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THE UNCERTAIN SCOPE OF THE PLAIN VIEW DOCTRINE

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In recent years the Supreme Court has expanded the plain view exception to the warrant requirement by relaxing the prior valid intrusion and the inadvertency requirements. This article examines the resulting confusion in the state courts and identifies areas where judicial clarification is needed.

I. INTRODUCTION

The fourth amendment of the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . ., shall not be violated."[1] A second clause directs "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."[2] The United States Supreme Court has interpreted these two provisions to mean that any search and seizure conducted without a warrant is *per se* unreasonable and that evidence acquired from a warrantless search and seizure is inadmissible at trial.[3] This exclusionary rule, however, has been eroded steadily by the Court's creation of various exceptions to the warrant requirement. Prominent among these is the plain view exception, first articulated by the Court in 1971 in *Coolidge v. New Hampshire*.[4] Although the plain view doctrine as first formulated consisted of rigid requirements, the Court no longer requires strict compliance with these requirements. Consequently, the scope of the plain view doctrine is uncertain. This article discusses the original formulation of the plain view doctrine, traces the modification of its various elements, and discusses the confusing results generated by Maryland appellate courts in applying the doctrine.

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1. U.S. CONST. amend. IV.
2. *Id.*
3. Katz v. United States, 389 U.S. 347, 357 (1967). *See also* United States v. Place, 462 U.S. 696, 701 (1983); Mincey v. Arizona, 437 U.S. 385, 390 (1978); Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971).
4. Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971). Other recognized exceptions to the warrant requirement include: inventory searches, South Dakota v. Opperman, 428 U.S. 364 (1976); search incident to arrest, Chimel v. California, 395 U.S. 752 (1969); hot pursuit, Warden v. Hayden, 387 U.S. 294 (1967); and the *Carroll* doctrine (otherwise known as the automobile exception), Carroll v. United States, 267 U.S. 132 (1925). Except for a brief discussion of the *Carroll* doctrine, *infra* notes 49-52 and accompanying text, these exceptions are beyond the scope of this article.

II. PLAIN VIEW UNDER *COOLIDGE V. NEW HAMPSHIRE*

Traditionally, the Supreme Court has recognized that a seizure of property occurs when the government significantly interferes with an individual's possessory interest in his property.[5] Seizure of property is permissible only when pursuant to either a warrant or one of the clearly delineated exceptions to the warrant requirement.[6] In *Coolidge v. New Hampshire*,[7] a plurality of the Court fashioned one of the principal exceptions to the warrant requirement.[8] The Court held that incriminating evidence is admissible at trial even if obtained without a search warrant if three requirements are satisfied: (1) the initial police intrusion must be valid,[9] (2) discovery of the evidence must be inadvertent,[10] and (3) it must be immediately apparent to the police that the evidence is incriminating.[11]

The prior valid intrusion element is satisfied when the search arises either from a judicial warrant or is justified by one of the recognized exceptions to the warrant requirement.[12] The plain view doctrine, how-

5. United States v. Jacobsen, 466 U.S. 109, 113 (1984); *Place*, 462 U.S. at 710 (Brennan, J., concurring); Texas v. Brown, 460 U.S. 730, 747 (1983) (Stevens, J., concurring).
6. *Place*, 462 U.S. at 701.
7. 403 U.S. 443 (1971).
8. Coolidge v. New Hampshire, 403 U.S. 443, 469-71 (1971). In *Coolidge*, pursuant to a warrant, police seized and searched an automobile for evidence implicating its owner in a murder. Because the warrant was later held to be invalid, the state attempted to justify its action under several different exceptions to the warrant requirement, including the plain view doctrine. *Id.* at 464.
9. *Id.* at 465-66.
10. *Id.*
11. *Id.*
12. The *Coolidge* Court offered the following illustrations of warrantless prior valid intrusions. First, police may discover evidence inadvertently while in "hot pursuit" of a fleeing suspect. *Coolidge*, 403 U.S. at 465. The Court cited Warden v. Hayden, 387 U.S. 294 (1967), as the prototype of the hot pursuit exception to the warrant requirement. *Coolidge*, 403 U.S. at 465. In *Hayden*, however, the warrantless hot pursuit search was limited to hidden felons and hidden weapons. *Hayden*, 387 U.S. at 298-300. Presumably, therefore, plain view seizures pursuant to hot pursuit warrantless searches are only valid when the hot pursuit search is for hidden felons or hidden weapons.

A second example of warrantless prior valid intrusions is a search incident to arrest, as limited by Chimel v. California, 395 U.S. 752 (1969). *Coolidge*, 403 U.S. at 465. Under *Chimel*, the search is limited to the area within which the arrestee could grasp a weapon or destroy evidence. Under *Coolidge*, however, evidence discovered by police in plain view outside of the area under the immediate control of the arrestee is also admissible under the plain view doctrine. *Coolidge*, 403 U.S. at 465 n.24.

The final category of warrantless prior valid intrusions consists of situations in which police are not searching for evidence against the accused, but inadvertently come across an incriminating object. *Coolidge*, 403 U.S. at 466 (citations omitted). *See* Frazier v. Cupp, 394 U.S. 731 (1969) (where co-owner of a duffel bag gave his consent for a police search, evidence discovered inadvertently as to the other owner admissible under the plain view doctrine); Harris v. United States, 390 U.S. 234 (1968) (where departmental regulation required police to remove all valuables from

ever, does not in and of itself justify the intrusion.[13] It only allows the police to seize an item in plain view *after* validly entering the premises. Although evidence exposed to open, public observation may provide police with probable cause to obtain a warrant,[14] it does not justify a warrantless intrusion absent exigent circumstances that would excuse the procurement of a warrant.

The inadvertency element is satisfied when the discovery of the evidence is unanticipated.[15] The Court reasoned that requiring the police to obtain a warrant under such circumstances would be a needless inconvenience, and perhaps dangerous to the preservation of the evidence and to the police themselves.[16] The plain view exception does not legitimize a warrantless seizure if the police have ample opportunity to obtain a valid warrant, and know the description and location of the evidence in advance.[17]

Finally, the Court in *Coolidge* added the requirement that it must be "immediately apparent" to the police that the objects seized are incriminating evidence.[18] Without this requirement, the Court feared searches would become "general or exploratory," in contravention of the Court's policy that search warrants specify the objects sought with particularity.[19]

The plain view doctrine frequently is confused with two related doctrines under which no warrant is required: the "open view" doctrine and the "open fields" doctrine. These two doctrines are only relevant in determining whether a search prohibited by the fourth amendment has occurred as to activate the search warrant requirement. Under the open view doctrine, no fourth amendment search occurs when an item is exposed to the general public in open view.[20] Under the open fields doc-

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impounded vehicles and, pursuant to this regulation, the officer discovered an incriminating registration card, warrantless seizure held constitutional under the plain view doctrine); Lewis v. United States, 385 U.S. 206 (1966) (where undercover agent was invited into the home of an unsuspecting drug dealer, evidence discovered inadvertently admissible under the plain view doctrine); Ker v. California, 374 U.S. 23 (1963) (where police were inside the home to arrest the defendant and inadvertently discovered evidence incriminating defendant's wife during a search incident to that arrest, evidence admissible under the plain view doctrine).

