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CASENOTES

ARIZONA v. HICKS:* PROBABLE CAUSE REQUIREMENT UNDER THE PLAIN VIEW DOCTRINE

The fourth amendment protection against unreasonable searches and seizures within a dwelling¹ is subject only to a few exceptions.² One such exception, the plain view doctrine,³ allows a po-

* 107 S. Ct. 1149 (1987).

1. The fourth amendment provides in pertinent part: "The right of the people to be secure in their . . . houses . . . against unreasonable searches and seizures, shall not be violated . . ." U.S. CONST. amend. IV.

2. In emphasizing the importance of adherence to the judicial process of obtaining a warrant, Justice Stewart proclaimed that "searches [and seizures] conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967). See also *United States v. Karo*, 468 U.S. 705, 717, *reh'g denied*, 468 U.S. 1250 (1984) (recognizing that warrantless searches are presumptively unreasonable subject only to a few limited exceptions); *Coolidge v. New Hampshire*, 403 U.S. 443, 465, *reh'g denied*, 404 U.S. 875 (1971) (confirming the well established rule that under certain circumstances the police may seize evidence in plain view without a warrant).

3. The United States Supreme Court first announced the plain view doctrine in the plurality opinion in *Coolidge*, 403 U.S. 443. For a complete account of the historical birth of the plain view doctrine, see Moylan, *The Plain View Doctrine: Unexpected Child of the Great "Search Incident" Geography Battle*, 26 MERCER L. REV. 1047 (1974-75). The plain view doctrine is only intended to provide justification for making a "seizure" without a warrant. 1 W. LAFAYE, SEARCH AND SEIZURE § 2.2(a) (2d ed. 1987). The doctrine describes when items found in plain view may be seized even though they were not the items that were the legitimate objectives of the initial lawful search. *Id.*

The Supreme Court has recognized other exceptions to the general rule that warrantless searches are presumptively unreasonable. In *United States v. Ross*, 456 U.S. 798, 804-09 (1982), the Court found that the police may make a warrantless search of an automobile. The Court emphasized, however, the importance of having probable cause to believe that the automobile contains contraband or illegal merchandise before any search can begin. *Id.* The "automobile exception" to the fourth amendment's warrant requirement was first established in *Carroll v. United States*, 267 U.S. 132, 153-56 (1925). In *Carroll*, the Court noted the impracticability of securing a warrant because a person could easily move an automobile. *Id.*

In *United States v. Robinson*, 414 U.S. 218 (1973), the Court found that police could make a warrantless search of a person when incident to a lawful arrest. *Id.* The purpose of this exception is protection of the officer as well as the protection of any evidence which may be on the person of the arrestee. *Id.* at 235.

lice officer to seize evidentiary items that come into plain view during a warrantless search.⁴ In *Arizona v. Hicks*,⁵ the United States Supreme Court addressed the issue of whether a police officer can make a warrantless seizure when he has less than probable cause⁶ to

In *Terry v. Ohio*, 392 U.S. 1 (1968), the Court held that if a police officer observes unusual conduct which he believes to be of a criminal nature, he may stop the persons involved to make reasonable inquires. *Id.* at 30. In addition, the officer is entitled to make a warrantless search of the outer clothing of such persons in an attempt to discover any weapons which may be used against the officer. *Id.*

In *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294, 298-99 (1967), the Supreme Court announced the "hot pursuit" exception to the warrant requirement. The Court held that police were justified in making a warrantless entry and conducting a search of a house when they had probable cause to believe that a suspect in an armed robbery, which had occurred only minutes earlier, was hiding. *Id.* The Court noted that the fourth amendment does not require police officers to delay their investigation if the delay would endanger lives. *Id.*

Furthermore, in *Bumper v. State of North Carolina*, 391 U.S. 543, 548 (1968), the Court found that the police may make a warrantless search if the individual whose expectation of privacy would be invaded consents to the search. The individual, however, must freely and voluntarily give his consent. *Id.*

4. A search warrant is:

An order in writing; issued by a justice or other magistrate, in the name of the state, directed to a sheriff, constable, or other officer, authorizing him to search for and seize any property that constitutes evidence of the commission of a crime, contraband, the fruits of crime, or things otherwise criminally possessed; or, property designed or intended for use or which is or has been used as the means of committing a crime. A warrant may be issued upon an affidavit or sworn oral testimony.

BLACKS LAW DICTIONARY 1211 (5th ed. 1979). The purpose of the warrant requirement is to ensure that inferences drawn from evidence be judged by a neutral and detached magistrate instead of by the officer engaged in the stressful circumstances of solving a crime. *Johnson v. United States*, 333 U.S. 10, 13-14 (1947). In *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932), the Court summarized the purpose of the warrant requirement when it stated,

the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried actions of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime"

5. 107 S. Ct. 1149 (1987).

6. The definition of "probable cause" varies from case to case. Cases involving search and seizure rights have generally held that probable cause to search exists when circumstances known to a police officer are such as to warrant a person of reasonable caution to believe that a search would reveal incriminating evidence. *Texas v. Brown*, 460 U.S. 730, 742 (1983) (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)). Probable cause does not require proof that the police officer's belief is correct or that it is more likely true than false. *Id.* Rather, all that is required is a "practical, nontechnical" probability that incriminating evidence is involved. *Brown*, 460 U.S. at 742 (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)). An objective test must be employed to determine whether probable cause exists rather than relying on a police officer's subjective beliefs. *Beck v. Ohio*, 379 U.S. 89, 97 (1964). If the opposite were true, the protection afforded by the fourth amendment would apply only at the discretion of the police. *Id.*

The seventh circuit formulated an interesting definition of probable cause when it stated, "[P]robable cause means, in fact, a reasonable basis — more than bare suspicion, but less than virtually certain." *Llaguno v. Mingey*, 763 F.2d 1560, 1565 (7th

believe that the object in plain view was evidence of criminal activity.⁷ The Court held that probable cause is a requirement for invoking the plain view doctrine.⁸ In so holding, the Court strengthened the rights of individuals against unreasonable searches and seizures⁹ and established guidelines under which all courts can analyze the plain view exception to the fourth amendment.¹⁰

On April 18, 1984, a man was injured when a bullet was fired through the floor of James Hicks' apartment.¹¹ Police officers entered Hicks' apartment to search for a weapon, other victims, and the individual who had shot through the floor.¹² During the course of the search, the officers found three weapons,¹³ a stocking-cap mask, and two sets of stereo equipment.¹⁴ One of the officers became suspicious that the stereo components were stolen,¹⁵ so he recorded

Cir. 1985), *cert. dismissed*, 107 S. Ct. 16 (1987) (quoting *United States v. Garza-Hernandez*, 623 F.2d 496, 499 (7th Cir. 1980)).

For a discussion of probable cause, see Grano, *Probable Cause and Common Sense: A Reply to the Critics of Illinois v. Gates*, 17 U. MICH. J.L. REF. 465 (1984) (discussing different approaches for determining whether there is sufficient information for a magistrate to determine that probable cause exists).

