief on the Merits at 28, *Dickerson* (No. 91-2019).

133 *See, e.g.*, Haselkorn, *supra* note 132, at 697-702; Respondent's Brief on the Merits at 42.

134 *See, e.g.*, Haselkorn, *supra* note 132, at 696; ACLU Amicus Brief at 16; Respondent's Brief on the Merits at 29.

135 *See e.g.*, *Dickerson*, 481 N.W.2d at 844; People v. Diaz, 612 N.E.2d 298, 302 (N.Y. 1993); Haselkorn, *supra* note 132, at 695; ACLU Amicus Brief at 15; Respondent's Brief on the Merits at 29-30.

136 *Dickerson*, 481 N.W.2d at 844. *See also supra* note 132.

137 *Id.* at 845.

138 Minnesota v. Dickerson, 113 S. Ct. 2130, 2138 (1993).

139 *See, e.g.*, Haselkorn, *supra* note 132, at 697-702; Respondent's Brief on the Merits at 42.

140 *Dickerson*, 113 S. Ct. at 2137. Balanced against the public's right to live in a society free of drug traffic and drug abuse, a minimal intrusion into a suspect's privacy seems inconsequential. *See* United States v. Ceballos, 719 F. Supp. 119, 122-23 (E.D.N.Y. 1989).

tion of privacy in objects they carry concealed on their persons.[141] Unlike evidence discovered through sight, evidence discovered during a patdown is necessarily discovered on the suspect's person. Opponents to the plain touch doctrine argue that people have a greater privacy interest in evidence discovered during a patdown than in evidence discovered through the sense of sight, because by concealing it on their person they have exhibited a high expectation of privacy.[142] This argument ignores the fact that the plain view doctrine already permits seizure of concealed evidence, so long as the discovery of that evidence occurred during a valid search.[143]

Analysis of the principles developed by the Court in *Coolidge* and its progeny demonstrates that the plain view doctrine permits seizure of evidence found concealed in a drawer, for instance, so long as the opening of the drawer was authorized by the original search.[144] A comparable situation occurred in *United States v. Diaz*,[145] in which an officer lifted the top of a toilet tank in a suspect's home in order to stop the toilet from running.[146] Because the officer had lawfully gained access to the toilet tank, seizure of the evidence discovered therein was justified under the plain view doctrine.[147] The suspect obviously exhibited a high expectation of privacy by placing the evidence in his toilet tank. Arguably, the privacy expectation in evidence placed in a pocket is no greater than the privacy expectation in evidence placed in a drawer or a toilet tank.[148] In both contexts, the suspect has expressed a desire to shield the object from public view. Consequently, the "expectation of privacy" argument provides little basis for allowing seizure of evi-

141 *See, e.g.*, Haselkorn, *supra* note 132, at 696; ACLU Amicus Brief at 16; Respondent's Brief on the Merits at 29.

142 *See, e.g.*, People v. Diaz, 612 N.E.2d 298, 301 (N.Y. 1993) ("unlike the item in plain view in which the owner has no privacy expectation, the owner of an item concealed by clothing or other covering retains a legitimate expectation that the item's existence and characteristics will remain private"); Haselkorn, *supra* note 132, at 696 ("Because the plain feel cases invariably involve items that are within some form of container, courts should take account of defendants' demonstrated intent to secrete objects from plain view when assessing the intrusiveness of a plain feel.").

143 *See* Horton v. California, 496 U.S. 128 (1990); Coolidge v. New Hampshire, 403 U.S. 443 (1971).

144 *See* United States v. Barnes, 909 F.2d 1059, 1069 (7th Cir. 1990) ("In their search for cocaine, the agents were authorized to search any and all areas and items where narcotic might readily be concealed.").

145 577 F.2d 821 (2d Cir. 1978).

146 *Id.* at 822.

147 *Id.* at 823.

148 *Cf.* United States v. Ocampo, 650 F.2d 421, 428 (2d Cir. 1981) (arguing that there is no reasonable expectation of privacy when the identity of an object is easily ascertainable by touch).

dence found concealed in a drawer or toilet tank, but not permitting seizure of the evidence found in a pocket.