13. *Coolidge*, 403 U.S. at 468. As the *Coolidge* Court stated: "Plain view *alone* is never enough to justify the warrantless seizure of evidence." *Id.*
14. Jones v. United States, 357 U.S. 493, 497 (1958); Johnson v. United States, 333 U.S. 10, 13-15 (1948).
15. *Coolidge*, 403 U.S. at 469.
16. *Id.* at 470.
17. *Id.* This inadvertency requirement prompted dissenting opinions by Justices Black and White. Justice Black criticized the requirement as being contrary to existing precedent. *Coolidge*, 403 U.S. at 506 (Black, J., dissenting). Justice White stated that the inadvertency requirement was "a punitive and extravagant application of the exclusionary rule." *Coolidge*, 403 U.S. at 517 (White, J., dissenting).
18. *Coolidge*, 403 U.S. at 466.
19. *Id.*
20. Under the open view doctrine, police observation of contraband is not a search for fourth amendment purposes if the incriminating evidence is exhibited to the public

trine, no fourth amendment search occurs when an item is in an open field beyond the curtilage of the defendant's house.[21] In contrast, the plain view doctrine applies only *after* it is determined that a fourth amendment search has occurred and serves to excuse the seizure of the evidence without a warrant.

III. SUPREME COURT'S MODIFICATION AND APPLICATION OF THE PRIOR VALID INTRUSION AND INADVERTENCY ELEMENTS OF PLAIN VIEW.

As a plurality decision, *Coolidge* was destined to suffer modification by subsequent decisions. In particular, more recent cases have modified the prior valid intrusion and inadvertency requirements.[22]

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because in such situations it is presumed that the owner does not intend to conceal its presence. Washington v. Chrisman, 455 U.S. 1, 9 n.5 (1982). The observation may provide the officer with probable cause to obtain a search warrant, but it does not give the officer the authority to enter the premises and seize the goods without a warrant. Jones v. United States, 357 U.S. 493, 497 (1958); Johnson v. United States, 333 U.S. 10, 13-15 (1948).

For examples of open view observations outside the purview of fourth amendment protection, see Sumdum v. State, 612 P.2d 1018, 1022 (Alaska 1980) (observation of motel room by police when motel manager opened door to check on room after checkout time); People v. Arroyo, 120 Cal. App. 3d 27, 31, 174 Cal. Rptr. 678, 680 (1981) (observation of marijuana plant in defendant's patio area viewed from common carport area); State v. Rickard, 420 So. 2d 303, 305 (Fla. 1982) (where there is no intrusion, the warrantless observation is "a legally permissive 'open view' "); State v. Dickerson, 313 N.W.2d 526, 532 (Iowa 1981) (observation through window in farmhouse door); Brown v. State, 15 Md. App. 584, 613, 292 A.2d 762, 770 (1972) (officers' observation of dormitory room through open door). State v. O'Herron, 153 N.J. Super. 570, 575, 380 A.2d 728, 730 (1977) (observation from vantage point off defendant's property); State v. Powell, 99 N.M. 381, 385, 658 P.2d 456, 458 (1983) (view into truck cab from public road); State v. Planz, 304 N.W.2d 74, 80 (N.D. 1981) (view of contraband on front seat of unattended car in public parking lot); Cook v. Commonwealth, 216 Va. 71, 73, 216 S.E.2d 48, 49 (1975) (observation from street into defendant's automobile). Courts have held that an individual has no expectation of privacy as to items in open view even when the police must resort to aircraft to effectuate the open view observation. *See* State v. Roode, 643 S.W.2d 651, 653 (Tenn. 1982); State v. Layne, 623 S.W.2d 629, 636 (Tenn. Crim. App. 1981); State v. Stachler, 58 Haw. 412, 420, 570 P.2d 1323, 1328-29 (1977).

21. Under the open fields doctrine, a warrantless intrusion upon an open space outside the curtilage of a home is not an unreasonable search proscribed by the fourth amendment because open fields are not encompassed within the phrase "person, houses, papers and effects." Oliver v. United States, 466 U.S. 170, 176-77 (1984). The Court has held that an individual has no legitimate expectation that open fields will remain free from warrantless intrusion by police, even when he erects fences and posts "no trespassing" signs. *Id.* at 182-83.

22. The third element, the immediately apparent requirement, is less controversial. The Court consistently has adopted the opinion that this requirement is satisfied only if the police have probable cause to believe the item observed is incriminating evidence. *See* Arizona v. Hicks, 107 S. Ct. 1149, 1153 (1987) (probable cause is the standard for immediately apparent and "to say otherwise would be to cut the 'plain view' doctrine loose from its theoretical and practical moorings").

A. Prior Valid Intrusion

Modification of the prior valid intrusion requirement began with two Supreme Court cases decided more than a decade after *Coolidge*. In *Washington v. Chrisman*,[23] the defendant's roommate was arrested on a university campus for illegal possession of alcohol.[24] The roommate, accompanied by the arresting officer, returned to his dormitory room in order to get proof of identity. While standing in the open doorway, the officer noticed the defendant becoming nervous at the sight of the officer.[25] Seconds later the officer saw what he believed to be marijuana seeds and a marijuana pipe on a desk inside the room.[26] The officer entered the room and confirmed that his perceptions had been accurate. Both the roommate and the defendant consented to a search, which yielded additional controlled substances.[27] The Supreme Court of Washington found that the warrantless entry and the seizure of the marijuana pipe and seeds was unlawful. Furthermore, the court excluded the incriminating evidence because the consent was the fruit of an illegal search.[28]

The Supreme Court reversed and held that the initial seizure of the marijuana seeds and pipe was valid under the plain view doctrine.[29] Because the officer had a right to accompany the arrestee into the dormitory room in order to preserve the integrity of the arrest, the officer was permitted to confiscate contraband coming within his sight.[30] The defendant argued that the plain view doctrine was inapplicable because the officer first chose to remain outside the room so that his observations were made from outside the room. The Court responded that, regardless of the officer's position with respect to the doorway, he had a right to enter the room whenever he considered it essential.[31] The officer's right to custodial control did not evaporate with his choice to hesitate in the doorway rather than enter the room.[32] After he observed the seeds and

23. 455 U.S. 1 (1982).
24. In the recital of the facts it appears the officer "stopped" the defendant's roommate. Washington v. Chrisman, 455 U.S. 1, 3 (1982). However, the opinion later states that the roommate was "under lawful arrest." *Id.* at 6. Earlier, the Supreme Court of Washington had approved the trial court's determination that the defendant had been arrested. State v. Chrisman, 94 Wash. 2d 711, 716, 619 P.2d 971, 974 (1980) (*en banc*), *rev'd*, 455 U.S. 1 (1982).
25. *Chrisman*, 455 U.S. at 3.
26. *Id.* at 4.
27. *Id.*
28. State v. Chrisman, 94 Wash. 2d 711, 717-18, 619 P.2d 971, 975 (1980), *rev'd*, 455 U.S. 1 (1982).
29. *Chrisman*, 455 U.S. at 9. The Court succinctly described the doctrine: "The 'plain view' exception to the Fourth Amendment warrant requirement permits a law enforcement officer to seize what clearly is incriminating evidence or contraband when it is discovered in a place where the officer has a right to be." *Id.* at 5-6.
30. *Id.* at 6-7.
31. *Id.* at 9.
32. *Id.* at 8-9.

the pipe, he had a right to act.[33]