7. *Hicks*, 107 S. Ct. 1149 (1987).

8. *Id.* at 1153.

9. The fourth amendment protects individuals against both searches and seizures. There has been little controversy over the definition of "seizure." A seizure is generally the "act of physically taking and removing tangible personal property." 68 AM. JUR. 2D *Searches and Seizures* § 8 (1973). A seizure results when an individual's possessory interest in a particular item is "meaningfully interfered" with. *Maryland v. Macon*, 472 U.S. 463, 469 (1985) (citing *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)). The definition of "search", however, is not as clear. A search occurs when "a expectation of privacy that society is prepared to consider reasonable is infringed." *Id.*

10. *Hicks*, 107 S. Ct. at 1153-54. For a discussion of the criteria established to guide courts in analyzing the plain view exception to the fourth amendment, see *infra* notes 116-123. The Court's holding strengthened the rights of individuals by establishing the additional requirement of probable cause in order for plain view seizures to withstand the test of reasonableness under the fourth amendment. *Hicks*, 107 S. Ct. at 1153. For a discussion of the other requirements of the plain view doctrine, see *infra* notes 85-87 and accompanying text.

11. A police officer testified that he and other officers were called to an apartment complex where a man had been shot. Joint Appendix of Brief for Petitioner and Brief for Respondent at 13-14, *Arizona v. Hicks*, 107 S. Ct. 1149 (1987) (No. 85-1027) [hereinafter Joint Appendix]. The officers determined that the shot had come from the apartment upstairs (James Hicks' residence) because there was a bullet hole in the ceiling of the victim's apartment. *Id.* In order to have standing for his motion to suppress, Hicks stipulated that the apartment that the police had subsequently entered was leased by him, and that there were belongings of his in the apartment. *Id.* at 12-13.

12. *Hicks*, 107 S. Ct. at 1151-52.

13. Specifically, the officers found a .25 automatic in the living room directly above where the victim had been shot, a .45 automatic, and a sawed-off .22 caliber rifle with an ammunition clip on it. Joint Appendix, *supra* note 11, at 16.

14. *Hicks*, 107 S. Ct. at 1152.

15. The police officer testified that his twelve years of experience and familiarity with people that have stolen stereos for their own use led him to believe that the stereo components in Hicks' apartment were stolen. Joint Appendix, *supra* note 11,

some of the serial numbers.¹⁶ In order to locate the serial number, the officer had to move a stereo turntable.¹⁷ The police seized the turntable after discovering that it had been stolen in a robbery.¹⁸ After checking computer and department reports at the police station, it was discovered that the other stereo components were stolen in the same robbery.¹⁹ The police obtained a search warrant and subsequently seized all of the stereo equipment from Hicks' apartment.²⁰

The Maricopa County Grand Jury²¹ indicted Hicks for armed robbery in connection with the stolen stereo equipment.²² Hicks filed a motion to suppress the evidence that had been seized from his apartment,²³ contending that the original warrantless entry and search of his apartment violated his fourth amendment rights.²⁴ The

at 28-29. In addition, he stated that the apartment was in a low rent area and was kept very sloppily. *Id.* The officer responded affirmatively to the Court's inquiry as to whether the stereo equipment "looked like it could be more expensive than the people that could afford that equipment." *Id.*

16. *Hicks*, 107 S. Ct. at 1152.

17. *Id.*

18. A police officer telephoned the National Crime Information Center who matched the serial number of the turntable to the serial number of a component that was on the Centers' computerized listing of stolen property. Joint Appendix, *supra* note 11, at 17-18.

19. A police officer testified that after he returned to the police station, he was still under the impression that the other stereo components were taken in a burglary. Joint Appendix, *supra* note 11, at 19. After reading a copy of an armed robbery report, the officer discovered that the other components were also stolen. *Id.*

20. *Hicks*, 107 S. Ct. at 1152.

21. The case originated in the Superior Court of the State of Arizona in and for the County of Maricopa on May 3, 1984. *Arizona v. Hicks*, Case No. CR-140258.

22. Brief for Petitioner at 4, *Arizona v. Hicks*, 107 S. Ct. 1149 (1987) (No. 85-1027) [hereinafter Brief for Petitioner]. The stereo equipment was stolen, at gunpoint, from the Jandrlich home on March 29, 1984. *Id.* The police also discovered a latent fingerprint in the Jandrlich home that was identified as Hicks'. *Id.* However, it was only after the police recovered the stereo equipment from Hicks' apartment that they were able to match the fingerprint to Hicks. *Id.*

23. Hicks originally filed a motion to suppress *all* of the evidence found in his apartment, including the weapons that the police found prior to the stereo turntable incident. Joint Appendix, *supra* note 11, at 2, 4-5. Hicks contended that the original entry was warrantless and therefore illegal. *Id.* Later, however, Hicks abandoned his contention that the initial warrantless entry was illegal. *Id.* at 31-34. In so doing, he failed to establish grounds for the suppression of the evidence found prior to the time the officer looked at the stereo turntable serial number. *Id.* Hicks' brief initiated the application of the plain view doctrine by stating, "If we assume that the initial warrantless intrusion by Officer Nelson and other members of the Phoenix Police Department was lawful . . ." *Id.* (emphasis added). Therefore, the only evidence actually at issue was that which was seized subsequent to the time that the officer recorded the serial number of the stereo turntable. *Id.* at 36-37. For a discussion of the court's ruling which summarizes the evidence at issue, see *infra* notes 25-26 and accompanying text.

24. Joint Appendix, *supra* note 11, at 4-5. For a discussion of fourth amendment rights under the plain view doctrine, see *supra* notes 1-2 and accompanying text. A suppression of evidence resulting from a violation of an individual's fourth amendment rights has been termed the "exclusionary rule." *Mapp v. Ohio*, 367 U.S.

Superior Court of the State of Arizona granted the motion²⁵ because the evidence was seized as a result of the officers' curiosity, and the police had no immediate realization that the items were obtained through criminal activity.²⁶ The Court of Appeals of Arizona affirmed this decision,²⁷ holding that the recording of the serial numbers violated Hicks' fourth amendment rights.²⁸ The superior court determined that the recording of the serial numbers involved an additional search that was not related to the exigency that made the original warrantless entry lawful.²⁹

643, 655 (1961). The exclusionary rule provides that all evidence obtained by searches and seizures in violation of the fourth amendment to the Constitution is inadmissible at trial. *Id.* The Supreme Court first announced the exclusionary rule in *Weeks v. United States*, 232 U.S. 383 (1914). The *Weeks* Court justified the exclusionary rule on the grounds that the fourth amendment would have no practical meaning without it. *Id.* at 393.

