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Criminal Procedure: The Supreme Court Takes a Stance with Plain View Searches and Seizures - Arizona v. Hicks

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CRIMINAL PROCEDURE—THE SUPREME COURT TAKES A STANCE WITH PLAIN VIEW SEARCHES AND SEIZURES—Arizona v. Hicks

INTRODUCTION

Prior to the decision in Arizona v. Hicks, the Supreme Court never had held unequivocally that probable cause was required to invoke the plain view doctrine. In Coolidge v. New Hampshire, the landmark plain view seizure case, the Court discussed three elements required for a plain view seizure but did not, at any point in the opinion, state that probable cause was required to seize an item in plain view. The Court stated that, for a plain view seizure to be constitutional, a police officer must have a prior justification for the intrusion, i.e., exigent circumstances; the discovery of the item must be inadvertent; and it must be immediately apparent to the officer that he has evidence before him. Of the three requirements, only the immediately apparent element speaks to the degree of certainty an officer must have before seizing an item, but it fails to define that degree. The failure to define that degree of certainty has caused inconsistency in the law, with some courts holding that a standard as low as mere suspicion is sufficient, while others have held that a standard greater than probable cause is required. Since Coolidge, the Supreme Court also has been undecided on the requisite degree of certainty, as evidenced by Payton v. New York, which suggested probable cause must be met, and Texas v. Brown, which regarded the matter as unresolved.

Arizona v. Hicks settled this uncertainty as to the standard of certainty an officer must have to seize items he believes to be evi-
dence. The *Hicks* Court held that probable cause was the required standard to invoke the plain view doctrine.\(^{10}\) This decision benefits the courts in that they now have a bright-line test to determine if evidence seized in plain view is admissible at trial. Conversely, this decision may prove to be very detrimental to effective law enforcement when police seize items in plain view they believe to be evidence of crime, but the items ultimately are inadmissible because the officer’s reasonable belief did not measure up to the standard of probable cause.

This Note will assess the ramifications and effect of *Arizona v. Hicks* on existing search and seizure law and law enforcement in general. Further, it will propose and evaluate a more flexible alternative approach that the Court could have taken.

**The Case**

*Arizona v. Hicks* involved a lawful warrantless entry into an apartment after a shot fired in that apartment injured a man in a downstairs apartment.\(^{11}\) The police entered the apartment to search for the shooter, other victims, and weapons.\(^{12}\) During the search of the apartment, the officers found and seized three weapons, ammunition, and a stocking mask.\(^{13}\) One of the officers noticed two sets of stereo equipment.\(^{14}\) Suspecting they were stolen,\(^{15}\) the officer recorded the serial numbers of the components, including a turntable and a few other pieces which the officer had to move in order to ascertain and record the numbers.\(^{16}\) After calling in the serial numbers to headquarters, the officer was notified that the turntable was stolen property, and he immediately seized the turntable.\(^{17}\) Subsequently, Hicks was indicted for the robbery of the stereo equipment.\(^{18}\)

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10. *Id.*
11. *Id.* at 1152. The exigent circumstance exception to the warrant requirement justified the initial entry.
12. *Id.*
13. *Id.* One of the weapons the officers found was a sawed-off shotgun.
14. *Id.*
15. *Id.* The officer suspected they were stolen because the stereos were expensive and of the kind that typically are stolen, and the apartment was practically bare of furniture except for a few pieces and the stereo. See also *id.* at 1156.
16. *Id.* at 1152.
17. *Id.* Later it was determined that some of the other pieces were stolen, and these were seized after a warrant was obtained.
18. *Id.*
Respondent Hicks moved to suppress the seized stereo equipment, contending that the officer who moved the equipment to record the serial number made a warrantless search without probable cause. The Arizona Superior Court granted the motion and the State appealed. The lower court relied on a statement from Mincey v. Arizona that a "warrantless search must be 'strictly circumscribed by the exigencies which justify its initiation.'" The Arizona Court of Appeals affirmed the lower court on grounds that the search of the stereo equipment was unconstitutional because it was unrelated to the justification for the initial entry. Both lower courts rejected the State's contention that the officer's actions were justified under the plain view doctrine of Coolidge. The State appealed to the Arizona Supreme Court, which denied review, and thereafter the State petitioned the United States Supreme Court for certiorari.

At the Supreme Court level, the State argued that there had been "neither a 'search' nor a 'seizure.'" The Supreme Court agreed that the "mere recording of the serial numbers did not constitute a seizure"; however, the Court held the officer's moving of the components to see the serial numbers constituted a search distinct from the original justification for entering the apartment.

19. Id.
20. Id.
22. Hicks, 107 S. Ct. at 1152 (quoting Mincey v. Arizona, 437 U.S. 385 (1975)). "The Court of Appeals viewed the obtaining of the serial numbers . . . as an additional search, unrelated to that exigency." Id.
23. Id. The United States Supreme Court made it clear in its opinion that the search was not ipso facto unreasonable" because it was unrelated to the justification for entering the apartment. Id. at 1153. "That lack of relationship always exists with regard to action validated under the 'plain view' doctrine." Id. The Court clarified Mincey by stating that Mincey simply addressed the scope of the primary search itself and did not overrule the plain view doctrine by implication. Id. at 1153.
24. Id. at 1152. The trial court explicitly rejected the plain view justification, and the court of appeals rejected it also by implication. Id.
25. Id.
26. Id.
27. Id. The Court stated that recording the serial numbers was "the first step in a process by which respondent was eventually deprived of the stereo equipment [but] in and of itself . . . it did not 'meaningfully interfere' with respondent's possessory interest in either the serial numbers or the equipment, and therefore did not amount to a seizure." Id.
28. Id. The Court stated it was a search in the fourth amendment sense be-
After establishing that there had been a search, the Court next addressed the issue of whether the search was reasonable. It held that it was not because it was based only on a reasonable suspicion, which is a less strict standard than probable cause. The Court rationalized its holding by stating, "No reason is apparent why an object should routinely be seizable on lesser grounds, during an unrelated search and seizure, than would have been needed to obtain a warrant for that same object if it had been known to be on the premises."