Fourth, the concern that touch is less accurate than sight[149] is also misplaced, because the United States Supreme Court already determined in *Terry* that "the sense of touch is capable of revealing the nature of an object with sufficient reliability to support a seizure."[150] Plain logic reveals that if the sense of touch is accurate enough to reveal the identity of a weapon, it is also accurate enough to reveal the identity of other contraband that an officer is trained to recognize. Admittedly, weapons are generally easier to identify by touch than small pieces of crack cocaine, but officers are able to detect such contraband in many cases because of their experience and training with these substances. Although the *Dickerson* Court did not discuss exactly how an officer becomes trained to recognize various types of contraband, this concern was addressed in *United States v. Ceballos*.[151] That court noted that unlike the average individual, officers deal with contraband continually in their law enforcement duties. This familiarity enables them to recognize contraband upon tactile contact that lay people might not recognize.[152]

Moreover, if tactile observations are generally less reliable than sight, that only means that fewer seizures will be justified by the plain touch doctrine.[153] If an officer does not know that an object is contraband with a sufficient degree of certainty, the officer is not permitted to seize the evidence.

B. THE SUPREME COURT PROVIDED AMBIGUOUS PARAMETERS FOR THE PLAIN TOUCH DOCTRINE

In creating the plain touch doctrine, the Court looked to the three prongs of the plain view test as it has developed from *Coolidge* to *Horton*.[154] Based on the analogy to the plain view doctrine, the Court held that an object can be seized based on tactile observations

149 Minnesota v. Dickerson, 481 N.W.2d, 840, 844 (Minn. 1992). *See also* People v. Diaz, 612 N.E.2d 289, 302 ("the identity and nature of the concealed item cannot be confirmed until seen"); Commonwealth v. Marconi, 597 A.2d 616, 624 (Pa. Super. Ct. 1991) ("when an individual feels an object through a pants pocket . . . the sense of touch is not so definitive"); Haselkorn, *supra* note 132, at 695 ("A tactile encounter will generally provide less information than a visual encounter.").

150 Minnesota v. Dickerson, 113 S. Ct. 2130, 2137 (1993) (referring to Terry v. Ohio, 392 U.S. 1 (1967)).

151 719 F. Supp. 119 (E.D.N.Y. 1989).

152 *Id.* at 123-24. As the *Ceballos* court eloquently stated, "A virtuoso may draw reasonable inferences and suspicions of criminal involvement that would elude the amateur." *Id.* at 124.

153 *Dickerson*, 113 S. Ct. at 2137.

154 *Id.* at 2136-37.

when: (1) a lawful patdown has occurred under *Terry*; (2) the character of the object as contraband or evidence of a crime is "immediately apparent"; and (3) the officer has a lawful right of access to the object.[155] However, this decision left a considerable degree of ambiguity about the specific requirements of the plain touch doctrine. Simultaneous use of the terms "immediately apparent" and "probable cause" left the holding ambiguous as to what standard of certainty is necessary to justify seizure. Additionally, the purpose for the requirement that the officer have a lawful right of access to the object was not clarified by the Court.

The requirement that the character of the object be immediately apparent will likely create confusion for courts applying the plain touch doctrine.[156] The Court did not clarify what it meant by "immediately apparent" when it relied upon this language from the *Coolidge* decision in defining the new doctrine. In its justification of the new doctrine, the Court also remarked that "seizure of an item *whose identity is already known* occasions no further invasion of privacy."[157] This particular language should indicate that the plain touch doctrine can only justify seizure when there is absolutely no doubt surrounding the identity of the object. However, the Court implied at another point in the decision that the less imposing probable cause standard is sufficient to justify a plain touch seizure, when Justice White stated that "[r]egardless of whether the officer detects contraband by sight or by touch, however, the Fourth Amendment's requirement that the officer have *probable cause* to believe that the item is contraband before seizing it ensures against excessively spec-

155 *Id.* at 2137. An issue that the Court did not address is whether the officer's state of mind at the time of the search and seizure is relevant. The *Coolidge* Court originally held that the discovery of contraband must be inadvertent to fall under the plain view exception. Coolidge v. New Hampshire, 403 U.S. 443, 469 (1971). However, this requirement was explicitly overruled in Horton v. California, 496 U.S. 128 (1990). Because the *Dickerson* Court based its construction of the plain touch doctrine on the plain view doctrine, it is logical to assume that the Court intended the officer's state of mind to be irrelevant in the plain touch context.