There has been considerable debate, however, whether the exclusionary rule is constitutionally mandated. See *United States v. Leon*, 468 U.S. 897 (1984) (expressly stating that the rule is not constitutionally mandated); *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 411-24 (1970) (Burger, C.J. dissenting) (suggesting the possibility that the rule is not constitutionally mandated). Compare Meese, *Promoting Truth in the Courtroom*, 40 VAND. L. REV. 271 (1987) (the truth finding process is a court's primary concern and the exclusionary rule is too severe a restriction on this process) with Hall, *In Defense of the Fourth Amendment Exclusionary Rule: A Reply to Attorney General Smith*, 6 U. ARK. LITTLE ROCK L.J. 227 (1983) (the fourth amendment would become a hollow constitutional guarantee without the exclusionary rule).

25. The court granted the motion to suppress only the evidence that came as a result of turning the turntable upside down. Joint Appendix, *supra* note 11, at 36-37. The court did not suppress the weapons and the stocking-cap mask seized during the initial search or the drug paraphernalia seized in the subsequent warranted search. *Id.*

26. See Joint Appendix, *supra* note 11, at 36-37 (summarizing the state trial court opinion).

27. *State v. Hicks*, 146 Ariz. 533, 707 P.2d 331 (Ariz. App. 1985), *aff'd sub nom*, *Arizona v. Hicks*, 107 S. Ct. 1149 (1987). The court of appeals denied the appellant's motion for reconsideration on July 18, 1985. *Id.*

28. *Hicks*, 146 Ariz. at 534, 707 P.2d at 332.

29. *Id.* The Court concluded that when there is a random shooting that can be immediately traced to a particular location, police need not delay to obtain a warrant. *Id.* The exigency of the situation justified entry into the apartment to search for a suspect, weapons and other possible victims. *Id.* The appellate court relied on *Mincey v. Arizona*, 437 U.S. 385 (1978), which stated that a "warrantless search must be strictly circumscribed by the exigencies which justify its initiation." In *Mincey*, homicide detectives arrived at an apartment where a police officer was shot moments earlier. *Id.* at 387. The detectives proceeded to conduct an exhaustive four day warrantless search of the apartment, and seized over two hundred objects. *Id.* at 388. The Supreme Court held that a search based on the seriousness of the offense of homicide did not present exigent circumstances to justify a four day search because all of the suspects in the apartment at the time of the shooting had been located. *Id.* at 393-95. (quoting *Terry v. Ohio*, 392 U.S. 1, 25-26 (1968)).

The appellate court's determination in *Hicks*, however, was subsequently rejected by the Supreme Court when it stated "[t]hat lack of relationship *always* exists with regard to action validated under the 'plain view' doctrine." *Hicks*, 107 S. Ct. at 1153. *Mincey* was addressing only the scope of the primary search. *Id.* If a search had to be conducted only for the items related to the justification for the initial entry, the plain view doctrine would be superfluous. *Id.*

The Arizona Supreme Court denied review, and the state filed a petition for certiorari. On certiorari, the United States Supreme Court confronted the issue of whether probable cause³⁰ is required under the plain view exception of the fourth amendment.³¹ Justice Scalia, writing for the majority, held that police officers must have probable cause in order for the plain view doctrine to justify a warrantless seizure.³² In addressing the contention that police action can fall between a plain view inspection and a full-blown search,³³ the Court held that moving the stereo equipment constituted a full-blown search that could only be justified if the plain view doctrine would have justified a warrantless seizure of the component.³⁴ Because no probable cause existed³⁵ for the warrantless seizure of the turntable, the Court concluded that the search was unjustified.³⁶

The Court began its analysis by discussing the significance of "moving" the stereo turntable to record its serial number.³⁷ Justice Scalia agreed with the lower court that "moving" the component constituted a search that was separate from and unrelated to the initial lawful search.³⁸ The police officers' action produced a new in-

30. For a general definition of "probable cause" as employed in search and seizure cases, see *supra* note 6.

31. *Hicks*, 107 S. Ct. at 1153. The Court noted that both the trial court and the court of appeals rejected the contention that the plain view doctrine was applicable to the police's inquiry into the stereo components. *Id.* In affirming the lower court decision, the Court applied the plain view doctrine. *Id.*

32. *Id.* For a general explanation of the plain view doctrine, see *supra* note 3 and accompanying text. For a summary of the requirements under the plain view doctrine, see *infra* notes 85-87 and accompanying text.

33. Justice O'Connor's dissent suggests that the officer's action merely constituted a "cursory inspection," which is not a search for fourth amendment purposes. *Hicks*, 107 S. Ct. at 1157 (O'Connor, J., dissenting). The majority rejected this suggestion, stating that police action is either a plain view inspection or a full-blown search. *Id.* at 1154. For a complete analysis of the Court's unwillingness to create a subcategory of searches, see *infra* notes 100-103 and accompanying text.

34. *Hicks*, 107 S. Ct. at 1153.

35. The only reference that the Court made to the lack of probable cause was to cite the Petitioner's Brief where the state conceded that there was a lack of probable cause. *Id.* See also Joint Appendix, *supra* note 11, at 23, 28-29 (a police officer testified that he only had a reasonable suspicion to believe that the equipment was stolen). Justice O'Connor, however, in her dissenting opinion, stated that probable cause did exist in view of all of the other incriminating items uncovered during the initial legal search. *Hicks*, 107 S. Ct. at 1160 (O'Connor, J., dissenting).

36. *Id.* at 1153-54.

37. *Id.* at 1152.

38. It is not disputed that the officers' initial warrantless entry into Hicks' apartment was lawful due to the exigency of the situation. *Id.* at 1153. In *Dorman v. United States*, 435 F.2d 385 (D.C. Cir. 1970), the court determined that due to the presence of certain factors, the police were justified in making a warrantless entry. The factors considered by the court included the seriousness of the offense involved, the reasonable suspicion by the police that the suspect was armed, the strong reason to believe the suspect was on the premises, the likelihood that the suspect would flee if he was not immediately apprehended, the probable cause to believe that suspect had committed the crime, and the relative peacefulness of the entry. *Id.* at 392-93.

vasion of Hicks' privacy, which was not justified by the exigencies that made the initial entry lawful.³⁹ The Court stressed the important distinction between merely looking at a suspicious object in plain view and moving that object even a few inches.⁴⁰ According to the Court, merely looking at the equipment that came into plain view would not have constituted an independent search for fourth amendment purposes.⁴¹ Moreover, it was irrelevant to the Court's decision that the search disclosed nothing except the serial numbers on the bottom of the turntable.⁴²

After concluding that moving the turntable constituted an independent search, the Court rejected the contention that this search was merely a cursory inspection that could be sustained on less than probable cause.⁴³ The Court found that, within a dwelling, police action is either a plain view inspection, or a full blown search.⁴⁴ A plain view inspection is not a search under the fourth amendment and does not require probable cause.⁴⁵ In contrast, a full-blown

39. *Id.* The Court reasoned that when the police moved the equipment and exposed the concealed portions of the apartment's contents, a new invasion of Hick's privacy resulted. *Id.* The Court added that merely writing down the serial numbers did not, in itself, produce an invasion of Hicks' privacy and amount to a search. *Id.* Similarly, writing down the serial numbers did not "meaningfully interfere" with Hicks' possessory interest in either the serial numbers or the stereo components, and therefore, did not amount to a seizure. *Id.*

40. *Hicks*, 107 S. Ct. at 1152. *Contra id.* at 1156 (Powell, J., dissenting) (contending that there should be no difference between looking at an object in plain view and moving that object a few inches).