**BACKGROUND AND CASE HISTORY**

Prior to the 1970s, plain view searches and seizures were associated with searches incident to arrest. The plain view doctrine exception to the warrant requirement was not recognized until 1971. In many of the earlier cases, such as *Marron v. United States* and *Harris v. United States*, the Court used neither the term "plain view" nor any similar language. In *Marron* and *Harris*, the Court upheld the search and seizure of plain view evidence and contraband on the grounds that the defendants committed the criminal activity in the officers' presence; therefore, a search of the area in the arrestees' control was justified, and any evidence or contraband the officers came across could be seized as incident to the lawful arrest.

In *Marron*, prohibition agents had obtained a warrant to search for "intoxicating liquors and articles for their manufacture" at an alleged speakeasy. When they entered the room, they observed one of the defendants serving drinks to several of the patrons and immediately placed him under arrest. During their

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29. *Id.* at 1153. (Justice Powell, dissenting, stated that the "State was unwise to concede the absence of probable cause." *Id.* at 1156.)

30. *Id.* at 1153.

31. *Id.* at 1154.

32. Moylan, *supra* note 3, at 1050. The author states that plain view was used as a "mere descriptive phrase" such as "plain sight" or "open view," and the phrase was "always in lower case." *Id.*

33. *Id.* at 1067.

34. 275 U.S. 192 (1927).


38. *Id.* at 194.
search for the liquor and manufacturing instruments, they seized a ledger and various bills that were associated with the management of the speakeasy. Over Marron's objections, the ledger and bills were introduced as evidence at trial.

The Supreme Court upheld the seizure and introduction of the ledger and bills on the grounds that one of the defendants had actually been engaged in criminal activity when the agents entered the room and since the agents "were authorized to arrest for crime being committed in their presence... [t]hey had a right without a warrant contemporaneously to search the place in order to seize the things used to carry on the criminal enterprise." Further, the Court stated that the officers were justified in searching all parts of the premises in the defendant's immediate possession and control that were used for the "unlawful purpose." Thus, the Court legitimated warrantless searches and seizures of evidence and contraband that follow a lawful arrest when the scope of the search is the areas within the arrestee's immediate possession and control.

Similarly, in *Harris*, the Court upheld a search of the defendant's apartment and seizure of United States draft cards in his possession on the same grounds as in *Marron*. *Harris* involved a search of defendant's apartment for two cancelled checks, pursuant to a warrant charging mail fraud and a warrant charging a violation of the National Stolen Property Act. One of the agents involved in the search discovered a sealed envelope that contained several draft cards. The defendant subsequently was indicted and convicted for possessing the draft cards, a federal offense. The Court reasoned that, even though the warrant particularly described not the draft cards but rather the two cancelled checks, when the officers executed the arrest warrants they were justified

39. Id.
40. Marron was the lessee of an entire floor of a building that housed the speakeasy. *Id.* at 193.
41. *Id.* at 194.
42. *Id.* at 198. The government contended the seizure could be justified on two grounds—as either an incident to the execution of the search warrant or as an incident to arrest. The Court rejected the first ground by stating that items seized must be particularly described in the warrant and that general searches are violative of basic fundamental rights. *Id.* at 194, 195; see also *Weeks v. United States*, 232 U.S. 383 (1914); *Boyd v. United States*, 116 U.S. 616 (1886).
43. *Marron*, 275 U.S. at 199.
44. 331 U.S. at 148.
45. *Id.* at 149.
46. *Id.*
in searching the premises under the defendant's immediate control—the entire apartment.\textsuperscript{47} When the officers "came upon property of the United States,"\textsuperscript{48} the defendant was "guilty of a serious and continuing offense,"\textsuperscript{49} and because a crime was being committed in the "presence of the agents,"\textsuperscript{50} they were justified under the fourth amendment to seize the instrumentalities of that crime.\textsuperscript{51}

Conversely, in \textit{Go-Bart Importing Co. v. United States},\textsuperscript{52} the officers arrested the defendant based on an "insufficient complaint"\textsuperscript{53} and then proceeded to search defendant's place of business.\textsuperscript{54} The officers seized the defendant's private papers and letters, and the defendant moved to have them returned and suppressed as evidence.\textsuperscript{55} The Supreme Court agreed with the defendant, holding that "the search and seizure were unreasonable and violated the Fourth and Fifth Amendments."\textsuperscript{56} The Court pointed out that the arrest was invalid and that "no felony or misdemeanor had been committed or carried on in the presence of the officers."\textsuperscript{57} It also distinguished \textit{Marron} by stating that no general search had been made in \textit{Marron}, as it had here, and the evidence that had been seized in \textit{Marron} was discovered incidentally.\textsuperscript{58} This latter language, that of inadvertent discovery, demonstrates the Court's first conceptualizations of the plain view doctrine as espoused in \textit{Coolidge}.