156 The cases decided since *Dickerson* have inconsistently interpreted the opinion. *See* United States v. Mitchell, 832 F. Supp 1073, 1078-79 (D. Miss. 1993) (holding that the evidence was inadmissible because there was no " 'immediately apparent' determination" of its identity); United States v. Winter, 826 F. Supp. 33, 37-38 (D. Mass. 1993) (rejecting seizure under the plain touch doctrine because the identity of the evidence was not immediately apparent); Ohio v. Crawford, No. 64607, 1993 Ohio App. LEXIS 4488, at *14 (Oh. Ct. App. Sept. 23, 1993) (requiring probable cause for seizure under the plain touch doctrine). The court completely misread the *Dickerson* opinion in United States v. Ross, No. 93-10015-01, 1993 U.S. Dist. LEXIS 9698, at *9 (D. Kan. June 8, 1993) (stating that the Supreme Court in *Dickerson* "held that a 'plain feel' exception was groundless under the Fourth Amendment").

157 *Dickerson*, 113 S. Ct. at 2138 (emphasis added).

ulative seizures."[158]

The Court seems to use these phrases interchangeably; however, they have vastly different implications. While the phrase "immediately apparent" indicates a very strict standard of certainty, probable cause does not require that the officer conducting the search know the identity of the object with absolute certainty before conducting a further search or seizure.[159] Rather, it requires only that a reasonable person, given the specific situation and the officer's experience, would be justified in believing that the object is contraband or evidence of crime.[160] The Court's haphazard use of these terms leaves the opinion ambiguous as to what standard of certainty is required to justify a search or seizure under the plain touch doctrine.

Probable cause is the proper standard to apply to plain touch seizures because in formulating the plain touch doctrine, the Court adopted the requirements of the plain view doctrine. Since the plain view doctrine requires probable cause to permit seizure[161], it is consistent to conclude that probable cause is also sufficient to justify seizure in the plain touch context. The *Coolidge* Court created a similar ambiguity when it held that the character of an object as contraband, or evidence of crime, must be immediately apparent to justify seizure under the plain view exception, but also mentioned probable cause in other parts of the decision.[162] The plain view cases decided after *Coolidge* resolved this ambiguity, holding that probable cause is sufficient to justify either a further search or seizure of an object.[163] In *Texas v. Brown*,[164] the plurality acknowledged that "immediately apparent" was a poor choice of words; they imply an excessively high degree of certainty as to the identity of the object.[165] The Court instead determined that probable cause will justify seizure of evidence discovered in plain view.[166] The Court has since reaffirmed the probable cause standard in the plain view context.[167]

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158 *Id.* at 2137 (emphasis added).

159 *See* Arizona v. Hicks, 480 U.S. 321 (1987); Texas v. Brown, 460 U.S. 730 (1983). *See supra* notes 35-43 and accompanying text.

160 *See* Texas v. Brown, 460 U.S. 730, 741 (1983).

161 *Id.*

162 Coolidge v. New Hampshire, 403 U.S. 443, 466, 468 (1971).

163 Horton v. California, 496 U.S. 128, 137 (1990); Arizona v. Hicks, 480 U.S. 321, 326 (1986); Texas v. Brown, 460 U.S. 730, 742 (1983).

164 460 U.S. 730 (1983).

165 *Id.* at 741.

166 *Id.* at 742.

167 *See* Arizona v. Hicks, 480 U.S. 321, 326 (1986); Horton v. California, 496 U.S. 128, 137 (1990). *See supra* notes 35-43 and accompanying text.