41. *Id.* at 1152. *See also* Illinois v. Andreas, 463 U.S. 765, 771 (1983) (once police officers are lawfully within a dwelling and observe items in plain view, the owner of those items immediately loses his privacy interest in the items).

42. *Hicks*, 107 S. Ct. at 1152-53.

43. *Id.* at 1154. Justice O'Connor agreed that probable cause is required for an extensive examination of an object, but states that courts have held that a cursory inspection requires only a reasonable suspicion. *Id.* at 1158 (O'Connor, J., dissenting). For examples of decisions which have allowed cursory inspections of objects to take place upon a reasonable suspicion, see *United States v. Marbury*, 732 F.2d 390, 399 (5th Cir. 1984) (police may inspect items found in plain view if there is reasonable suspicion to believe the items are evidence); *United States v. Hillyard*, 677 F.2d 1336, 1342 (9th Cir. 1982) (police may give suspicious documents a perusal if they have a reasonable suspicion); *United States v. Wright*, 667 F.2d 793, 798 (9th Cir. 1982) (police may conduct an examination if they have reasonable suspicion).

Justice Scalia, however, categorized an inspection, a perusal, and an examination as something other than a search that does not even require a reasonable suspicion. *Hicks*, 107 S. Ct. at 1154-55. The Court refused to place these terms in a category between a plain view inspection and a full-blown search. *Id.* In addition, the Court defines a "plain view inspection," a "mere inspection" and a "cursory inspection" synonymously. *Id.* All three terms imply that the object in plain view was not disturbed in any way. *See id.* at 1154 (a "cursory inspection" is one that merely involves looking at what is already exposed to view, without disturbing it); *Stanley v. Georgia*, 394 U.S. 557, 571 (1969) (Stewart, J., concurring) (reference is made to "mere inspection"). For a further explanation of the Court's unwillingness to create a subcategory of searches, see *infra* notes 45-48 and accompanying text.

44. *Hicks*, 107 S. Ct. at 1154.

45. *Id.*

search is a search under the fourth amendment and does require probable cause.⁴⁶ The Court emphasized its unwillingness to create a subcategory⁴⁷ of searches under the fourth amendment.⁴⁸ Because the police officer moved the turntable, the Court concluded that there was a separate, full-blown search that must independently survive the test of reasonableness under the fourth amendment.⁴⁹

To determine whether the additional search was reasonable under the fourth amendment, the Court applied the plain view doctrine.⁵⁰ The plain view doctrine provides that a police officer may seize evidence without a warrant if the items are in plain view.⁵¹ The doctrine will only activate, however, if the police are lawfully in the place where the view occurred.⁵² The exigent circumstances present here made the police's initial entry lawful.⁵³ The Court noted that where items could be lawfully seized under the plain view doctrine, a police officer could lawfully move those items for a closer inspection.⁵⁴ The Court found, however, that the turntable could not be legally seized under the plain view doctrine because the officer lacked the required probable cause to believe that the item was stolen.⁵⁵ Thus, the Court concluded that the additional search of the turntable was not justified.⁵⁶

46. *Id.*

47. A subcategory of searches refers to any search other than either a plain view inspection or a full-blown search. *Id.* The Court rejected the dissent's attempt to create subcategories of searches including cursory inspections, perusals, and examinations. See *supra* note 43 for a discussion of the various categories of searches.

48. *Hicks*, 107 S. Ct. at 1152.

49. *Id.* at 1152-53. The reasonableness of a search and seizure under the fourth amendment is dependent upon the existence of the recognized exceptions to the warrant requirement. See *supra* notes 2 & 3 and accompanying text for examples of the recognized exceptions. See also *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). In *T.L.O.*, a high school teacher took two students to an Assistant Vice Principal after he found them smoking in a school lavatory in violation of a school rule. *Id.* at 328. The Assistant Vice Principal thoroughly searched the purse of one student and found evidence of drug use. *Id.* Thereafter, the state brought delinquency charges against that student. *Id.* The Supreme Court held that determining the reasonableness of any search involves deciding first, whether the action was justified at its inception and second, whether the search was reasonably related in scope to the circumstances which justified the interference in the first place. *Id.* at 341 (quoting *Terry v. Ohio* 392 U.S. 1 (1967)).

50. *Hicks*, 107 S. Ct. at 1153.

51. *Coolidge v. New Hampshire*, 403 U.S. 443, 465-66 (1971). See *supra* note 3 for the general definition of the plain view doctrine and *infra* notes 85-87 for the requirements of the plain view doctrine.

52. *Coolidge*, 403 U.S. at 465. See also *Harris v. United States*, 390 U.S. 234 (1968) (under the plain view doctrine, a police officer must be in a position where he has a right to be).

53. See *supra* notes 29 & 38 for a discussion of cases establishing the "exigent circumstances" doctrine.

54. *Hicks*, 107 S. Ct. at 1153.

55. *Id.* For a discussion of the grounds underlying the lack of probable cause, see *supra* note 35 and accompanying text.

56. *Hicks*, 107 S. Ct. at 1154.

In reaching the conclusion that probable cause is required under the plain view doctrine, the Court relied on both the theoretical⁵⁷ and practical⁵⁸ principles of the plain view doctrine. These principles coupled with the requirements of obtaining a search warrant⁵⁹ supported its proposition that probable cause must exist in order to invoke the plain view doctrine.⁶⁰ Specifically, the theory and practicality of the doctrine allow police officers to seize items without a search warrant to avoid the inconvenience and risk, to themselves or to the preservation of the evidence, of having to obtain a search warrant.⁶¹ In addition, the Court noted that probable cause has always been a prerequisite to securing a search warrant.⁶² The *Hicks* Court, then, concluded that because probable cause is required to seize items with a search warrant, it should also be required when police seize items without a search warrant.⁶³

Although the Court emphasized the need for probable cause under the plain view doctrine, it recognized that under certain circumstances, a seizure can be justified on less than probable cause.⁶⁴ The Court cited cases⁶⁵ where the seizure was minimally intrusive,

57. The theory of the plain view doctrine is to extend the police's authority to make warrantless seizures in public places to nonpublic places such as the home. *Id.* at 1153.