Although *Chrisman* expands the scope of the plain view exception by permitting the plain view observation to occur before the valid intrusion, it is consistent with *Coolidge* in upholding the essentials of the prior valid intrusion requirement. The evidence in *Chrisman* was not observed during the course of an ongoing constitutional search, but the officer was vested nonetheless with the authority to conduct a warrantless entry prior to his observation. The Court hastened to distinguish this case from one where an officer, by chance, passes an open doorway to a residence and observes what he believes to be contraband inside the room.[34] In the latter situation the officer's open view observation would not provide him with any basis for intruding without a warrant. *Chrisman* is significant, however, because it adds a new dimension to the plain view doctrine. Where police are vested with the authority to enter premises before the observation, ultimate entry is considered a prior valid intrusion. Thus, for the first time, the Court held that the plain view sighting of incriminating evidence could justify an intrusion.[35]

The Court further modified the prior valid intrusion requirement in *Texas v. Brown*.[36] In *Brown*, an officer asked for the defendant's driver's license at a routine driver's license checkpoint. The officer shined his flashlight into the car and saw the defendant drop a knotted opaque party balloon onto the seat.[37] Cognizant that narcotics frequently are packaged in such balloons, the officer examined the automobile's interior more closely and observed plastic vials, loose white powder, and an open bag of party balloons.[38] After the driver admitted that he did not have his driver's license, the officer instructed him to get out of the car. The officer reached into the car, removed the knotted balloon, and displayed it to a fellow officer.[39] The suspect was then arrested.[40] Subsequent tests verified that the seized knotted balloon contained heroin. The Court of Criminal Appeals of Texas held that the plain view doctrine was inapplicable because the incriminating nature of the balloon was not "immedi-

33. *Id.* at 9.

34. *Id.* at 9 n.5.

35. Justice White dissented, disagreeing with the majority's modification of the prior valid intrusion requirement. *Id.* at 14 (White, J., dissenting). Justice White argued that neither the officer's authority to remain at the arrestee's elbow nor his authority to enter the room were sufficient grounds for validating the subsequent seizure. *Id.* Because entry was made with intent to remove contraband observed prior to the intrusion, the officer could not justify the seizure under the plain view doctrine. *Id.*

36. 460 U.S. 730 (1983).

37. Texas v. Brown, 460 U.S. 730, 733 (1983).

38. *Id.* at 734.

39. *Id.*

40. The state court opinion suggested that the driver was arrested for failing to produce a current driver's license. Brown v. State, 617 S.W.2d 196, 200 (Tex. Crim. App. 1981), *rev'd*, 460 U.S. 730 (1983). The Supreme Court was unable to endorse that conclusion inasmuch as transcripts indicated that the defendant was arrested only after the balloon was seized. *Brown*, 460 U.S. at 734 n.2.

ately apparent" to the arresting officer.[41] The United States Supreme Court reversed, finding that Texas had adopted an unduly restrictive interpretation of the "immediately apparent" standard.[42] *Brown* is significant, however, not so much for its reversal on the immediately apparent issue as it is for its discussion of the prior valid intrusion requirement.

Writing for the *Brown* plurality, Justice Rehnquist suggested that the *Coolidge* characterization of plain view as an "independent exception" to the warrant requirement was somewhat inaccurate.[43] Justice Rehnquist suggested that the plain view doctrine is better understood as an extension of the officer's prior justification for access to the object because "plain view" merely provides grounds for the seizure of the object.[44] In support of this contention, the *Brown* plurality first referred to the well-settled rule from *Payton v. New York*[45] that illegal objects found in public places may be seized by police without a warrant.[46] The *Brown* Court acknowledged that there was a distinction between the *Payton* public place and private premises.[47] Nevertheless, the plurality reasoned that, when an officer has "prior justification" for an intrusion into the premises, the owner's only remaining interest in the object is that of possession and ownership,[48] the same interest an owner has in objects found in a public place under *Payton*.

The *Brown* plurality found that the officer's intrusion into the car was valid even without a warrant based upon the "*Carroll* automobile exception."[49] Under this exception, first articulated in *Carroll v. United States*,[50] probable cause alone justifies the search of a lawfully stopped vehicle, as well as its contents.[51] In *Brown*, the defendant's automobile was stopped lawfully for a traffic check, the balloon was in the officer's view, and the officer had probable cause to believe the car contained contraband.[52] Consequently, the officer's entry and search of the automobile was a valid intrusion upon the defendant's privacy interests. Because the balloon was found in plain view following a prior valid intrusion, the *Brown* plurality concluded that the evidence was admissible under the plain view doctrine.

According to the *Brown* plurality, the "*Carroll* automobile exception" is justified because an individual has a reduced expectation of pri-

41. *Brown*, 460 U.S. at 736.
42. *Id.* at 741-42.
43. *Id.* at 738.
44. *Id.* at 738-39.
45. 445 U.S. 573 (1980).
46. Payton v. New York, 445 U.S. 573, 587 (1980).
47. *Brown*, 460 U.S. at 738.
48. *Id.* at 739.
49. *Id.* at 741 n.6. The *Brown* Court actually invoked the interpretation of the *Carroll* automobile exception set forth in United States v. Ross, 456 U.S. 798 (1982).
50. 267 U.S. 132 (1925).
51. Carroll v. United States, 267 U.S. 132, 149 (1925).
52. Texas v. Brown, 460 U.S. 730, 742-43 (1983).

vacy in his automobile. Because the state's interest in preventing an item's disappearance always outweighs an individual's interest in the possession of that item while it is in his automobile, the item will be seizable under the plain view doctrine as if it were publicly situated.[53] Under *Brown*, the plain view seizure doctrine extends the officer's prior justification for seizing the object; it does not serve as an independent grounds for warrantless seizures.

Unlike the classic *Coolidge* scenario where the discovery follows the valid intrusion, the incriminating evidence in both *Brown* and *Chrisman* was discovered *before* the prior valid intrusions. *Brown*, however, broadens the *Chrisman* rationale by permitting intrusions that arise after the evidence is first discovered. The officer in *Brown* did not have probable cause to enter the car until after he saw the balloon. Once he saw the balloon, he had a right to enter the car under the *Carroll* search doctrine and to seize the balloon under the plain view seizure doctrine.[54]

This interpretation of the plurality opinion in *Texas v. Brown* is supported by the Court's analysis in two subsequent cases, *Illinois v. Andreas*[55] and *United States v. Jacobsen*.[56] In *Andreas*, the Court upheld the warrantless search of a table that was shipped from overseas.[57] Customs officials uncovered marijuana, which was tested by narcotics agents, repackaged into the legs of the wooden table, and delivered to the defend-

53. This approach is suggested in a footnote in *Brown* on prior valid intrusion. Prior valid intrusion may be by a search warrant or by an exception to the warrant requirement. *Brown*, 460 U.S. at 738 n.4. In the alternative, no justification is needed when property is left in a public place. *Id.* In analogizing these two diverse situations, the Court attempted to equate the principles governing plain view seizures with those governing seizures of items in public places. This analogy is somewhat strained, however, because, as the Court recognized, the seizure of items in public places does not implicate fourth amendment rights. *Id.*

54. *Brown* appears to conform with *Coolidge* at least to the extent of requiring that there be some prior valid intrusion on the reasoning that plain view alone is insufficient to justify the warrantless seizure of evidence. *Coolidge*, 403 U.S. at 468. Although Justice Steven's concurrence in *Brown* does not conflict with this premise, one aspect of his plain view analysis merits further consideration. Justice Stevens states:

> An object may be considered to be 'in plain view' if it can be seized without compromising any interest in privacy. Because seizure of such an object threatens only the interest in possession, circumstances diminishing that interest may justify exceptions to the Fourth Amendment's usual requirements. Thus, if an item has been abandoned, neither Fourth Amendment interest is implicated, and neither probable cause nor a warrant is necessary to justify seizure.