In \textit{Trupiano v. United States},\textsuperscript{59} which was one of the earliest

\begin{footnotes}
\footnotetext[47]{Id. at 151.}
\footnotetext[48]{Id. at 154.}
\footnotetext[49]{Id. at 155.}
\footnotetext[50]{Id.}
\footnotetext[51]{Id.}
\footnotetext[52]{282 U.S. 344 (1931).}
\footnotetext[53]{Id. at 346. The complaint was insufficient because it "was verified merely on information and belief and did not state facts sufficient to constitute an offense." \textit{See also id. at 355.}}
\footnotetext[54]{Id. at 349, 350. Officers went to the defendant's place of business and told the defendants they had arrest warrants and a warrant to search the premises for violations of the National Prohibition Act. The arrest warrant was invalid, and the officers did not have a search warrant. By threat of force they made the defendants open desks and the safe from which they seized papers, journals, account books, letter files, insurance policies, cancelled checks, index cards, and various other personal papers belonging to the defendants and the company. \textit{Id.}}
\footnotetext[55]{Id. at 347.}
\footnotetext[56]{Id. at 346.}
\footnotetext[57]{Id.}
\footnotetext[58]{Id.}
\footnotetext[59]{334 U.S. 699 (1948).}
\end{footnotes}
cases to use the term plain sight or open view, the Supreme Court held that the search and seizure of bootlegging contraband violated the fourth amendment. Law enforcement officials, who knew several weeks in advance of the distilling operation, went to the building used for the operation without an arrest or search warrant, saw defendant in the process of making whiskey, arrested him, subsequently searched the building, and seized the contraband. The Court conceded that the arrest was valid because the defendant was committing an offense in the presence of the agents. However, the Court did not agree that this justified the search and seizure that followed the arrest even though there existed a "long line of cases recognizing that an arresting officer may look around at the time of the arrest and seize fruits and evidences of crime or those contraband articles which are in plain sight and in his immediate and discernible presence." Here the Court held that the officers knew of the operation and what they would find when they went to the building; therefore, the officers needed to follow the dictates of the fourth amendment warrant requirement to legitimize the search and seizure.

These earlier cases demonstrate that there was a need for, and that the Court was moving towards, a plain view exception to the warrant requirement, independent of search incident grounds. After the late 1940s, there began a shift away from the search incident rationale. The decision in Chimel v. California, decided in 1969, permanently limited searches incident to arrests to the body of the arrestee and areas within his immediate control. In 1967 the Supreme Court decided Warden v. Hayden, which was the first case to recognize a plain view exception; however, the Court

60. Id. at 704.
61. Id. at 702-03.
62. Id. at 705.
63. Id. The Court distinguished Harris in that the seizure of property was only after officers had "unexpectedly" come upon it during the search, as opposed to the situation in Trupiano, where the officers knew long in advance what they would find. Id. at 708-09. The unexpectancy language is akin to the "incidental discovery" language used in Go Bart, 282 U.S. 344, which eventually became the "inadvertent discovery" prong of Coolidge.
64. Id. at 706.
66. Id. at 763. The Chimel court construed "immediate control" to mean the area from which an arrestee might "gain possession of a weapon or destructible evidence." Id.
did not articulate it as such. Hayden involved a warrantless search of a house after a robbery suspect had been seen fleeing into the house.\(^{68}\) The officers arrested the suspect in an upstairs bedroom after his wife had given them permission to enter and search the house.\(^{69}\) The officers' search disclosed weapons and clothing of the type the fleeing man was said to have worn. The defendant was later convicted\(^{70}\) upon this evidence.

The Supreme Court held that neither the warrantless entry nor the search was invalid.\(^{71}\) The Court determined that the entry fell under the hot pursuit exception to the warrant requirement, and it upheld the search on the grounds that a "thorough search" was the only way to insure that the defendant was the only man present in the house and that all of the weapons were under the control of the police.\(^{72}\) The defendant contended that the clothing should have been suppressed because the officer who found it in a downstairs washing machine could not have been looking for a suspect or weapons, but the Court disagreed. "[I]t cannot be said on this record that the officer who found the clothes in the washing machine was not searching for weapons."\(^{73}\) The Court allowed an officer to seize evidence, admissible at trial, if the officer conducted a lawful warrantless search, limited by the exigencies of the situation, and came across evidence in plain view unrelated to the exigency. Thus, the Hayden Court laid the groundwork for plain view searches and seizures.

The Supreme Court did not fully articulate plain view as a doctrine and exception to the warrant requirement until Coolidge

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68. Id. at 297.
69. Id. at 297-98.
70. Id. at 296.
71. Id. at 298.
72. Id. at 299. The Court distinguished Hayden from Harris v. United States, 331 U.S. 145 (1947), by stating it was not upholding the search because it was incident to arrest. It sustained the search because it was the only means to prevent the suspect from resisting or escaping. The Court stated that the permissible scope must be broad enough to allow law enforcement to achieve their goal. Id.
73. Id. The main issue before the Court was the distinction between "mere evidence," which as a general rule was immune from seizure, and instrumentalities, fruits, and contraband, which were validly seizable. Id. at 300. The court of appeals below had held that the clothing seized from the washing machine was inadmissible because it was "mere evidence." Id. The Supreme Court rejected the distinction, stating that nothing in the fourth amendment supports the distinction. Id. at 300-01.
v. New Hampshire. In Coolidge, the Supreme Court held that a search and subsequent seizure of an automobile belonging to a murder suspect violated his fourth amendment rights. As in Trupiano, the police in Coolidge "had ample opportunity to obtain a valid warrant" but failed to do so.