58. Practically, the plain view doctrine allows police to avoid the inconvenience and risk of having to obtain a search warrant when their viewing of the object in the case of a lawful search is as legitimate as it would have been in a public place. *Id.*

59. It is well-settled that probable cause is required to secure a search warrant. The fourth amendment provides in pertinent part: "[A]nd no Warrants shall issue, but upon probable cause, supported by Oath or affirmation . . ." U.S. CONST. amend. IV. *See also* *Zurcher v. Dailey*, 436 U.S. 547, 554, *reh'g denied*, 439 U.S. 885 (1978) (a warrant may be issued by a justice or magistrate "to search any property . . . at which there is probable cause to believe that fruits, instrumentalities, or evidence of crime will be found"). For the definition of "search warrant," see *supra* note 4.

60. *Hicks*, 107 S. Ct. 1153-54.

61. *Id.* *See supra* notes 57 & 59 for the theory and practicality of the plain view doctrine.

62. *See supra* note 59 for the requirements of a search warrant.

63. *Hicks*, 107 S. Ct. at 1154. Suppose, for example, a police officer was standing outside Hicks' apartment, absent any exigent circumstances to legally enter, with probable cause to believe that there was stolen stereo equipment inside. In order to enter the apartment and seize the equipment as evidence, the officer would have to have probable cause to obtain a search warrant. The Court reasoned that merely because the officer was already legally in the apartment to search for other items, this fact alone should not justify seizure of the stereo equipment. *Id.* Rather, in order to seize the stereo equipment, the officer should have had the same probable cause that would have been necessary to obtain a search warrant. *Id.*

64. *Id.*

65. The Court cited three cases where a seizure was justified in the absence of probable cause: *United States v. Place*, 462 U.S. 696, 709 n.9 (1983) (officers seized luggage of suspected drug dealer to allow exposure to specially trained dog); *United States v. Cortez*, 449 U.S. 411 (1981) (a vehicle suspected to be transporting illegal aliens was detained and searched); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (same facts as *Cortez*).

and operational necessities rendered it the only practical means of detecting certain types of crime.⁶⁶ The Court found, however, that the case before it could not be justified on less than probable cause because the state relied solely on the fact that the stereo equipment came lawfully within the officer's plain view and not on any special operational necessities.⁶⁷

Finally, the *Hicks* Court addressed the state's contention that the standard for a search of objects in plain view is a lesser standard than for a seizure.⁶⁸ The Court found that there was no justification for treating the two differently.⁶⁹ The Court reasoned that if searches were treated differently than seizures, police officers would search from one object to another until something incriminating could be found.⁷⁰ Thus, the Court established that a search or a seizure of an object in plain view requires the existence of probable cause.⁷¹

The Court in *Hicks* justifiably concluded that probable cause is required under the plain view exception to the fourth amendment. The decision strengthened the rights of individuals against unreasonable searches and seizures for three reasons. First, the requirement of probable cause under the plain view doctrine is consistent with the constitutional protections served by the warrant requirement. Second, by refusing to create a subcategory of searches, the Court established clear guidelines under which all courts can determine whether there has been an unreasonable search and seizure. Finally, the decision eliminates the possibility of exploratory searches that would erode the rights of individuals to be free from unreasonable searches and seizures.

The basic requirements of a search warrant lend support to the *Hicks* decision. In *Coolidge v. New Hampshire*,⁷² the Court explained that in order to rationalize the plain view doctrine, the constitutional protections served by the warrant requirement must be analyzed.⁷³ The most basic protection of the search warrant require-

66. *Hicks*, 107 S. Ct. at 1154.

67. *Id.*

68. *Id.* See Brief for Respondent at 24-25, *Arizona v. Hicks*, 107 S. Ct. 1149 (1987) (No. 85-1027) [hereinafter Brief for Respondent].

69. *Hicks*, 107 S. Ct. at 1154. The fourth amendment protection against unreasonable searches, however, is quite different from the protection against unreasonable seizures. *Texas v. Brown*, 460 U.S. 730, 747-48 (1983) (Stevens, J., concurring). A seizure protects an individual's interest in retaining possession of property, whereas a search protects an individual's interest in maintaining personal privacy. *Id.* A search usually precedes a seizure merely as a matter of timing. *Id.*

70. *Hicks*, 107 S. Ct. at 1154. For a discussion of the warning against exploratory searches, see *infra* notes 124-130 and accompanying text.

71. *Hicks*, 107 S. Ct. at 1154.

72. 403 U.S. 443, *reh'g denied*, 404 U.S. 874 (1971).

73. *Id.* at 467.

ment is to insure that all search warrants are based on probable cause.⁷⁴ The *Coolidge* Court stated that any intrusion in the way of a search or seizure is an evil, and no intrusion is justified without a prior determination of necessity.⁷⁵ Thus, for any search, with or without a warrant, to be justified, the police must have probable cause.⁷⁶ Where a search occurs with a warrant, a prior determination of probable cause must be met by a magistrate.⁷⁷ Similarly, where a warrantless search occurs,⁷⁸ a prior determination of probable cause must be met by the police.⁷⁹ The plain view doctrine is an exception to the warrant requirement.⁸⁰ Therefore, because the warrant requirement includes the requirement of probable cause, an exception to the warrant requirement, the plain view doctrine, should not logically substitute a standard of less than probable cause.⁸¹

The *Hicks* decision is also justified because it eliminated the confusion in the lower courts as to the applicable standard under the plain view exception.⁸² The Court in *Coolidge*⁸³ placed limita-

74. *Id.* See *supra* notes 4 & 59 for the definition of and probable cause requirements for a search warrant.

75. *Coolidge*, 403 U.S. at 467.

76. See *New Jersey v. T.L.O.*, 469 U.S. 325, 346 (1985) ("Sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment") (quoting *Hill v. California*, 401 U.S. 797, 804 (1971)); *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979), *reh'g denied*, 444 U.S. 1049 (1980) ("a search or seizure of a person must be supported by probable cause"). See also *Krehmhelmer v. Powers*, 633 F. Supp. 1145, 1149 (E.D. Mich. 1986) (probable cause is a prerequisite to any search).

77. A search warrant can only be issued upon an affidavit or sworn oral testimony. BLACKS LAW DICTIONARY 1211 (5th ed. 1979). The affidavit issued requesting the warrant must provide a substantial basis for the justice or magistrate to determine the existence of probable cause. *Illinois v. Gates*, 462 U.S. 213, 239, *reh'g denied*, 463 U.S. 1237 (1983).

78. A warrantless search within a dwelling occurs when exigent circumstances justified the initial entry. *Hicks*, 107 S. Ct. at 1153. Exigent circumstances exist when there is a compelling need for official action and there is no time to secure a search warrant. *United States v. Dowell*, 724 F.2d 599, 602 (7th Cir. 1983), *cert. denied*, 466 U.S. 906 (1984).

79. *Hicks*, 107 S. Ct. at 1152.

80. *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971). Recognition of the existence of the plain view exception to the warrant requirement can be found prior to *Coolidge*. See, e.g., *Trupiano v. United States*, 334 U.S. 699 (1948) (an arresting officer may search and seize evidence of a crime which is in "plain sight" and in his immediate and discernible presence); *United States v. Lefkowitz*, 285 U.S. 452 (1932) (plain view doctrine is implied); *United States v. Lee*, 274 U.S. 559 (1927) (no express reference to the plain view doctrine, but the Court held that "no search" occurred where cases of liquor were discovered on the deck of a motorboat through the use of a searchlight).