Brown, 460 U.S. at 748 (Stevens, J., concurring).

> If no fourth amendment interest is implicated by the removal of abandoned property, the action should not be considered a technical plain view seizure. No prior valid intrusion is required when an owner consciously has relinquished any privacy interest in the item. It may be, however, that Justice Stevens was referring to "plain view" in its ordinary, nonlegal sense.

55. 463 U.S. 705 (1983).

56. 466 U.S. 109 (1984).

57. Illinois v. Andreas, 463 U.S. 705, 767 (1983).

ant.[58] Forty-five minutes after the defendant received the table, narcotics agents arrested him as he was leaving his apartment.[59] The agents seized the table, promptly examined it, and discovered the marijuana where they had left it after their initial search.[60]

A majority of the Court reasoned that, just as a prior valid intrusion of a house minimizes a homeowner's privacy interest in items that are in plain view, the initial opening of the table minimized the owner's privacy interest in its contents.[61] Justice Brennan dissented, rejecting the analogy to the plain view seizure doctrine.[62] He argued that there must be an independent justification for breaching the individual's right to security in his possessions, even where there is a reduced expectation of privacy.[63] Although the sending of a container through customs relinquishes one's right to keep the contents secret,[64] that act alone is not a waiver of all privacy interests. One retains the expectation that his possessions will remain undisturbed.[65] Justice Brennan contended that when narcotics agents reopen a delivered package they violate fourth amendment protections because they have no independent reason, aside from the earlier administrative search, for invading the individual's privacy interests.[66] According to Justice Brennan, the plain view seizure doctrine was employed inappropriately to justify reopening the closed container without a warrant.[67]

Under similar facts, the Court in *Jacobsen*[68] held that the government examination of the contents of a package previously opened by Federal Express employees did not violate any legitimate expectation of privacy.[69] The majority reasoned that the earlier search by the Federal Express employee was not a government search within the meaning of the fourth amendment. Because the police were informed of the contents of the package by a third party, they obtained probable cause to search the package without invading a fourth amendment privacy interest.[70]

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58. *Id.* Common carriers have a common law right to inspect packages they accept for shipment. *See* United States v. Pryba, 502 F.2d 391, 399-400 (D.C. Cir. 1974). When contraband is discovered, it is routine for common carriers to notify authorities. The arrival of police to confirm the presence of contraband is not a government search subject to the fourth amendment. *See, e.g.*, United States v. Edwards, 602 F.2d 458 (1st Cir. 1979).
59. *Andreas*, 463 U.S. at 767.
60. *Id.* at 767-68.
61. *Id.* at 771-72. With respect to the forty-five minute gap in surveillance, the *Andreas* Court held that the warrantless seizure remains valid as long as there is no substantial likelihood that the contents of the container have been changed. *Id.* at 773.
62. *Id.* at 778 (Brennan, J., dissenting).
63. *Id.* at 779.
64. *Id.* at 776.
65. *Id.*
66. *Id.* at 789.
67. *Id.* at 780.
68. United States v. Jacobsen, 466 U.S. 109 (1984).
69. *Id.* at 126.
70. *Id.* at 115.

Once the contents of the package were discovered by Federal Express, the owner no longer had an expectation of privacy.[71]

The application of the plain view doctrine in *Andreas* and *Jacobsen* deviates from the original plain view formula. In both cases, personal interests in privacy were compromised before a justified intrusion. In the traditional plain view scenario, the breach of privacy occurs after a justified intrusion. The individual's possessions are fully protected by the fourth amendment until a justified intrusion occurs. The subsequent observations of the individual's possessions are a reasonable violation of privacy — permissible under the fourth amendment. *Andreas* and *Jacobsen* equate observations made in a constitutionally protected place with observations made in public places. Those decisions reason that the intrusion on privacy is really not an intrusion because the intrusion itself reduces the individual's expectation of privacy.

Although the Court allows plain view seizures based on a diminished privacy interest, an individual's expectation of privacy can be diminished only when there has been a justified intrusion into an individual's constitutionally protected domain. Therefore, prior valid intrusion remains an indispensable element of the plain view doctrine, regardless of whether one agrees that plain view is applicable in "diminished privacy interest" situations. Lamentably, however, the Court has withdrawn from the strict, literal definition of prior valid intrusion. The result may well be increased criminal convictions. From the perspective of constitutional rights, however, the relaxation of the prior valid intrusion requirement is disconcerting.

B. Inadvertency

The inadvertency element of the plain view doctrine, like the prior valid intrusion element, has become increasingly imprecise. Because the plain view doctrine was espoused by only a plurality of the Court in *Coolidge*, several lower courts have regarded the Court's inadvertency discussion as dicta,[72] and some have questioned the binding effect of the

71. It is significant that in both *Andreas* and *Jacobsen* the examination of the interiors of the respective containers revealed that they contained nothing but contraband. *Jacobsen*, 466 U.S. at 120 n.17. Any further expectations of privacy were therefore less than legitimate. The Court conceded that a container which can support a reasonable expectation of privacy may not be searched without a warrant, even on probable cause. *Id.* Presumably, therefore, a container holding both contraband and noncontraband could be searched only with a warrant.

Justice White concurred with the result in *Jacobsen*, but argued that a subjective expectation of privacy is not diminished by an unanticipated private search. *Id.* at 132-33 (White, J., concurring). He also disagreed with the majority's assertion that the criterion for privacy must be appraised on the basis of the facts as they existed at the time the invasion occurred. *Id.* at 132.

72. *See* North v. Superior Court of Riverside County, 8 Cal. 3d 301, 307-08, 502 P.2d 1305, 1308-09, 104 Cal. Rptr. 833, 836-37 (1972); State v. Pontier, 95 Idaho 707, 712, 518 P.2d 969, 974 (1974); State v. King, 191 N.W.2d 650, 655 (Iowa), *cert. denied*, 406 U.S. 908 (1971); State v. Mitchell, 300 N.C. 305, 310-11, 266 S.E.2d

opinion.[73] Other courts have latched onto language in the opinion that appears to exclude contraband, stolen goods, and dangerous items from the inadvertency requirement.[74]

Although most courts have accepted the inadvertency limitation on a plain view seizure,[75] the degree of expectation necessary to make a po-

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605, 609 (1980), *cert. denied*, 449 U.S. 1085 (1981). The Supreme Court of Iowa in *King* mistakenly refers to the *Coolidge* plurality opinion as a "minority" opinion. *King*, 191 N.W.2d at 655.

73. *See* United States v. Bradshaw, 490 F.2d 1097, 1101 n.3 (4th Cir.), *cert. denied*, 419 U.S. 895 (1974); United States v. Santana, 485 F.2d 365, 369-70 (2d Cir. 1973), *cert. denied*, 413 U.S. 931 (1974). One court has suggested that although inadvertence may not be required for conventional seizures, it may be indispensable in an electronic surveillance context because those invasions are of a more insidious nature. United States v. Pine, 473 F. Supp. 349, 358 (D. Md. 1978).

74. The plurality opinion states:

> [T]o 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.

Coolidge, 403 U.S. at 471 (footnote omitted). *See also id.* at 472 ("this is not a case involving contraband or stolen good or objects dangerous in themselves") (footnotes omitted).