The Supreme Court rejected the State's argument that the car could be seized because it was an "instrumentality of the crime" and in plain view on the defendant's property. According to the Court, "[t]he problem with the 'plain view' doctrine has been to identify the circumstances in which plain view has legal significance rather than being simply the normal concomitant of any search, legal or illegal." Thereafter, the Court discussed the three requisite elements necessary for plain view to have legal significance. First, initial entry must be justified either by a warrant or by one of the exceptions to the warrant clause. Second, the officer must inadvertently come across the evidence. If the officers know what they will find in advance, as in Coolidge and Trupiano, then they must obtain a warrant before they search or seize any evidence. Lastly, it must be immediately apparent to the officer that he has evidence before him. The concern here lies in discouraging a "general exploratory search from one object to another until something incriminating at last emerges." This test for ap-

74. 403 U.S. 443 (1971).
75. Id.
76. 334 U.S. 699 (1948).
77. 403 U.S. at 472. The police had a search warrant for the car, but the Supreme Court held it was invalid because it had not been issued by a detached and neutral magistrate. Id. at 449. The warrant had been issued by the attorney general who was personally in charge of the investigation. Id. at 447. Thereafter, the State proposed theories that it contended brought the search and subsequent seizure of the car within the exceptions to the warrant requirement. Id. at 448. One theory was a search incident to arrest, "that the police may make a warrantless search of an automobile whenever they have probable cause to do so," Id. at 458; see Carroll v. United States, 276 U.S. 132 (1925). The state also contended that the car was an instrumentality of the crime and in plain view. 403 U.S. at 464. The Court rejected all three grounds.
78. 403 U.S. at 464.
79. Id. at 465.
80. The Court named the hot pursuit exception and the search incident to arrest exception if limited in scope. Id.
81. Id.
82. Id. at 466.
83. Id.
84. Id.
plying the plain view doctrine appears simple enough at first glance. However, the last element of immediate apparency has caused some inconsistency and confusion in the case law since **Coolidge**. The Supreme Court had never stated the precise degree of immediate apparency until **Hicks**. Before **Hicks**, some courts required nothing less than probable cause, while other courts allowed reasonable suspicion to satisfy the requirement.

For example, in dicta in **Payton v. New York**, the Supreme Court stated, "[t]he seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity." However, in **Texas v. Brown** the Supreme Court implied that a lesser standard may be acceptable in certain situations. In **Brown**, the Supreme Court granted certiorari after a state court rejected the State's argument that the plain view doctrine justified the seizure of a "heroin balloon." The Court granted certiorari "[b]ecause of the apparent uncertainty concerning the scope and applicability of the [plain view] doctrine." The Court accepted the "statement of the rule from **Payton** ... requiring probable cause for seizure in the ordinary case," and held that the officer did indeed have probable cause. However, the Court in a footnote made clear that it was not addressing "whether, in some circumstances, a degree of suspicion lower than probable cause would be sufficient basis for a seizure in certain cases." The Court's statement implies that there may be occasions where a standard less than probable cause is acceptable and demonstrates the Court's reluctance, before **Hicks**, to take a firm position on the issue.

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86. Id. at 587. **Payton** involved the warrantless entry into the home of defendant and the warrantless arrest of defendant. While there, the officers seized a shell casing in plain view. The Court ruled only on the constitutionality of the entry and arrest; it never reached the issue of the seizure of the shell since the unreasonable warrantless entry automatically invalidated the subsequent warrantless seizure. See also id. at 576.
88. Heroin is sometimes packaged for sale in tied off party balloons. Id at 734.
89. Id. at 733.
90. Id. at 742.
91. Id.
92. Id. at 742 n.7.
The decision in Arizona v. Hicks consisted of three holdings. The Court first held that the "mere recording of the [stereo components'] serial numbers did not constitute a seizure." The recording was not a seizure, the Court concluded, because it was not an additional interference with the defendant's "possessory interest." However, moving the stereo equipment did constitute a search, which was unrelated to the original entry. The Court held that taking action, i.e., picking up the turntable to view the serial number, was an additional invasion of defendant's privacy that was "unjustified by the exigent circumstance that validated the entry." Further, the Court stated that it did not matter what the search uncovered, because "[a] search is a search" no matter what it discloses.

Upon determining that the officer's moving the equipment was a search, the Court held that the search was not reasonable. The Court stated that the plain view doctrine did not make the search reasonable because the officer did not have probable cause to believe the stereo equipment was stolen; rather, he had only a reasonable suspicion that it was stolen. Before an officer may seize items in plain view, he must have probable cause to believe the items are evidence of crime or contraband. As stated previously, the Court rationalized the probable cause requirement by stating that there was no reason to require a lesser standard of cause in a warrantless search and seizure than would be required if the police knew they would be encountering the evidence or contraband.

The Court also held that the officer's actions could not be upheld on grounds that it was not a full-blown search but only a cursory inspection that could be justified by reasonable suspicion instead of probable cause. The Court stated that a "truly cursory inspection" is not a search at all, because it does not involve mov-

93. 107 S. Ct. at 1152.
94. Id.
95. Id.
96. Id.
97. Id. at 1153.
98. Id.
99. Id.
100. Id. The Court stated that it had "not ruled on the question whether probable cause is required in order to invoke the 'plain view' doctrine." Id.
101. Id. at 1154.
102. Id.
ing the item; rather, it involves "merely looking at what is already exposed to view." The Court refused to "send police and judges into a new thicket of Fourth Amendment law, to seek a creature of uncertain description that is neither a plain-view inspection nor yet a 'full blown search.'"