81. See Scott, "Plain-View" - *Anything But Plain: Coolidge Divides The Lower Courts*, 7 LOY. L.A.L. REV. 489, 506-507 (1974).

82. In *Hicks*, Justice Scalia specifically stated that the Court had never ruled on the issue of whether probable cause was required under the plain view doctrine. *Hicks*, 107 S. Ct. at 1153. As support for this argument, he cited *Texas v. Brown*, 460 U.S. 730, 742 n.7 (1983), which he believed explicitly regarded the issue as unresolved, and *Payton v. New York*, 445 U.S. 573, 587 (1980), which he believed only implied that probable cause was required. A closer look, however, reveals that in both

tions on the plain view doctrine so that it would be consistent with the constitutional protections served by the warrant requirement.⁸⁴ In *Coolidge*, the Court held that a seizure is justified by the plain view exception only when: 1) the police officer views the object from a position where he has a right to be;⁸⁵ 2) the object seized is in plain view where it was discovered inadvertently;⁸⁶ and 3) the incriminating character of the object is immediately apparent.⁸⁷ The *Coolidge* Court, however, did not provide a precise definition of the "immediately apparent" requirement.⁸⁸ As a result, there has been

Brown and *Payton* the Supreme Court established that probable cause was required under the plain view doctrine.

In *Payton*, the Court stated, "The 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." *Payton*, 445 U.S. at 587. The Court in *Payton* clearly emphasized the necessity of probable cause for a justified seizure under the plain view doctrine. *Id.*

In *Brown*, the Court quoted the above excerpt from *Payton* and further stated, "We think this statement of the rule from *Payton*, requiring probable cause for seizure in the ordinary case, is consistent with the Fourth Amendment and we reaffirm it here." *Brown*, 460 U.S. at 741-42. In *Brown*, however, the Court declined to decide whether a degree of suspicion lower than probable cause would be sufficient for seizure in certain cases. *Id.* at 742 n.7. See also *id.* at 748-49 (Stevens, J., concurring) (stating that one of the core requirements of the plain view doctrine is that at the time of the seizure, the officer must have probable cause to connect the item with criminal activity).

Similarly, the Supreme Court has reiterated the probable cause requirement in *Illinois v. Andreas*, 463 U.S. 765 (1983). In asserting the probable cause requirement, the *Andreas* Court stated that the "plain view doctrine authorizes seizure of illegal or evidentiary items visible to a police officer whose access to the object has some prior Fourth Amendment justification and who has *probable cause* to suspect that the item is connected with criminal activity." *Id.* at 771 (emphasis added).

83. *Coolidge*, 403 U.S. at 443 (plurality opinion).

84. *Id.* at 467.

85. See *supra* note 52 and accompanying text.

86. *Coolidge*, 403 U.S. at 469-71.

87. *Id.* at 466. Although most courts have accepted the requirements of the plain view doctrine set forth in *Coolidge*, it is important to note that the requirements are not beyond dispute. The manner in which the justices divided in *Coolidge* makes it impossible to conclude that the majority subscribed to the requirements. *Id.* In *Coolidge*, four members of the Court dissented from any such qualification of the plain view doctrine, while Justice Harlan concurred in only part of the Stewart opinion. *Id.* In *Texas v. Brown*, 460 U.S. 730, 737 (1983), four members of the Court stated that because "[t]he *Coolidge* plurality's discussion of 'plain view' . . . has never been expressly adopted by a majority of this Court . . . [it was] not binding precedent . . . [but] should obviously be the point of reference for further discussion of the issue." Two other members of the *Brown* Court stated that the requirements established in *Coolidge* should not be criticized because they have been generally accepted for over a decade. *Id.* at 746. For other examples of the controversy over the plain view exception, see LaFave, *Warrantless Searches and the Supreme Court: Further Ventures Into the "Quagmire"*, 8 CRIM. L. BULL. 9 (1972); Landynski, *The Supreme Courts Search for Fourth Amendment Standards: The Extraordinary Case of Coolidge v. New Hampshire*, 45 CONN. B.J. 330, 336-38, 349-53 (1971); Mortensen, *Constitutional Law-Search and Seizure-Coolidge v. New Hampshire*, 6 SUFFOLK U.L. REV. 695, 699-700, 704 (1972); Comment, *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 243-50 (1971).

88. See 2 W. LAFAVE, SEARCH AND SEIZURE § 6.7(b), at 717 (2d ed. 1987). LaFave

much confusion in the lower courts about the interpretation of the requirement.⁸⁹

The standard for the "immediately apparent" requirement has ranged from reasonable suspicion⁹⁰ to probable cause⁹¹ to virtually certain that an item has evidentiary value.⁹² Then, in *Texas v. Brown*,⁹³ the Supreme Court rejected the virtually certain standard and returned to the probable cause standard.⁹⁴ The *Brown* Court stated that police officers are not required to "know" that certain items are evidence of a crime, but they are required to at least have probable cause to associate the items with criminal activity.⁹⁵ The *Hicks* Court adopted the *Brown* standard by requiring the probable

warns that if the "immediately apparent" requirement were interpreted strictly, it would bar any examination of an article that would extend beyond the reason for the officers' presence on the premises. *Id.* Most courts, however, have not taken such a narrow view of the requirement. For interpretations of the requirement, see *infra* notes 90-94 and accompanying text.

89. See Scott, *supra* note 81, at 502-503.

90. For examples of federal courts that have allowed the reasonable suspicion standard, see *supra* note 43. See also *United States v. White*, 463 F.2d 18, 21 (9th Cir. 1972) (plain view doctrine was used to justify the seizure of items that were "suspicion arousing"); *United States v. Hill*, 447 F.2d 817 (7th Cir. 1971) (in the course of executing a search warrant for other items, FBI agents "saw" bottles of pills).

91. For examples of Supreme Court cases, in addition to *Hicks*, that have adopted the probable cause standard, see *supra* note 82. Since *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), most commentators have indicated a preference for the adoption of the probable cause standard. See, e.g., Kuipers, *Suspicious Objects, Probable Cause and the Law of Search and Seizure*, 21 *DRAKE L. REV.* 252, 252-55 (1972); Mortensen, *supra* note 87, at 699-703; Rintamaki, *Plain View Searching*, 60 *MIL. L. REV.* 25, 27-45 (1973); Scott, *supra* note 81, at 502-507; Comment, *Probable Cause to Seize and the Fourth Amendment: An Analysis*, 34 *ALB. L. REV.* 658, 658-66 (1970); Annotation, *Search and Seizure-Plain View*, 29 *L.Ed. 2d* 1067 (1971).