The probable cause standard is a more practical standard than the immediately apparent requirement, because officers and courts are familiar with the requirements of probable cause, and because probable cause allows officers to rely on their experience and training when making critical decisions.[168] The Court has been unable to apply the immediately apparent requirement successfully in the plain view context, admitting that probable cause is a more functional standard.[169] Because the Court abandoned *Coolidge*'s immediately apparent standard for the probable cause standard in *Brown*, little precedent developed interpreting the scope of the immediately apparent requirement. Consequently, it would be exceedingly difficult for courts applying the plain touch doctrine to evaluate the immediacy of an officer's recognition of some object as contraband. Judges applying this standard will be forced to rely solely on the officer's testimony that he or she knew immediately upon touching the object that it was contraband, without guidance from precedent. Because thought processes cannot be artificially broken down into consecutive events, it is nearly impossible for anyone to say with complete certainty whether he or she was "immediately" aware of the nature of an object.[170] However, well-articulated, familiar standards exist for the determination of probable cause.

The recent plain view cases, which require that probable cause be satisfied before seizure, can be looked to for guidance in the plain touch context. Probable cause was explained in *Texas v. Brown*:

> probable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer would warrant a man of reasonable caution in the belief that certain items may be contraband

168 The senselessness of requiring a higher standard of certainty than probable cause in the plain touch context is illuminated by a brief look at the standards for a search incident to arrest. To make a warrantless arrest, an officer need only have probable cause to believe that the suspect has committed or is in the process of committing a crime; after arrest a full blown search of the suspect's person is permissible. Chimel v. California, 395 U.S. 752 (1964); Carroll v. United States, 267 U.S. 132 (1925); Weeks v. United States, 232 U.S. 383 (1914). Possession of contraband is a crime. In essence, therefore, only probable cause is required to search for and seize contraband from a suspect's person.

Interestingly, a number of earlier cases justified seizure of evidence discovered during a patdown as a search incident to arrest, even when the search and seizure of the evidence occurred prior to the arrest. *See, e.g.*, People v. Taylor, 344 P.2d 837 (Cal. Ct. App. 1959); People v. Brown, 305 P.2d 126 (Cal. Ct. App. 1956); State v. Chester, 129 A. 596 (R.I. 1925). It seems irrational to require a stricter standard for seizure under the plain touch doctrine, since the same result could theoretically be achieved through manipulation of the search incident to arrest exception.

169 Arizona v. Hicks, 480 U.S. 321, 326 (1986); Texas v. Brown, 460 U.S. 730, 741 (1983).

170 Brief for the United States as Amicus Curiae Supporting Petitioner at 10-12, Minnesota v. Dickerson, 113 S. Ct. 2130 (1993) (No. 91-2019).

or stolen property or useful as evidence of a crime; it does not demand that such a belief be correct or more likely true than false.[171]

Use of this standard is more realistic than requiring that the identity of the object be immediately apparent. Experienced officers should be allowed to judge the totality of the circumstances in which a search occurs. The excessively strict requirement that recognition of an object as contraband be immediate would not only lead to confusion in the lower courts, but would most likely render the newly created plain touch doctrine ineffective, because no room is given for consideration of the totality of the circumstances, or the officer's experience. The probable cause standard gives the proper weight to the experience and intuition that officers rely on in the daily performance of their official duties, while simultaneously ensuring that a suspect's Fourth Amendment rights are not unnecessarily intruded upon.[172]

In its analogy to the plain view doctrine, the *Dickerson* Court required that the third prong of the plain view doctrine introduced by the *Horton* Court be satisfied. *Horton* required that an officer have lawful access to the evidence in order to seize it once the discovery has been made.[173] Because this was the only reference the *Dickerson* Court made to this prong of the plain view test, it is not clear how this operates in the plain touch setting. The *Horton* decision does not provide any insight because it did not define "lawful access," nor did it describe what purpose this requirement serves.[174] The only clue is given in a footnote, which cites a number of pre-*Coolidge* cases that dealt with situations in which evidence was held inadmissible because the officers trespassed while seizing the evidence.[175]

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171 460 U.S. 730, 742 (1983) (citations and internal quotations omitted).