In her dissent, Justice O'Connor stated that the officer's actions could be upheld on the grounds that it was a cursory inspection of the equipment. She concluded that the officer embarked, not on a full-blown search requiring probable cause, but rather a mere inspection that could be supported by the less strict standard of reasonable suspicion. Justice O'Connor agreed with the majority that the officer needed probable cause before he seized an item or conducted a full-blown search of an item in plain view, but she did not believe a "mere inspection of a suspicious item must be supported by probable cause." She stated that an "overwhelming majority of both state and federal courts have held that probable cause is not required for a minimal inspection of an item in plain view" and cited several cases supporting this proposition. Justice Powell also wrote a dissenting opinion in which he stated that the "distinction" the Court made "between 'looking' at a suspicious object in plain view and 'moving' it even a few inches trivializes the Fourth Amendment." Both dissenting jus-

103. Id.
104. Id.
105. 107 S. Ct. 1149, 1159-60 (O'Connor, J., dissenting).
106. Id. at 1157.
107. Id. at 1158.
108. Id.
109. Id. at 1158-59. See, e.g., United States v. Marbury, 732 F.2d 390 (5th Cir. 1984); United States v. Hillyard, 677 F.2d 1336 (9th Cir. 1982); United States v. Wright, 667 F.2d 793 (9th Cir. 1982); United States v. Roberts, 696 F.2d 379 (5th Cir. 1980); United States v. Ochs, 595 F.2d 1247 (2d Cir. 1979). See also infra notes 122-132 and accompanying text.
110. 107 S. Ct. 1149, 1155 (Powell, J., dissenting). The Chief Justice joined Justice O'Connor and Justice Powell in their dissents. Id. Justice White concurred only to emphasize that Arizona v. Hicks had nothing to do with the inadvertent discovery prong of Coolidge. Id. at 1155 (White, J., concurring).
111. 107 S. Ct. at 1156 (Powell, J., dissenting).
112. Id. at 1157. Justice Powell included an interesting footnote proposing the scenario where a policeman coming upon two watches, one face up and the other face down, can read the serial number of the face-down watch. Justice Powell pointed out that reading the serial number would be constitutionally valid, but to turn the other watch over in order to reach the number would be an unreasonable search according to Arizona v. Hicks. Id at 1157 n.4.
tices voiced their fears concerning the effect Arizona v. Hicks would have on effective law enforcement. 118

Arizona v. Hicks inevitably will have a profound effect on existing plain view search and seizure law. Undoubtedly, the Supreme Court saw a need to address the probable cause issue Hicks presented but, by doing so, and by taking the position it did, the Court in effect did away with the flexible approach Coolidge 114 offered. The Court could have easily decided that the officer's search and seizure met the three Coolidge requirements. The initial entry was valid due to the exigency of the situation. 116 The discovery of the stereo equipment was inadvertent because the only things the police knew in advance they might find were possibly the shooter, other victims, and/or weapons. 116 Finally, it can be argued that it was immediately apparent to the officer that he had evidence of crime before him due to the scant furnishings in the apartment, 117 the expensive equipment, 116 and the other evidence that was found, specifically a stocking mask, 119 which is a regular tool of thieves. If the Coolidge plurality intended the language "immediately apparent" to mean probable cause, then, in the words of Justice O'Connor in her dissent in the present case, "I have little doubt that it was satisfied here." 120

Not only has the Court put an end to the flexibility offered by Coolidge, but it has also directly overruled several state and federal court decisions. 121 For example, in United States v. Marbury, 122 the Court held that:

113. Id. at 1157 (Powell, J., dissenting), 1160 (O'Connor, J., dissenting).
114. 403 U.S. 443.
115. Id. at 1152.
116. Id. at 1150.
117. Id. at 1152.
118. Id. at 1150.
119. Id. at 1160.
120. Id.
121. Id. at 1158-59. The state and lower federal court cases cited were cited by Justice O'Connor in her dissent.
122. 732 F.2d 390 (5th Cir. 1984) On a tip from two informants, Louisiana law enforcement officers obtained a search warrant to search a gravel pit owned by the defendant in hopes of finding a large truck, trailer, and bulldozer that had been stolen from a Mississippi construction company. They found the truck but had to stop the search due to darkness. They obtained a second warrant and during this search recorded serial numbers of other equipment they believed to be stolen. After checking the numbers they obtained a third warrant for two other pieces of equipment. The court held that the plain view doctrine applied and that no general search had been made. Id. at 393.
actions of officers executing duly issued search warrants, in copying down identification numbers from several items of equipment not named in the warrants but believed to be stolen, were proper in view of the fact that the items of equipment in question were in plain view and the officers did not have to use particularly intrusive means to retrieve the numbers.123

Similarly, in United States v. Hillyard,124 the Court specifically held that "an officer may inspect an item found in plain view to determine whether it is evidence of a crime if he at least has a reasonable suspicion to believe that the discovered item is evidence."125 The Court in United States v. Wright126 stated, "the incriminating nature of an item . . . may not be immediately apparent without a closer inspection of the item."127 The Court went on to say that "the cases indicate that an officer may conduct such an examination if he has at least a 'reasonable suspicion' to believe that the discovered item is evidence."128 In United States v. Roberts,129 the Court held that "[p]olice officers are not required to ignore the significance of items in plain view even when the full import of objects cannot be positively ascertained without some