Justice White dissented, criticizing the "confusing and unworkable" distinction between contraband and mere evidence. *Id.* at 519 (White, J., dissenting). For cases interpreting *Coolidge* as inapplicable to contraband, see United States v. Thompson, 700 F.2d 944, 951-52 (5th Cir. 1983); United States v. Bellina, 665 F.2d 1335, 1346 (4th Cir. 1981); United States v. Gorman, 637 F.2d 352, 354 (5th Cir. 1981); United States v. Vargas, 621 F.2d 54, 56 (2d Cir.), *cert. denied*, 449 U.S. 854 (1980); United States v. Cutts, 535 F.2d 1083, 1084 (8th Cir. 1976); State v. Slade, 116 N.H. 436, 439, 362 A.2d 194, 196 (1976).

In both *Bellina* and *Vargas*, the courts relied on the observation made in Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 326 n.5 (1979), that "contraband may be seized without a warrant under the 'plain view' doctrine." Although the statement is correct, it does not support the bald conclusion that inadvertency is not a requirement when contraband is involved. On the contrary, the *Lo-Ji* decision made it clear that prior to the intrusion in that case, there was insufficient probable cause to seize the pornographic contraband. *Id.* at 325. Because a search warrant could not have been obtained, the seizure of contraband under the circumstances was, in fact, inadvertent.

One prominent author complains that no explanation was offered for excluding contraband, and stolen and dangerous goods from the inadvertency limitation; nor is an explanation readily apparent. LAFAVE, CRIMINAL PROCEDURE § 3.4(K), at 139-40 (1985). In *Vargas*, the Second Circuit suggested that inadvertence is not required for a plain view seizure of contraband because under federal law, 21 U.S.C. § 881(a)(1)-(3), there is no property right in controlled substances. *Vargas*, 621 F.2d at 56. This explanation is unappealing because expectations of privacy ordinarily are not defined by property interests. Some support for that concept may be found, however, in more recent Supreme Court decisions that consider privacy interests in contraband less than legitimate. *See* United States v. Jacobsen, 466 U.S. 109, 123 (1984).

75. *See, e.g.*, Texas v. Brown, 460 U.S. 730, 737 (1983); United States v. Liberti, 616 F.2d 34, 36 (2d Cir.), *cert. denied*, 446 U.S. 952 (1980); State v. Ercolano, 79 N.J. 25, 35, 397 A.2d 1062, 1066 (1979). *See also* LAFAVE, *supra* note 74, § 3.4(K).

lice discovery inadvertent remains elusive.[76] The possibility that incriminating items will be discovered on the premises does not invalidate an otherwise valid plain view seizure.[77] On the other hand, where there is probable cause to believe certain evidence will be found, many courts have overturned warrantless seizures for lack of inadvertence.[78] Inasmuch as a warrant could have been obtained, evidence from a warrantless seizure is not admissible under the plain view doctrine.

In other jurisdictions, however, probable cause alone is not enough to invalidate a plain view seizure. Even in situations where the officers could have obtained a warrant, discovery can be deemed inadvertent if the officers acted innocently and the procedure was not a mere subterfuge to the warrant requirement.[79] Courts using this good faith standard consider the inadvertency requirement as a way of preventing police from obtaining a warrant "in bad faith" or using plain view to "evade the warrant requirement."[80] If a warrant is sought in good faith, police

76. *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 244 (1971).

77. *See Liberti*, 616 F.2d at 37; People v. Stoppel, 637 P.2d 384, 389-91 (Colo. 1981); State v. Pepe, 176 Conn. 75, 79-80, 405 A.2d 51, 53-54 (1978); State v. McColgan, 631 S.W.2d 151, 155 (Tenn. Crim. App. 1981).

78. *See* United States v. Hare, 589 F.2d 1291, 1294 (6th Cir. 1979); State v. Howard, 448 So. 2d 713, 718 (La. App. 1984); Commonwealth v. Cefalo, 381 Mass. 319, 326 n.6, 331 n.9, 409 N.E. 2d 719, 724 n.6, 727 n.9 (1980); Commonwealth v. Casuccio, 308 Pa. Super. 450, 469-70, 454 A.2d 621, 630-31 (1982).

If the inadvertency limitation on the plain view doctrine is to make any sense at all, it must require that a discovery of objects not named in the search warrant always be inadvertent. No attention should be given to the hopes or expectations of the police. LAFAVE, *supra* note 74, § 3.4(K), at 139-40.

One jurist has aptly observed that "traditional roles on the issue of probable cause" are oddly reversed under these circumstances because the defendant will urge and the state disclaim the presence of probable cause. *Liberti*, 616 F.2d at 38 (Newman, J., concurring).

79. United States v. Johnson, 707 F.2d 317, 321 (8th Cir. 1983); United States v. Wright, 641 F.2d 602, 605-06 (8th Cir.), *cert. denied*, 451 U.S. 1021 (1981). In both cases federal agents, in good faith, accompanied state officers during valid state searches and seizures of drugs. Although in both cases, the Eighth Circuit conceded that the federal agents could have obtained warrants for the items seized, the plain view exception was held applicable.

In State v. Oliver, 341 N.W.2d 744 (Iowa 1983), the inadvertency requirement was met where police had probable cause to include the magazines seized in their application for a search warrant. The court reasoned there was no basis for finding the magazines were omitted intentionally from the search warrant. The record had established that the magazines were omitted from the warrant application due to an oversight, and police were not looking for them. *Id.* at 746.

Jurisdictions viewing inadvertency as a means of deterring subterfuge may read *Coolidge* as implying that the officers in *Coolidge* did not act in good faith. That premise could be based on United States v. Leon, 468 U.S. 897 (1984), in which the Court recognized that a good faith exception to the warrant requirement could not be invoked by police "where the issuing magistrate wholly abandoned his judicial role." *Id.* at 923. It could be argued that the officers in *Coolidge* should have realized that the warrant issued by a non-neutral magistrate was invalid and that the ensuing entry was a subterfuge to the warrant requirement.

80. *See Johnson*, 707 F.2d at 321; *Wright*, 641 F.2d at 605-06; *Oliver*, 341 N.W.2d at 746.

knowledge of what evidence might be discovered should not bar a plain view seizure.[81]

Although the good faith standard appears appropriate, the *Coolidge* opinion does not support it. The seizure in *Coolidge* was authorized by a warrant.[82] The warrant was invalidated, however, because it was issued by a non-neutral magistrate.[83] In an attempt to bring the search and seizure of the defendant's automobile under an exception to the warrant requirement, the prosecution argued that the plain view doctrine was applicable. The Court disagreed because the discovery of the automobile was not inadvertent inasmuch as the automobile and other evidence seized were specifically listed in the warrant.[84]

In jurisdictions permitting plain view seizures where the seized evidence was not listed in the warrant due to an oversight and police were not expecting to remove the items, discovery of the evidence is considered inadvertent. This rationale appears to penalize police for their attempts to comply with the warrant requirement. In addition to producing that rather curious anomaly, the requirement of inadvertency is difficult to apply. Courts relying on a good faith criterion must examine the subjective intent of intruding officers. This determination entails inquiry into whether the failure to list the evidence was deliberate or accidental, whether the invasion was undertaken with the expectation that these objects would be seized, and whether all the officers were operating under the same misapprehension. A more practical guide for determining whether seizures are inadvertent is the familiar and workable probable cause standard.