172 *See, e.g.*, Bryant v. United States Treasury Dep't, 903 F.2d 717, 729-30 (9th Cir. 1990) (Trott, J., dissenting) ("The *Davis* court also emphasized the role that the expertise and special training of the arresting officer plays in the determination of probable cause. This, of course, makes good sense. We spend billions of dollars providing special training for our law enforcement officers. What a waste if we do not rely on it."); *United States v. Packer*, 730 F.2d 1131 (8th Cir. 1984) ("[O]bservation of apparently innocent acts can be significant to a trained officer and . . . the officer is entitled to assess probable cause in light of his experience.").

173 Horton v. California, 496 U.S. 128, 137 (1990).

174 *See supra* notes 49-50 and accompanying text.

175 *Horton*, 496 U.S. at 137 n.7. (citing Chapman v. United States, 365 U.S. 610 (1961) (holding inadmissible evidence seized by officers who detected odor of whiskey mash and entered defendant's apartment through an open window with landlord's consent, but without defendant's consent); Jones v. United States, 357 U.S. 493 (1958) (holding evidence seized by officers who had good cause to believe liquor was illegally distilled in house inadmissible because officers forced their way into house without a warrant); McDonald v. United States, 335 U.S. 10 (1948) (holding evidence that officers saw through window in door inadmissible because they entered through a closed door to seize); Trupiano v. United States, 334 U.S. 699 (1948) (holding evidence viewed from outside of

There are no subsequent Supreme Court decisions that address this issue, and lower courts are inconsistent in the application of this requirement.[176]

Synthesis of the cases cited in *Horton* with the requirements of the plain view doctrine leads to the rational inference that the lawful access requirement was imposed to prevent trespass. In other words, if officers are lawfully conducting a search on a suspect's property, they can seize evidence observed in plain view without a warrant specifying the particular evidence, because they have lawful access to the object.[177] However, if officers are conducting a lawful search on one piece of property and observe contraband in plain view on the neighboring property, they can not enter the neighboring property in order to seize the evidence without a warrant, because to do so would constitute an illegal trespass.[178] Consequently, the third prong is not satisfied in the second scenario.

Trespass is not an issue in plain touch situations, however, because the officer must already be lawfully touching the contraband. Although the opinion provided no guidance as to how this requirement functions in the plain touch context, the *Dickerson* Court would not likely have included lawful access among the criteria for seizure if the Court did not intend it to have some significance. One rational interpretation is that the *Dickerson* Court intended the plain touch doctrine itself to satisfy the third prong of the *Horton* test. In other words, this doctrine *provides* lawful access to an object when the original search is lawful and the officer has probable cause to believe that the object is contraband.[179]

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barn and seized after officers entered the barn inadmissible); Johnson v. United States, 333 U.S. 10 (1948) (holding evidence inadmissible because officers who smelled burning opium from hallway entered closed hotel room door in order to seize); Taylor v. United States, 286 U.S. 1 (1932) (holding whiskey that officers saw and smelled inadmissible because they had to enter locked garage in order to seize)).

176 Some lower courts seem to combine the requirement that the initial search be valid with the requirement that the officer have lawful access to the evidence. *See, e.g.*, United States v. Matthews, 942 F.2d 779, 783 (10th Cir. 1991) (holding lawful access requirement satisfied when evidence discovered during lawful search). However, this interpretation ignores the fact that *Horton* distinctly delineated these as two separate requirements: "not only must the officer be lawfully located in a place from which the object can be plainly seen, but he or she must also have a lawful right of access to the object itself." *Horton*, 496 U.S. at 137.

177 *See* Coolidge v. New Hampshire, 403 U.S. 443, 467-68 (1971).

178 *See Project: 22nd Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeal 1991-1992*, 81 GEO. L.J. 853, 901 n.191 (1993).