92. One federal case has held that even probable cause is not enough to justify seizure of items in plain view. *United States v. Smollar*, 357 F. Supp. 628 (S.D.N.Y. 1972) (police officers must be "virtually certain" that the items are evidence of criminal activity). *Contra United States v. Drew*, 451 F.2d 230-233 (5th Cir. 1971) (the plain view exception would be worthless if officers had to be absolutely certain that what they saw was seizable). The Supreme Court has held that "The determination of the standard of reasonableness governing any class of searches requires 'balancing the need to search against the invasion which the search entails,'" *New Jersey v. T.L.O.*, 469 U.S. 325, 337 741 (1985) (quoting *Camara v. Municipal Court*, 387 U.S. 523, 536-537 (1967)). *Cf. Warden v. Hayden*, 387 U.S. 294 (1967), where the Court stated:

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

Id. at 307. Thus, the *Warden* Court seemed to favor a standard that either provided for a "nexus" between the item seized and the crime, or a probable cause standard.

93. 460 U.S. 730 (1983).

94. *Id.* at 741-42 (quoting *Payton v. New York*, 445 U.S. 573 (1980)). For a discussion of the probable cause standard as adopted in *Brown* and *Payton*, see *supra* note 82.

95. *Texas v. Brown*, 460 U.S. 730, 741-42 (1983).

cause standard and rejecting the reasonable suspicion standard.⁹⁶ The *Hicks* Court's adoption of the probable cause standard finally eliminated the division among lower courts⁹⁷ as to the correct standard under the plain view doctrine.⁹⁸

In addition to establishing the probable cause requirement, the Court keenly expressed its unwillingness to create a subcategory of searches somewhere between a plain view inspection and a full-blown search.⁹⁹ If allowed, subcategories of searches¹⁰⁰ would become numerous and undefinable.¹⁰¹ Courts would be overwhelmed with the additional task of deciding whether each new subcategory required police to have mere suspicion, probable cause or some other undefined standard.¹⁰² The *Hicks* decision eliminated any possible confusion with undefined terms by narrowing the definition of a search,¹⁰³ thereby making it easy for courts to apply the probable cause standard.¹⁰⁴ Accordingly, a search is either a full-blown search

96. *Hicks*, 107 S. Ct. at 1151, 1153. The *Hicks* Court specifically states the issue before it as "whether this 'plain view' doctrine may be invoked when the police have less than probable cause to believe that the item in question is evidence of a crime or is contraband." *Id.*

97. For a summary of the division among lower courts as to the applicable standard under the plain view doctrine, see *supra* notes 89-92 and accompanying text.

98. See Scott, *supra* note 81, at 506, where the author comments that the confusion created by the conflicting interpretations of the applicable standard under the plain view doctrine would easily be resolved when the Supreme Court adopts one of the competing standards.

99. See *supra* notes 44-50 and accompanying text for a summary of the Court's refusal to create subcategories of searches.

100. For examples of possible subcategories of searches, see *supra* note 43.

101. The *Hicks* Court states that subcategories of searches would send police and judges into a broad and undefined area of fourth amendment law. *Hicks*, 107 S. Ct. at 1154.

102. This burden would be too great for the court system. The *Hicks* case, for example, illustrates the confusion surrounding the applicable standard for "plain view" searches. *Hicks*, 107 S. Ct. at 1149. If courts were to open the flood gates for variations of the "search," the confusion resolved in *Hicks* would still exist, and cases would be irreconcilable. *Id.* The term "search," as defined for fourth amendment purposes, is already broad and unclear and any variations, by way of subcategories of the term, would simply add to the confusion. See 1 W. LAFAYETTE, SEARCH AND SEIZURE § 2.1(a), at 299 (2d ed. 1987) (explaining that the term "search" is not easily understood and cannot be captured with any verbal "formulation"). In *Katz v. United States*, 389 U.S. 347 (1967), the Supreme Court established the expectation of privacy definition of a search. The expectation of privacy definition, however, has proven to be just as confusing as any definition of a search. See W. LAFAYETTE, *supra* at 303-307. For a workable definition of a fourth amendment search, see *supra* note 9.

103. The terms "search" and "seizure" are terms of limitation and police practices are not required to be reasonable unless there is actually a search or a seizure. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 356 (1974). Subcategories of searches would broaden this limiting effect and make it more difficult for courts to determine when an unreasonable search has occurred. The *Hicks* Court strengthened the rights of individuals by adopting a more precise definition of when a search occurs, thereby allowing courts to determine whether that search was reasonable under the fourth amendment. *Hicks*, 107 S. Ct. at 1154-1155.

104. *Id.* at 1153 (holding that the probable cause standard is "now" required in order to invoke the plain view doctrine).

which requires probable cause¹⁰⁵ or a plain view inspection which requires no degree of suspicion at all.¹⁰⁶

Furthermore, in finding that moving the stereo component constituted a full-blown search,¹⁰⁷ the *Hicks* Court established a more precise definition of a fourth amendment search. In *Illinois v. Andreas*,¹⁰⁸ the Court reiterated that the fourth amendment protects an individual's expectations of privacy.¹⁰⁹ The *Andreas* Court noted that if an inspection by police does not intrude upon a legitimate expectation of privacy, there is no search.¹¹⁰ In *Hicks*, when the police officers lawfully entered the premises to search for a weapon, other victims and the individual who had shot through the floor, Hicks still retained an expectation of privacy in areas of the apartment which were unrelated to the original search.¹¹¹ Specifically, Hicks retained an expectation of privacy in the area under the stereo turntable. When the police officer exposed this area to view,¹¹² he eliminated Hicks' expectation of privacy and was, therefore, conducting a separate search.¹¹³ Police officers must not be allowed to make plain view inspections of objects by moving them.¹¹⁴

105. *Id.*

106. Plain view inspections are not searches under the fourth amendment, and therefore do not even require a reasonable suspicion. *Id.* at 1152, 1154. *See also supra* notes 43-45 and accompanying text for a complete discussion of the standard adopted by the *Hicks* Court for a plain view inspection.

107. *Hicks*, 107 S. Ct. at 1152.

108. 463 U.S. 765 (1983).

109. *Id.* at 771. *See also* *California v. Ciraolo*, 106 S. Ct. 1809, 1811 (1986) (the touchstone of the fourth amendment is whether a person has a "constitutionally protected reasonable expectation of privacy") (quoting *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring)).

110. *Andreas*, 463 U.S. at 771. (quoting *Walter v. United States*, 447 U.S. 649, 663-665 (1980) (Blackmun, J., dissenting)).

111. *See Hicks*, 146 *Ariz.* at 534, 707 P.2d at 332 (the recording of serial numbers was found to be unrelated to the exigency which justified the original entry and was therefore considered an additional search). *See also* *Mincey v. Arizona*, 437 U.S. 385, 393 (1978) (a warrantless seizure must be "strictly circumscribed by the exigencies which justify its initiation") (quoting *Terry v. Ohio*, 392 U.S. 1, 25-26 (1968)).