Controversy over the inadvertency requirement may hinge on a particular court's reading of the *Coolidge* plain view analysis. In *Coolidge*, the Court reasoned that if a warrant fails to mention a particular object, but police know the object's location and intend to seize it, there is a violation of the constitutional requirement that a warrant particularly describe the things to be seized.[85] Some jurisdictions may interpret knowledge to mean that police must have known the exact location of a particular item. Under those circumstances, discovery of the item would not be inadvertent.[86]

Other jurisdictons consider two elements to determine whether there was "a *planned* warrantless seizure": (1) knowledge of the item's location, and (2) intent to seize the item.[87] Under this interpretaton, even if there is probable cause to obtain a warrant, removal of that object

81. *See supra* note 80. Presumaby all jurisdictions would agree that no plain view seizure could be made where the warrant naming the seized article is later declared invalid. *See* State v. Westfall, 446 So. 2d 1292, 1304 (La. App. 1984).
82. Coolidge v. New Hampshire, 403 U.S. 443, 447 (1971).
83. *Id.* at 453.
84. *Id.* at 472-73.
85. *Id.* at 471.
86. *Id.* at 472.
87. *Id.* at 471 n.27.

may be inadvertent if the invasion is not for the purpose of seizing a particular object.

Since *Coolidge*, Supreme Court decisions have offered no standard for determining whether a seizure is inadvertent. Additionally, the Court has not addressed the lingering doubts over whether inadvertency is an indispensable element of the plain view doctrine. In *Texas v. Brown*,[88] Justice Rehnquist noted that several lower court decisions questioned the validity of the inadvertency requirement[89] and Justice White wrote a separate opinion specifically rejecting inadvertency as a requirement of plain view seizures.[90] Justice Powell and Justice Blackmun, on the other hand, saw no reason to cast doubt on the *Coolidge* articulation of the plain view exception.[91] The three remaining Justices offered no comment on the inadvertency requirement.[92]

In *Brown*, the officer's view of contraband preceded his right under the *Carroll* doctrine to enter and search the automobile's interior. Ordinarily, when police learn that evidence is located in a constitutionally protected area, a warrant must be obtained prior to entry. Under the *Brown* rationale, however, when police unexpectedly see evidence under circumstances in which applying for a warrant might lead to the loss of that evidence, a warrantless search and seizure is permissible. More specifically, if the warrantless invasion based on an inadverent observation would satisfy the other requirements of the plain view doctrine, the invasion is valid.[93] Had the officer expected to find the drugs before he stopped the car, the failure to obtain a warrant could not be excused. In *Brown*, the inconvenience of obtaining a warrant prior to the intrusion fulfilled the requirement that the discovery be inadvertent.

The *Brown* decision is flawed, however, because it fails to recognize

88. 460 U.S. 730 (1983).
89. Texas v. Brown, 460 U.S. 730, 743 n.8 (1983).
90. *Id.* at 744 (White, J., concurring).
91. *Id.* at 746 (Powell, J., concurring). The fact that these two Justices appear to accept the plain view doctrine as developed in *Coolidge* invalidates the justice-counting theory proposed by the Fourth Circuit. United States v. Bradshaw, 490 F.2d 1097, 1101 n.3 (4th Cir.), *cert. denied*, 419 U.S. 895 (1974). In *Bradshaw*, the court theorized that inadvertency was not required because three members of the Court disagreed with the inadvertency requirement (Burger, White and Blackmun) and two new members shared the same view (Rehnquist and Powell); thus a Court majority repudiating inadvertency was present. The theory is without foundation because neither Justice Powell nor Justice Blackmun challenged the view of the *Coolidge* plurality.
92. It is interesting to note that, although contraband was seized in *Texas v. Brown*, the Court did not refer to the language in *Coolidge* that seemingly exempts contraband from the inadvertency requirement. Jurisdictions adopting the view that contraband need not be discovered inadvertently have not recognized the implicit rejection of that interpretation in *Texas v. Brown*. *See* United States v. Hultgren, 713 F.2d 79, 88-89 (5th Cir. 1983); State v. Couture, 194 Conn. 530, 547, 482 A.2d 300, 310, *cert. denied*, 469 U.S. 1192 (1984); State v. Hobson, 8 Conn. App. 13, 18 n.7, 511 A.2d 348, 351 n.7 (1986); People v. Boyd, 123 Misc. 2d 634, 640, 474 N.Y.S.2d 661, 667 (1984); *see also* State v. Cote, 126 N.H. 514, 527, 493 A.2d 1170, 1179 (1985).
93. *Cf. Brown*, 460 U.S. at 743-44.

that the evidence was not found inadvertently inasmuch as the invasion was undertaken for the very purpose of seizing that evidence. Although the seizure in *Brown* may well have been justified under the *Carroll* automobile exception, the lack of inadvertency takes the seizure outside the parameters of the original plain view formula. Under *Brown*, the seizures would be permissible under the plain view doctrine as long as the circumstances prior to the intrusion make obtaining a warrant impractical.

What emerges from *Brown* is a disturbing modification of the inadvertency requirement. In the classic plain view scenario depicted in *Coolidge*, a prior valid intrusion must precede the inadvertent discovery of evidence. *Chrisman* extends *Coolidge* to situations where the inadvertent discovery is made prior to the invasion, but after the officer was vested with the authority to make an invasion. *Brown* suggests that the inadvertency requirement is satisfied simply if it would be inconvenient to obtain a warrant.[94]

IV. MARYLAND APPLICATION OF THE PRIOR VALID INTRUSION AND INADVERTENCY REQUIREMENTS

A. Prior Valid Intrusion

The confusion generated by the United States Supreme Court as to the precise nature of the prior valid intrusion requirement has been complicated further in Maryland by inconsistent or incomplete appellate decisions. Although the Court of Special Appeals of Maryland has explained that plain view seizures are valid only if they are preceded by a prior valid intrusion,[95] the court confused the plain view and open view doctrines.[96] Moreover, the Court of Appeals of Maryland has failed to

94. Because, under *Brown*, an exigency arising prior to invasion satisfies the inadvertency requirement, *Chrisman* may be interpreted similarly. Obviously, it would have been inconvenient for the officer in *Chrisman* who spotted contraband inside the arrestee's dormitory room to obtain a warrant. Therefore, plain view is applicable when an unanticipated discovery has been preceded by the right to intrude. As a practical matter, this theory might validate plain view seizures which otherwise would fail to satisfy *Brown*. For example, police arrive at a suspect's home armed with a search warrant for Item A. Before entering or making their presence known, the police spot the equally incriminating Item B displayed in the window. Under *Brown*, obtaining a warrant for Item B would be inconvenient. Yet the discovery of Item B is anticipated and therefore inadmissible under plain view. Pursuant to *Chrisman*, however, the discovery of Item B would be inadvertent for purposes of plain view because Item B was observed after the police were already authorized to enter the premises pursuant to the warrant for Item A. Courts have yet to consider the legality of seizures under these circumstances.

95. Dent v. State, 33 Md. App. 547, 557, 365 A.2d 57, 63 (1976); Floyd v. State, 24 Md. App. 363, 366, 330 A.2d 677, 679, *cert. denied*, 275 Md. 748 (1975); Neam v. State, 14 Md. App. 180, 185, 286 A.2d 540, 543 (1972).