123. Id. at 392.
124. 677 F.2d 1336 (9th Cir. 1982) Defendant was convicted on interstate transportation of stolen motor vehicles, concealment of stolen motor vehicle, and interstate transportation of stolen property. While examining the vehicles the officers seized a notebook and logbook from the cab of one of the vehicles. The logbook and notebook incriminated the defendant. The court held it was reasonable for the officers to peruse or skim through the items to see if they were relevant and that these items could be admitted into evidence. Id. at 1338-39.
125. Id. at 1342.
126. 667 F.2d 793 (9th Cir. 1982) Officer came across ledger in the defendant's residence during search for objects named in warrant for tax evasion. The court held the officer was justified in inspecting the ledger to determine if the item specified in the warrant was hidden there. Id. at 798. Here, however, the officer exceeded his authority by perusing the contents; therefore, the ledger should have been suppressed. Id. at 799.
127. Id. at 797.
128. Id. at 798.
129. 619 F.2d 379 (5th Cir. 1980) Defendant was convicted of conspiracy to operate an illegal gambling business, operating such a business, and failure to file a special tax return. When sheriff deputies went to execute a search warrant for a stolen television set, they saw in plain view evidence of the gambling business and seized it. The court held that, because the initial intrusion was justified and the observation and determination of the gambling evidence was inadvertent, the seizure was proper under the plain view doctrine. Id. at 380-81.
Lastly, the Second Circuit Court of Appeals in *United States v. Ochs* stated that, “when in the course of a legal warrantless search a police officer comes upon a suspicious object, he is entitled to inspect it and, if it consists of fruits, instrumentalities or evidence of crime, to seize it, even though the crime was not that which justified the search.”

Several state courts also have upheld examinations of items in plain view based on a reasonable suspicion. For example, the Supreme Court of Wisconsin in *State v. Noll* held that “the inspection of the television set for the purpose of copying down the serial number was not unreasonable . . . .” The television was “apparent to the police officers as soon as they entered the kitchen,” they were lawfully in a position to view the television, and one of the officers “had a reasonable suspicion that the television was stolen . . . .” The Supreme Court of North Dakota, in a case almost identical to *Arizona v. Hicks*, stated “we believe that the officer’s reasonable suspicions that the oven was stolen goods justified the very minimal intrusion on privacy to check the serial number. Upon verification of its stolen character via radio, it was ‘immedi-

130. *Id.* at 381.

131. 595 F.2d 1247 (2d Cir. 1979) Defendant was charged and convicted on use of extortionate means to collect a loan, obstruction of justice, and falsely subscribing income tax returns. He sought reversal on the grounds that the police had conducted an illegal search of his car. The court held that even if the government was obliged to rely on the plain view doctrine the limitations of *Coolidge* had been met. *Id.* at 1250-51, 1258-59.

132. *Id.* at 1256.

133. 107 S. Ct. at 1159.

134. 116 Wis. 2d 443, 343 N.W.2d 391 (1984) Defendant, who was charged with burglary, sought suppression of a television set that was seized from his father’s home when the officers executed a search warrant for items stolen from an auction. A television set was not named in the warrant. The court held that the combination of factors—the type of television, burglary of a home a few miles away, etc.—was sufficient to arouse a reasonable suspicion the television was stolen. Upon finding it was stolen a second warrant was executed; the television was seized and later introduced at trial.

135. *Id.* at 466, 343 N.W.2d at 402.

136. *Id.*

137. *State v. Reidinger*, 374 N.W.2d 866 (N.D. 1985) Officers obtained a warrant to search defendant’s house after an undercover drug deal in which the defendant was arrested. The warrant named controlled substances and currency. During the search the police found a microwave oven in a cooler. The officers picked up the oven to record the serial number and radioed the number to the National Crime Information Center. Upon learning it was stolen they seized it. The court upheld the seizure and subsequent admission at trial. *Id.* at 869, 876.
ately apparent' that there was probable cause to justify its seizure as stolen property contraband." In *State v. Hoffman*, the North Carolina Supreme Court also held that "[b]eing lawfully in defendant's residence, the officers could examine and, without a warrant, seize 'suspicious objects in plain sight' . . . . If the officers' presence was lawful, the observation and seizure of what was then and there apparent could not in itself be unlawful."

Another unfavorable effect of the *Hicks* decision is the inconsistency it appears to have created with other landmark United States Supreme Court cases. Specifically, how does one rationalize the holding in *Terry v. Ohio* with the holding in the present case? In *Terry*, the Supreme Court held that a police officer may conduct a limited search of a person for weapons if he reasonably believes the person is armed. Further, the Court stated that the exclusionary rule "cannot properly be invoked to exclude the products of legitimate police investigative techniques . . . ." The Court would allow a limited search of a person based on less than probable cause but would not allow a limited search of an item in plain view, believed to be evidence of crime, on less than probable cause. Clearly, the search of a person intrudes and interferes with one's privacy interest more than the examination of property, yet the Court allows the former and not the latter. In fact, an officer's mere movement of an item in plain view is much more limited, for fourth amendment purposes, than his patdown of a person.