112. *See* Joint Appendix, *supra* note 11, at 19-20 (a police officer testified that he turned the stereo turntable upside-down in order to read its serial number).

113. *Hicks*, 107 S. Ct. at 1152. *But cf. Andreas*, 463 U.S. at 771 (any owner of items immediately loses his privacy interest in those items when they are observed in plain view). If Hicks lost his privacy interest in the stereo turntable because it was in plain view, it could be argued that he also loses his privacy interests in the area underneath the turntable. The Court in *Andreas*, however, stressed that the owner still retains the incidents of title and possession in those items. *Id.* Thus, if the police cannot deprive the owner of his title and possession in an item, there would be no way to become aware of the area underneath that item.

114. Moving an object in plain view deprives the owner of his expectation of privacy in the area underneath the object. *Hicks*, 107 S. Ct. at 1152. In addition, moving objects in plain view deprives the owner of his title and possession of the object. *Id.* Moving objects in plain view, therefore, constitutes a separate search not justified by the initial intrusion. *Id.* In *Hicks*, the Court found that it is irrelevant that the deprivation only lasted a few seconds and uncovered nothing but the bottom of the turntable. *Id.* at 1152-53. *See also* Moylan, *The Plain View Doctrine: Unex-*

The police would be tempted to move every object until something incriminating could be found.¹¹⁵

The decision in *Hicks* established guidelines for both the courts and the police. If police officers move objects in plain view, a separate search will result¹¹⁶ which must independently survive the test of reasonableness¹¹⁷ under the fourth amendment. To determine whether police action is reasonable, courts can employ a simple analysis. Where police observed objects in plain view, a court should first categorize the police action as either a search¹¹⁸ or not a search.¹¹⁹ If objects were merely looked at¹²⁰ and not moved, then there was not a search and there would be no need for probable cause to exist. If objects not related to the original purpose of entry¹²¹ were moved,¹²² then probable cause must exist.¹²³ Next, the court should determine whether the requirement of probable cause was met to conclude whether the search was reasonable under the fourth amendment.

Finally, the Court's holding is justified because it eliminates the potential for exploratory searches.¹²⁴ The Court in *Coolidge* ex-

pected Child of the Great "Search Incident" Geography Battle, 26 MERCER L. REV. 1047, 1096 (1975) (emphasizing that police officers should not over-apply the plain view doctrine by touching everything they see in open view).

115. This temptation would lead to what the courts have termed an exploratory search. *Coolidge v. New Hampshire*, 403 U.S. 443, 466-67 (1971). For a discussion of the warning against exploratory searches, see *infra* notes 124-130.

116. See *supra* notes 39 & 114 for discussion of how the elimination of an individual's expectation of privacy by moving object, results in a separate search.

117. See *supra* note 49 for considerations regarding the test of reasonableness under the fourth amendment.

118. See *supra* text accompanying notes 44-48 for an explanation of the *Hicks* Court's conclusion that probable cause is required if a police inquiry is deemed a "search" under the fourth amendment.

119. See *supra* note 45 and accompanying text for an explanation of the *Hicks* Court's finding that a reasonable suspicion is not even required if a police inquiry is not a "search" under the fourth amendment.

120. See *supra* note 43 for examples of the terms used by various courts when police officers have looked at objects in plain view.

121. See *supra* note 29 for an explanation of the requirement that warrantless searches be circumscribed by the exigencies which justified the initial lawful entry.

122. See *supra* text accompanying notes 40 & 42 for the *Hicks* Court's conclusion that there is a distinction between merely looking at an object in plain view and moving it even a few inches.

123. See *supra* text accompanying notes 73-81 for a discussion of how the protections served by the warrant requirement satisfy the probable cause requirement.

124. In *Coolidge v. New Hampshire*, 403 U.S. 443, 466-67 (1971) the Court specifically warned against using the plain view doctrine to extend a general exploratory search from one object to another until something incriminating could be found. The Court stated that exploratory rummaging in a person's belongings is intolerable. *Id.* Even the dissent in *Hicks* agreed that the purpose of the immediately apparent requirement under the plain view doctrine is designed to prevent general exploratory searches. *Hicks*, 107 S. Ct. at 1157-58 (O'Connor, J., dissenting). See also *Stanley v. Georgia*, 394 U.S. 557, 571-72 (1969) (Stewart, J., concurring) (exploratory searches cannot be undertaken by officers with or without a warrant) (quoting *United States v.*

plained that in addition to the requirement that all searches be based on probable cause,¹²⁵ a second constitutional protection served by the warrant requirement must be analyzed to rationalize the plain view doctrine.¹²⁶ The second objective is that searches should be as limited as possible.¹²⁷ A search warrant accomplishes this objective by requiring that the warrant be specific as to the place to be searched and the items to be seized.¹²⁸ Similarly, the plain view exception to the warrant requirement is consistent with this objective as long as the search does not result in a general or exploratory one.¹²⁹ If a police officer could indiscriminately search every item in plain view and justify it by claiming that it is incident to an original lawful purpose, then an individual would be stripped of his right to be secure in his home against unreasonable searches and seizures.¹³⁰

In conclusion, the *Hicks* Court firmly established that probable cause is required in order to invoke the plain view doctrine. In so doing, the Court reinforced the grounds under which the plain view doctrine was founded and warned against general exploratory searches. The Court's decision emphasizes the important distinction between looking at an object in plain view and moving that object. This helped to resolve the confusion among lower courts as to what degree of justification is needed under the immediately apparent requirement of the plain view doctrine. In addition, the *Hicks* decision established general guidelines under which all courts can analyze whether a search and seizure was reasonable. The decision strengthened the rights of individuals by requiring courts to test the reasonableness of police action when objects in plain view are moved. By requiring police to have probable cause to believe that objects in plain view are evidence of criminal activity, the *Hicks* Court established an effective way of deterring unreasonable searches.

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Rabinowitz, 339 U.S. 56, 62 (1950)).

125. *Coolidge* explained that the probable cause requirement is the first constitutional protection served by the warrant requirement. *Coolidge*, 403 U.S. at 467. See also *supra* note 59 for a discussion of the probable cause requirement of a search warrant.

126. *Coolidge*, 403 U.S. at 467.

127. *Id.*

128. See U.S. CONST. amend. IV, which provides in pertinent part: "[N]o Warrants shall issue . . . [unless] particularly describing the place to be searched, and the persons or things to be seized." See also *United States v. Leon*, 468 U.S. 897, 923 (1984), *reh'g denied*, 468 U.S. 1250 (a search warrant must be specific as to the place to be searched and the items to be seized).

129. *Coolidge*, 403 U.S. at 467.

130. *Hicks*, 107 S. Ct. at 1157-58 (O'Connor, J., dissenting) (arguing that an officer should not be allowed to indiscriminately search every item in plain view because this would eliminate the protections of the fourth amendment). See also *Stanley v. Georgia*, 394 U.S. 557, 571-72 (1969) (arguing that exploratory searches would give government officials too much power and discretion to search a person's home).