96. Hutchinson v. State, 38 Md. App. 160, 380 A.2d 232 (1977), illustrates the confusion of the plain view and open view doctrines by the Court of Special Appeals of

discuss the prior valid intrusion requirement altogether, despite being provided with the opportunity to do so in *Liichow v. State*.[97]

In *Liichow*, the defendant was told by a trailer park owner and by the police to leave a trailer park because of his involvement in several disturbances.[98] As the defendant was transferring his belongings into a waiting car, an officer observed many white, dime-sized tablets at the bottom of a large plastic bag.[99] The bag was seized and a subsequent search revealed that the tablets were a controlled dangerous substance.[100] The defendant was convicted for the possession of narcotics but the court of appeals reversed the conviction because the warrantless search was unconstitutional.[101] The court held that the search could not be justified under the plain view exception[102] because pharmaceutical companies manufacture many white tablets that are not contraband and it could not have been immediately apparent to the officer that the tablets were

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Maryland. In *Hutchinson*, a police officer stopped a car driven by an individual whom the officer believed had just committed a felony. As he was arresting the suspect, the officer observed a handgun and bullets in the back seat of the car. The items were not seized until the car was at an impoundment lot. The court upheld the search of the car and seizure of evidence on two separate grounds. First, the *Hutchinson* court held that the exigent circumstances at the time of arrest gave the officer probable cause to believe the car contained an instrumentality of the crime. *Id.* at 171, 380 A.2d at 238. In offering a second ground on which to justify its holding, however, the court confused the open view and plain view doctrines. The court attempted to invoke the plain view doctrine, under which a search incident to the arrest would serve as the prior valid intrusion. Instead, the court quoted Sweeting v. State, 5 Md. App. 623, 627-28, 249 A.2d 195, 198 (1969), a pre-*Coolidge* Maryland case which propounds the open view doctrine.

Similar confusion occurs in Roop v. State, 13 Md. App. 251, 283 A.2d 198 (1971). In *Roop*, police stopped a car that was trying to evade them. As an officer approached, he observed a quantity of stereo equipment in the car. The occupants of the car were arrested for housebreaking. The car was searched and evidence was seized after the car was brought to the station. The court of special appeals held the arrest and subsequent search and seizure unconstitutional because the police lacked the probable cause belief that the defendants committed a felony. In attempting to analyze the case under the plain view doctrine, the court mistakenly referred to a classic open view observation where, without a search, an officer sees objects in plain view within a motor vehicle of such a nature as to give him probable cause to believe that the vehicle harbors that which is subject to seizure — whether it be contraband or the fruits, instrumentalities, or evidences of crime. *Id.* at 260, 283 A.2d at 203.

97. 288 Md. 502, 419 A.2d 1041 (1980).
98. Liichow v. State, 288 Md. 502, 504, 419 A.2d 1041, 1042 (1980).
99. *Id.* at 504-05, 419 A.2d at 1042-43.
100. *Id.* at 505-06, 419 A.2d at 1043-44.
101. *Id.* at 509, 419 A.2d at 1045.
102. *Id.* at 513, 419 A.2d at 1047. The court also excluded the evidence in reliance on Arkansas v. Sanders, 442 U.S. 753 (1979). Liichow v. State, 288 Md. 502, 510-13, 419 A.2d 1041, 1046-47 (1980). In *Sanders*, the Supreme Court held that a suitcase could be seized from an automobile if the police had probable cause to believe the suitcase contained contraband, but that the suitcase could be searched only after obtaining a warrant. *Sanders*, 442 U.S. at 767. On this authority, the *Liichow* court held that the officer was permitted to seize the bag, but that he was prohibited from searching it without a warrant because of the defendant's reasonable expectation of privacy in the bag. *Liichow*, 288 Md. at 512, 419 A.2d at 1046.

contraband.[103]

Although the *Liichow* court acknowledged the requirements of the plain view doctrine by quoting an excerpt from *Coolidge*,[104]the court never discussed the prior valid intrusion element. The dissent asserted, however, that the prior valid intrusion requirement was "plainly satisfied" because the officer was lawfully on the premises in the course of his police duties.[105] This position is erroneous, however, because the observation of the tablets constituted merely an open view observation. A legitimate right to see the contents of an opened bag is not a prior valid intrusion unless there is some further legal authority to invade the receptacle's interior. Thus, neither the *Liichow* majority nor the dissent provides any valid constitutional basis for the officer's warrantless search of the seized plastic bag.[106]

B. Inadvertency

Maryland, in conformity with the majority view, has accepted the inadvertency requirement as an indispensable element of the plain view exception.[107] Application of the inadvertency requirement by Maryland courts, however, is both confusing and inconsistent.

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103. The dissent argued that the tablets were seized properly under the plain view doctrine because the officer had probable cause to believe the tablets were a controlled dangerous substance. *Liichow*, 288 Md. at 514-15, 419 A.2d at 1047-48. Indeed, in *Brown*, decided three years after *Liichow*, the Supreme Court cautioned against interpreting "immediately apparent" to mean the officer must be possessed of "near certainty" as to the seizable nature of the items. Texas v. Brown, 460 U.S. 730, 741 (1983). Moreover, in the recent case of Arizona v. Hicks, 107 S. Ct. 1149 (1987), the Supreme Court unequivocally stated that probable cause was sufficient to satisfy the immediately apparent requirement. *Hicks*, 107 S. Ct. at 1153.

    At least one state has construed the immediately apparent requirement under its state constitution more strictly than the Supreme Court construes the requirement. *See* State v. Ball, 124 N.H. 226, 235, 471 A.2d 347, 352-54 (1983). The Court of Appeals of Maryland has taken the position that Article 26 of the Maryland Declaration of Rights must be read in conjunction with the fourth amendment. *Liichow*, 288 Md. at 509 n. 1, 419 A.2d at 1044-45 n.1. Accordingly, the Supreme Court's perception of the "immediately apparent" requirement probably would be accepted by the court of appeals in interpreting the Maryland constitution.

104. *Id.* at 513, 419 A.2d at 1047 (quoting Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971)).

105. *Liichow*, 288 Md. at 519, 419 A.2d at 1050.

106. Even under the Supreme Court view in *Andreas* and *Jacobsen* that privacy interests in closed containers may be lost because of prior inspections, the officer's fortuitous glimpse into the bag did not eliminate the defendant's further legitimate expectations of privacy in his possessions. *Liichow* might be decided differently today based on United States v. Ross, 456 U.S. 798 (1982). Under *Ross*, an officer with a probable cause belief that contraband is hidden in an automobile can search the entire vehicle and its contents. Thus, in a situation similar to *Liichow*, if the bag was already in the vehicle, the officer could search the car and its contents in search of contraband and seize the evidence under the plain view doctrine.

107. State v. Boone, 284 Md. 1, 10, 393 A.2d 1361, 1366 (1978); State v. Wilson, 279 Md. 189, 195, 367 A.2d 1223, 1227-28 (1977); Smith v. State, 33 Md. App. 407, 410-11, 365 A.2d 53, 55-56 (1976).

In 1972, the court of special appeals determined in *Brown v. State* [108] that the inadvertency requirement should be applied narrowly where police have probable cause to obtain a search warrant.[109] This approach logically limits plain view seizures to evidence for which a warrant could not be obtained. Cases following *Brown*, however, appear to apply a different standard.