*United States v. Place* also seems to conflict with the *Hicks*

138. Id. at 875.
139. 281 N.C. 727, 190 S.E.2d 842 (1972) Defendant was indicted and convicted of murder. He appealed on grounds that his motion to suppress a rifle found in his home should not have been denied. The rifle had been seized after officers in search of defendant entered his home and observed the rifle. The court held that the officers were lawfully in defendant's home; therefore, the observation and seizure of what was in plain view was not unlawful. Id. at 728-731, 736-37, 190 S.E. 2d at 844-46, 849.
140. Id. at 736, 190 S.E.2d at 849.
141. 392 U.S. 1 (1968) (*Terry* involved a "cop on the beat" who observed the defendants apparently "casing" a store. He observed defendants from a distance, and when he was reasonably certain they were planning a robbery, he approached them and conducted a patdown. Id. at 5-7.).
142. Id. at 30.
143. Id. at 13.
144. 462 U.S. 696 (1983) *Place* involved a stop of defendant at the Miami International Airport because defendant fit a drug courier profile. Defendant was late for his flight so DEA agents let him go but called ahead to New York's La Guardia to alert the agents there. When Place landed, DEA agents approached
decision. In *Place*, the Court held, based on *Terry*, that Drug Enforcement Administration agents could detain a person's luggage for a limited time based on a reasonable suspicion that the luggage contained narcotics. The Court stated that a properly limited detention is a minimal intrusion and that the fourth amendment does not prohibit such detentions. It seems totally inconsistent that the Court would allow the warrantless seizure of a person's luggage on less than probable cause but would not allow an officer, on less than probable cause, to move a piece of equipment in plain view to ascertain a serial number. In this case, as with the search of the person, the detention of the luggage is much more intrusive than the limited inspection of a plain view item.

While *Arizona v. Hicks* is inconsistent with *Terry* and *Place* on the type of police conduct the Court allowed on a reasonable suspicion standard, *Hicks* is also inconsistent with *Texas v. Brown* on the facts. In *Brown*, the Court upheld a plain view seizure of a heroin balloon taken from the defendant after he had been stopped at a license check. The officer testified that, based on his experience in drug offense arrests, he was aware that people packaged narcotics in such balloons. Similarly, in *Arizona v. Hicks*, the officer knew from years of police experience and working on different burglary crimes that the stereo equipment found in Hicks's apartment was of a type commonly stolen. In *Brown*, the officer picked up the balloon to ascertain if it contained any-

him and noticed discrepancies in the addresses on his luggage. They then took defendant's luggage to another airport for a canine sniff. The dog reacted positively to one bag, and because it was late Friday the agents kept the luggage until Monday when they could secure a search warrant. The Court held limited detentions of person's luggage was constitutionally valid if based on a reasonable suspicion. Here it held the detention was too long. *Id.* at 698-99, 710.

145. *Id.* at 698.
146. *Id.*
148. *Id.*
149. *Id.* at 734.
150. 107 S. Ct. 1149, 1156 (Powell, J., dissenting).
151. 460 U.S. at 734. In *Brown*, the officer also had plain view of the glove box where he saw small plastic vials, quantities of loose white powder, and an open bag of party balloons. Brown could not produce a driver's license. *Id.* The other paraphernalia observed by the officer in *Brown* are similar to the other items observed by the officer in *Hicks*. Those other items consisted of weapons, ammunition, a stocking mask, and various drug paraphernalia. The Court should have found that the officer in *Hicks*, like the officer in *Brown*, also had probable cause to believe the stereo was stolen property.
thing and, determining that it did, he seized it.\textsuperscript{152} In \textit{Hicks}, the officer had to move the stereo equipment to ascertain the serial number, and after police headquarters informed him the serial number matched that of stolen property, he seized it.\textsuperscript{153} These two fact situations are similar enough to warrant upholding the search and seizure in \textit{Hicks} on the same grounds as those in \textit{Brown}, i.e., that at the time the officer seized the balloon he had probable cause to do so.\textsuperscript{154} Had the \textit{Hicks} Court addressed the issue of whether the officer had probable cause to believe the stereo equipment was stolen, then it inevitably would have reached the same conclusion as did the court in \textit{Brown}. As Justice Powell said in his \textit{Hicks} dissent, "Indeed, the State was unwise to concede the absence of probable cause."\textsuperscript{155}

Another aspect of the \textit{Arizona v. Hicks} decision is the profound and far-reaching effect it will have on law enforcement authorities. \textit{Hicks} fails to recognize the importance of police experience. The officer in \textit{Hicks} knew that the type of stereo he came across in Hicks's apartment was a common target of thieves from his years of experience on burglary cases, and this is one of the several factors which led him to suspect it was stolen.\textsuperscript{156}

In the past, the Supreme Court has given due weight to police experience when analyzing police conduct. For example, in \textit{United States v. Cortez},\textsuperscript{157} the Court addresses whether a stop to search for illegal aliens was permissible. It stated that "the totality of the circumstances—the whole picture—must be taken into account

\begin{itemize}
\item \textsuperscript{152} Id.
\item \textsuperscript{153} 107 S. Ct. at 1152.
\item \textsuperscript{154} \textit{Brown}, 460 U.S. at 744.
\item \textsuperscript{155} 107 S. Ct. 1149, 1156 (Powell, J., dissenting).
\item \textsuperscript{156} Id.
\item \textsuperscript{157} 449 U.S. 411 (1981) \textit{Cortez} involved the Border Patrol's attempt to catch a person they called Chevron who they believed was bringing illegal aliens over the border. From their surveillance they knew one person with a Chevron symbol shoe sole was leading many other persons over the border. They also knew that he made these trips on weekend nights very late. Acting on this information, they set up a stake-out on the road they suspected Chevron would use to transport the aliens. While the officers were in location, they saw a camper truck make several trips. This was the only vehicle that was observed. Subsequently, the officers, based on a reasonable suspicion that the camper contained aliens, stopped the vehicles and found Chevron and several illegal aliens. The Court held the stop of the vehicle was constitutionally valid because based on the whole picture the officers could reasonably surmise that the vehicle was involved in criminal activity. \textit{Id.} at 413-16, 421.
\end{itemize}
Further, "when used by trained law enforcement officers, objective facts, meaningless to the untrained, can be combined with permissible deductions from such facts to form a legitimate basis for suspicion of a particular person and for action on that suspicion." The Court's decision in *Hicks* undoubtedly will hamper effective law enforcement in plain view situations where quick thinking and quick action are usually necessary. The decision forces police officers, who encounter items in plain view believed to be evidence or contraband of crime, to risk losing the evidence or contraband in the time it takes to obtain a warrant. Preventing police officers from acting on their reasonable suspicions frustrates effective crime detection and prevention and does not further fourth amendment interests. This is especially true in situations, as in *Hicks*, where the intrusion is so very minimal, the items are in plain view anyway, and the odds are that the police are correct.