179 *See, e.g.*, State v. Crawford, No. 64607, 1993 Ohio App. LEXIS 4488 (Ohio Ct. App. Sept. 23, 1993). The *Crawford* Court determined that because the first two prongs of the *Dickerson* test were satisfied, the officer "had a lawful right of access to the object." *Id.*

C. THE COURT IMPROPERLY APPLIED THE PLAIN TOUCH DOCTRINE TO THE FACTS OF THIS CASE

Assuming, arguendo, that "immediately apparent" is the proper standard, the Court should not have affirmed the Minnesota Supreme Court's decision. Instead, the Court should have remanded the case for further proceedings, as Chief Justice Rehnquist suggested in his opinion.[180] During the trial, Officer Rose recounted his discovery of the crack cocaine.[181] He stated that when he frisked Respondent's chest, he "felt a lump, a small lump, in the front pocket. [He] examined it with [his] fingers and it slid and it felt to be a lump of crack cocaine in cellophane."[182] The trial court did not find that Officer Rose exceeded the scope of *Terry* when he conducted this search.[183] In allowing the seizure, the court found only that "Officer Rose felt a small, hard object wrapped in plastic in defendant's pocket."[184] The court further found that "[b]ased upon his training and experience, Officer Rose formed the opinion that the object in defendant's pocket was crack/cocaine and removed it."[185]

Although nothing in the trial court's findings indicated that Officer Rose toyed with or manipulated the object in Respondent's pocket, the Minnesota Supreme Court came to the erroneous conclusion that he squeezed, slid, and otherwise manipulated the object in Dickerson's pocket in order to determine the identity of the small lump.[186] A comparison of the trial transcript to the Minnesota Supreme Court decision reveals that this conclusion was based on a misquote of Officer Rose's testimony. In its discussion of the facts, the Minnesota Supreme Court quoted Officer Rose's testimony as "I examined it with my fingers and *slid it* and *felt it* to be a lump of crack cocaine in cellophane."[187] However, Officer Rose testified that the object slid, not that he slid the object.[188] He testified that the object "felt to be" crack cocaine, not that he "felt it."[189] Because an officer is not permitted to exceed the scope of *Terry* in conducting a patdown under the plain touch doctrine, the Minnesota Supreme

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180 Minnesota v. Dickerson, 113 S. Ct. 2130, 2141 (1993) (Rehnquist, C.J., concurring in part and dissenting in part).
181 Record, *supra* note 60, at 9.
182 *Id.*
183 Trial Court Findings, *supra* note 72.
184 *Id.*
185 *Id.*
186 State v. Dickerson, 481 N.W.2d 840, 844 (Minn. 1991).
187 *Id.* at 843 (emphasis added).
188 Record, *supra* note 60, at 9.
189 *Id.*

Court made a critical mistake. Had Officer Rose actively slid the object, as the Minnesota Supreme Court described, he would have exceeded the permissible scope of the search for weapons authorized by *Terry*. However, the actual transcript of his testimony indicates that the object slid without any assistance. Therefore, it is likely that he did not exceed the scope of the original search.

The United States Supreme Court, however, relied solely on the Minnesota Supreme Court's account of Officer Rose's testimony when it held that he exceeded the scope of Terry.[190] The Court analogized Officer Rose's supposed manipulation of the object to the actions of the officers in *Arizona v. Hicks*.[191] In *Hicks*, one of the officers conducting a lawful search noticed some expensive stereo equipment that he felt was out of place in the "squalid" apartment.[192] Suspecting that it might be stolen, the officer moved some of the equipment in order to read and record the serial numbers.[193] The Court held that the act of moving the object was a further search for which the officer must have probable cause under the plain view doctrine.[194] Because the state conceded that the officer did not have probable cause to conduct this further search, the Court held that the stereo equipment was not admissible under the plain view doctrine.[195]

The *Dickerson* Court determined that, like the moving of the stereo in *Hicks*, Officer Rose's supposed manipulation of the object was a further search not authorized by *Terry*.[196] Had the *Dickerson* Court examined the trial transcript, it would have realized that it is not obvious that any of Officer Rose's actions exceeded the mandates of *Terry*. Admittedly, Officer Rose's statement that "I examined it with my fingers" raises some question as to whether or not the nature of the object as crack was immediately apparent without further examination. The original proceedings were simply not focused enough on the actual touching of the object in Dickerson's pocket to adequately address the issue of whether the identity of the object was immediately apparent.[197] Consequently, the Court

190 Minnesota v. Dickerson, 113 S. Ct. 2130, 2138-39 (1993).

191 *Id.* at 2139 (citing Arizona v. Hicks, 480 U.S. 321 (1986)).