In *Waine v. State*,[110] for example, the police obtained a warrant to search a murder suspect's residence, but seized evidence that was not listed in the warrant.[111] The court condoned seizure of the unlisted items because the police had plain view of the unlisted items.[112] Because the police had prior probable cause to believe the unlisted items would be discovered during the search, however, the items could have been specified in the warrant. Therefore, the court's reliance on plain view is misplaced; the inadvertency requirement bars warrantless seizures in circumstances where a warrant could have been obtained. Given the officers' probable cause belief that the evidence would be discovered among the suspect's possessions, the discovery was anticipated. The court in *Waine* apparently considered the inadvertency requirement to be merely a means of preventing conscious subterfuge of the warrant requirement. The court did not consider the requirement as excluding evidence that should have been named in the warrant but was mistakenly omitted.[113]

One year later, the court of special appeals reached a similar result in *Briscoe v. State*.[114] In *Briscoe*, the police seized a shotgun that was not listed in the warrant authorizing the search of a rape suspect's residence.[115] The court held that the shotgun fell within the general language of the warrant, which provided for the seizure of "all evidence and paraphenalia found which may be in connection with purported violations of the aforementioned crimes statutes."[116] On alternative grounds, the court found the warrantless seizure valid under the plain view exception.[117] The court found the discovery of the shotgun inadvertent even

108. Brown v. State, 15 Md. App. 584, 292 A.2d 762 (1972).
109. *Id.* at 608 n.39, 292 A.2d at 776 n.39 (quoting *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 250 (1971)). The *Brown* court's holding, that the plain view doctrine did not apply, was based not upon the inadvertency requirement, but upon the lack of prior valid intrusion. *Id.* at 612-13, 292 A.2d at 778.
110. 37 Md. App. 222, 377 A.2d 509 (1977).
111. Waine v. State, 37 Md. App. 222, 237, 377 A.2d 509, 519 (1977).
112. *Id.* at 238, 377 A.2d at 519.
113. The opinion implies that the omission of the unlisted items from the warrant was an oversight, not deliberate.
114. 40 Md. App. 120, 388 A.2d 153, *cert. denied*, 283 Md. 730 (1978).
115. Briscoe v. State, 40 Md. App. 120, 130, 388 A.2d 153, 159, *cert. denied*, 283 Md. 730 (1978).
116. *Id.* A supporting affidavit specifically stated that a shotgun had been used during the robbery. *Id.* at 124, 388 A.2d at 156.
117. The court summarized the plain view requirements:

> For the warrantless seizure to be constitutionally valid under the plain view doctrine, however, it must be established that the police had prior justification for an intrusion into the area searched, that the police inad-

though it could have been listed in the search warrant because the omission was a good faith error.[118] The court invoked the plain view exception presumably because it believed inadvertency is required only for the purpose of deterring pretextual intrusions. Although that position is consistent with *Waine*, it is inconsistent with *Brown*.

In *Norwood v. State*,[119] the court of special appeals resumed its adherence to the view expressed in *Brown*. In *Norwood*, a warrant was issued for the seizure of certain evidence from a suspected rapist's residence. During the search, officers seized several keys not mentioned in the warrant. The suspect was believed to have entered the victim's apartment with a pass key. The defendant claimed that the discovery of the keys was anticipated and therefore not inadvertent.[120] The court characterized the argument as "a catch 22" situation:

> The short answer to this is simply that appellant confuses his probable causes. Because there had been no signs of forced entry into the locked apartment, the officer had "probable cause" to believe that a pass key afforded the unlawful entry and would thus be evidence associated with the crime. His expression of a *belief* that the key or keys would be in Howard's apartment may have been a reasonable suspicion based upon other evidence of Howard's culpability, but it fell short of constituting "probable cause" to obtain a warrant to search for *it* (or them). When upon lawful entry under the warrant the keys appeared in plain view they were, in light of the foregoing circumstances, "probably" those used to gain entrance and were therefore properly seized.[121]

Thus, under *Norwood*, the test for inadvertency is whether probable cause exists prior to entry.[122] Under either *Waine* or *Briscoe*, however,

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vertently came across the item seized, and that it was 'immediately apparent' to the police that the item seized was evidence.

Id. at 131, 388 A.2d at 159-160 (quoting Smith v. State, 33 Md. App. 407, 410, 365 A.2d 53, 55 (1976)).

118. Where a robbery victim has not informed authorities of every item taken from him, plain view may validate the seizure of an unlisted stolen object. People v. Boyd, 123 Misc. 2d 634, 640, 474 N.Y.S.2d 661, 667 (1984). In that situation, police discovery is unexpected. In *Briscoe*, however, police knew the suspect used a shotgun in the commission of the crime.

119. 55 Md. App. 503, 462 A.2d 93 (1983).

120. Norwood v. State, 55 Md. App. 503, 507-09, 462 A.2d 93, 96 (1983).

121. *Id.* at 509, 462 A.2d at 96.

122. The court's conclusion that the keys could not have been named in the warrant because the police lacked the probable cause belief that the keys would be found at the defendant's residence is startling. Assuming there was probable cause to believe the suspect entered the victim's apartment with a pass key, it is logical to believe that a pass key might be secreted in the suspect's home. If the use of a pass key were pure speculation, there would have been no basis for associating the key with criminal conduct. Thus, in upholding the seizure, the court was compelled to reach the strained conclusion that although the police had probable cause to believe a

the discovery of the keys would have been inadvertent because there was no evidence of bad faith on the part of the police.

The uncertainty created by these conflicting decisions is apparent in the dissenting opinion in the subsequent case of *Ross v. State*.[123] In *Ross*, a search warrant called for the seizure of "obscene, erotic and pornographic material."[124] The majority held that the seizure of an obscene videotape not listed in the warrant did not fall within the plain view exception because the officers lacked a reasonable belief that the videotape was evidence of a crime.[125] The dissent argued that the videotape was within the scope of the warrant's description and, even if it were not, the seizure was permissible under the plain view doctrine.[126] Under *Norwood*, discovery is anticipated if there is probable cause to include the object in a warrant. The *Ross* dissent appears to reject the *Norwood* probable cause standard for inadvertency in favor of the *Waine-Briscoe* interpretation of inadvertency under which a discovery is inadvertent unless there is evidence of bad faith or an attempt to subvert the warrant requirement. It is still not resolved, however, whether the *Norwood* probable cause approach or the *Waine-Briscoe* good faith approach is the law in Maryland. Of the two positions, the *Norwood* approach is preferable because, as an objective approach, it is more workable and logical. The evaluation of inadvertency on the basis of good faith is nebulous and impractical.

V. CONCLUSION

Despite a significant shift in the theoretical underpinnings of the plain view doctrine and significant modification of the original principles articulated in *Coolidge*, the doctrine provides a viable basis for warrantless seizures. Where police officers discover incriminating evidence inadvertently while properly on the premises, the plain view doctrine appropriately allows such evidence to be admitted at trial. In such situations, the requirement of a warrant would not serve to deter wrongful police activity; rather it would serve to exclude relevent evidence that is fortuitously acquired.

Unfortunately, however, several key issues concerning the nature and extent of the plain view doctrine remain unresolved. Courts, including those in Maryland, have misinterpreted the prior valid intrusion requirement by failing to recognize that entry into areas supporting an interest in privacy, such as houses, cars, or containers, may not be based only upon an open view. An independent legitimate basis for a search must precede any plain view seizure. Additionally, courts in Maryland

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master key was used, they had no probable cause to believe the keys were in the suspect's residence.

123. 59 Md. App. 251, 475 A.2d 481 (1984).

124. Ross v. State, 59 Md. App. 251, 256, 475 A.2d 481, 483 (1984).

125. *Id.* at 261-62, 475 A.2d at 486-87.

126. *Id.* at 273, 475 A.2d at 492 (Garrity, J., dissenting).

and elsewhere have displayed a lack of consistency in applying the inadvertency requirement. Courts have failed to clarify whether discovery before the intrusion satisfies the inadvertency requirement, whether lack of probable cause is required for inadvertency, or whether good faith omissions from a warrant are sufficient. Until the prior valid intrusion requirement is honored and the parameters of inadvertence clearly drawn, the scope of the plain view doctrine will remain uncertain.