Alternatively, the Court could have adopted the approach proposed in *Delaware v. Prouse*. There the Court stated:

Thus, the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests. Implemented in this manner, the reasonableness standard usually requires, at a minimum, that the facts upon which an intrusion is based be capable of measurement against an objective standard, whether this be probable cause or a less stringent test.

Had the Court adopted this balancing test, the decision in *Arizona v. Hicks* would have most likely been in favor of the state. The officer's movement of the turntable to view the serial numbers minimally intruded or interfered with Hicks' privacy or possessory interest. The movement was minimally intrusive in that the item was in plain view, and the officers were lawfully in the apartment

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158. *Id.* at 417.
159. *Id.* at 419.
160. 440 U.S. 648 (1979) *Prouse* involved a license check in which the arresting officer smelled marijuana as he approached the car and saw marijuana in plain view. He seized the marijuana and the defendant was subsequently convicted. The Court rejected the government's argument for complete discretion in stopping vehicles for license and registration check but upheld a reasonable suspicion standard if the officer believed the driver to be unlicensed, the car unregistered, or an occupant or the vehicle to be otherwise in violation of the law. *Id.* at 650, 663.
161. *Id.* at 654 (footnotes omitted).
due to the exigent circumstances Hicks had created by allowing the shot to be fired. Detecting and apprehending criminals, particularly those like Hicks, who was apparently involved in a variety of criminal activities, is an important and legitimate governmental interest.\textsuperscript{162} Obviously, the detection and apprehension of criminal activity outweighs the minimal intrusion of one's privacy interest. Had the Court applied this approach, it could have avoided throwing out evidence and convictions in future cases where the officers acted in good faith and on a reasonable suspicion that, as in Hicks, was supported by twelve years' experience in the field.\textsuperscript{163}

The Court could have followed the course proposed by Justice O'Connor's dissent, that the mere inspection of items in plain view may be done on reasonable suspicion.\textsuperscript{164} This would have been consistent with the patdown of a person on reasonable suspicion, as in \textit{Terry v. Ohio}\textsuperscript{165} and the detention of luggage based on reasonable suspicion, as in \textit{United States v. Place}.\textsuperscript{166} If the Court is going to allow a limited search of a person and detention of personal effects based on a reasonable suspicion, then there is no apparent reason why it should not allow a limited inspection of items in plain view by an officer who is lawfully in a position to see the item based on this same standard.

\textbf{CONCLUSION}

The position of the the Hicks Court, requiring probable cause for an inspection of an item in plain view, answers the questions Coolidge left unanswered. Specifically, what is meant by the language "immediately apparent"? Henceforth, for a plain view item to be seized or inspected more closely, the officer must have probable cause to believe the item is evidence or an instrumentality of crime, or contraband. Probable cause is now the functional equivalent of immediate apparencty. The advantage of this decision is that it provides the judiciary with a bright-line test for deter-

\textsuperscript{162} The opinion stated the officers found a sawed-off shotgun, ammunition and other weapons; thus, Hicks could have been guilty of firearm violations. They also found drug paraphernalia and evidence of larceny, the stereo equipment, and a stocking mask. 107 S. Ct. 1149, 1156 (Powell, J., dissenting). As Justice Powell stated, "[w]hat they saw in the apartment hardly suggested that it was occupied by law-abiding citizens." \textit{Id.} at 1156.

\textsuperscript{163} \textit{Id}.

\textsuperscript{164} \textit{Id.} at 1157 (O'Connor, J., dissenting).

\textsuperscript{165} 392 U.S. 1 (1968).

\textsuperscript{166} 462 U.S. 696 (1983).
mining if evidence seized in plain view is admissible. However, for all the benefit this holding provides the courts, the law enforcement agencies are burdened to that extent and more.

Further, *Hicks* is inconsistent with *Terry* and *Place*. This inconsistency raises the question of why the Supreme Court allows the more intrusive searches on the lessser degree of cause than the less intrusive search. The decisions in these cases appear irreconcilible.

Lastly, it is difficult to understand why the Court took such a cut-and-dried approach to a procedural problem that can be handled easily by a case-by-case balancing test approach or an application of a less rigid reasonable suspicion standard. As the Court noted in *Terry v. Ohio*, "it is frequently argued that in dealing with the rapidly unfolding and often dangerous situations on city streets the police are in need of an escalating set of flexible responses, graduating in relation to the amount of information they possess." So, too, the police must in plain view situations instantaneously reflect and react.

With the decision in *Hicks*, the police can no longer use flexible responses based on experience and intuition in plain view situations. The short term effect of *Hicks* will be the suppression of very valuable evidence and many overturned convictions. Ultimately, if these disadvantages begin to outweigh whatever fourth amendment protection was gained from the decision, then the Court may be forced to apply a balancing test and reassess *Arizona v. Hicks*.

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167. 392 U.S. at 10.