192 Arizona v. Hicks, 480 U.S. 321, 326 (1986).

193 *Id.* at 323.

194 *Id.*

195 *Id.* at 328.

196 Minnesota v. Dickerson, 113 S. Ct. 2130, 2139 (1993). Under *Hicks*, the further search requires only probable cause to be valid. *Hicks*, 480 U.S. at 323. The *Dickerson* opinion, however, apparently required that it be immediately apparent to the officer that the object is contraband to invoke the plain touch doctrine. *Dickerson*, 113 S. Ct at 2137.

197 *Dickerson*, 113 S. Ct. at 2141 (Rehnquist, C.J., concurring in part and dissenting in part).

should have remanded the case for a more complete inquiry into the events surrounding the search and seizure of the object.

Had the Court truly applied the probable cause standard, Officer Rose's search of Dickerson's pocket and seizure of the crack would have been justified by *Hicks*. As noted above, the *Hicks* Court held that a further search is justified under the plain view doctrine so long as the officer has probable cause to believe it is contraband.[198] Considering the Court's reliance on *Hicks*,[199] and its analogy to the plain view doctrine,[200] a further search should accordingly be permissible under the plain touch doctrine so long as the officer has probable cause. Under this theory, the issue of whether Officer Rose manipulated the object in Respondent's pocket is irrelevant, because it can be characterized as a "further search" that is permissible under the plain touch doctrine, so long as the officer has probable cause to believe the object is contraband before searching further.

When Officer Rose discovered the lump in Respondent's pocket, he had probable cause to believe it was contraband. Probable cause is a flexible standard which allows an officer to draw upon the available facts and his own experience when determining whether a reasonable person under the same circumstances would believe that an object is contraband.[201] Probable cause does not require that the officer's conclusion be accurate, or even more likely true than false.[202] Because Officer Rose saw Respondent coming out a building commonly known as a crack house, because Respondent behaved evasively upon noticing the marked squad car and making eye contact with the officers, and because Officer Rose had extensive experience in feeling crack through clothing, Officer Rose had probable cause to believe that the small lump wrapped in cellophane in Respondent's pocket was crack before any further examination of the lump occurred. Consequently, any manipulation of the object that may have occurred before its seizure is justified as a further search permissible under *Hicks*.

VI. CONCLUSION

The *Dickerson* Court's decision to allow seizure of an object based on the sense of touch is a logical extension of the plain view doctrine. The Court properly relied on the requirements of the

198 *Hicks*, 480 U.S. at 326.
199 *Dickerson*, 113 S. Ct. at 2139.
200 *Id.*
201 *See, e.g.*, Texas v. Brown, 460 U.S. 740, 742 (1983).
202 *Id.*

plain view doctrine in delineating the plain touch doctrine. Unfortunately, the *Dickerson* decision left a number of ambiguities. The Court demanded that an officer have lawful access to an object before seizing that object under the plain touch doctrine. However, the Court did not explain how this requirement functions in the plain touch context. More importantly, the decision is not clear about which standard of certainty, probable cause or immediately apparent, must be satisfied to justify seizure under the plain touch doctrine. These ambiguities may lead to confusion in the lower courts as judges throughout the country attempt to abide by this new doctrine.

Additionally, the Court relied on a misquote of Officer Rose's testimony in determining that the seizure in the instant case was impermissible. Because the trial court's findings were not focused enough on the events surrounding the actual touching of the crack in Respondent's pocket to determine whether it was immediately apparent that it was crack, and because the Minnesota Supreme Court made a critical mistake when it quoted Officer Rose's testimony, the Court should have remanded the case for a more complete investigation of Officer Rose's actions. However, had the Court properly applied the probable cause standard, any manipulation of the object in Dickerson's pocket would have been acceptable as a further search.

SUSANNE M. MACINTOSH