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Dale J. Gilsinger

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OKLAHOMA'S PLAIN VIEW RULE: LICENSING UNREASONABLE SEARCHES AND SEIZURES?

I. INTRODUCTION

During a lawful search, a police officer may inadvertently discover incriminating evidence which is not the intended object of his search. The plain view exception to the warrant requirement of the fourth amendment allows the officer to make a warrantless seizure of his unexpected find.¹ The scope of the plain view exception has been carefully delineated by the United States Supreme Court.² The Oklahoma Court of Criminal Appeals, however, has on occasion disregarded the Supreme Court's guidance.³ The result is an Oklahoma plain view exception which allows unconstitutional intrusions upon privacy.⁴

This Comment examines the two leading Oklahoma plain view opinions against the background of plain view doctrine developed by the United States Supreme Court. Disparities between the Oklahoma plain view exception and its federal counterpart are analyzed and a method for resolving those disparities is suggested.

II. UNITED STATES SUPREME COURT DECISIONS

A. *Background*

The fourth amendment to the United States Constitution consists of two clauses: the reasonableness clause and the warrant clause.⁵ The reasonableness clause provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."⁶ The warrant clause pro-

1. "The 'plain view' exception to the fourth amendment warrant requirement permits a law enforcement officer to seize what clearly is incriminating evidence or contraband when it is discovered in a place where the officer has a right to be." *Washington v. Chrisman*, 455 U.S. 1, 5-6 (1982).

2. *See, e.g.*, *Washington v. Chrisman*, 455 U.S. 1 (1982); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

3. *See, e.g.*, *Phelps v. State*, 598 P.2d 254, 262 (Okla. Crim. App. 1979) (Bussey, J., dissenting); *Clayton v. State*, 555 P.2d 1310 (Okla. Crim. App. 1974).

4. *See infra* notes 123-26 and accompanying text; text accompanying notes 132-40.

5. U.S. CONST. amend. IV. The fourth amendment has been substantially incorporated into the Oklahoma Constitution as art. II, § 30.

6. U.S. CONST. amend. IV, cl. 1.

vides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."⁷ The juxtaposition of the two clauses has been construed as an indication that the drafters of the fourth amendment intended to outlaw all searches and seizures conducted without a warrant.⁸ The searches and seizures prohibited by the reasonableness clause are those searches and seizures undertaken without a warrant that meet the requirements of the warrant clause.⁹

Although a general warrant requirement for search and seizure has emerged as the law of the land, it has not served as an absolute bar to warrantless searches and seizures. The Supreme Court has recognized that there exist "exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant for search may be dispensed with."¹⁰ The Court has not been without sympathy for the po-

7. *Id.* cl. 2.

8. Justice Frankfurter explained the relationship of the two clauses in *United States v. Rabinowitz*, 339 U.S. 56 (1950):

When the Fourth Amendment outlawed "unreasonable searches" and then went on to define the very restricted authority that even a search warrant issued by a magistrate could give, the framers said with all the clarity of the gloss of history that a search is unreasonable unless a warrant authorizes it.

Id. at 70 (Frankfurter, J., dissenting). But this explanation has not won unanimous approval. One commentator has argued that "Justice Frankfurter, and others who have viewed the fourth amendment primarily as a requirement that searches be covered by warrants, have stood the amendment on its head. Such was not the history of the matter . . ." T. TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 46-47 (1969). According to Taylor, the framers, as men of the eighteenth century, were primarily concerned with the dangers of "overreaching" warrants, *id.* at 41, and "were not at all concerned about searches without warrants," *id.* at 43. Justice Rehnquist recently took note of this debate and the futility of attacking the Frankfurter view: "There is significant historical evidence that we have over the years misread the history of the Fourth Amendment . . . But one may accept all of that as *stare decisis* . . ." *Payton v. New York*, 445 U.S. 573, 621 (1980) (Rehnquist, J., dissenting).

9. *Coolidge v. New Hampshire*, 403 U.S. 443, 474-75 (1971) ("[A] search or seizure carried out on a suspect's premises without a warrant is *per se* unreasonable . . ."); *accord* *Katz v. United States*, 389 U.S. 347, 357 (1967); *cf.* *Jones v. United States*, 357 U.S. 493, 498 (1958) ("essential purpose of the Fourth Amendment [is] to shield the citizen from unwarranted intrusions into his privacy").

10. *Johnson v. United States*, 333 U.S. 10, 14-15 (1948); *Roaden v. Kentucky*, 413 U.S. 496, 505 (1973) ("Where there are exigent circumstances in which police action literally must be 'now or never' to preserve the evidence of the crime, it is reasonable to permit action without prior judicial evaluation."); *see* *Chambers v. Maroney*, 399 U.S. 42, 51 (1970) ("Only in exigent circumstances will the judgment of the police as to probable cause serve as a sufficient authorization for a search."); *Schmerber v. California*, 384 U.S. 757, 770 (1966) ("Search warrants are ordinarily required for searches of dwellings, and, absent an emergency, no less could be required where intrusions into the human body are concerned."); *McDonald v. United States*, 335 U.S. 451, 454 (1948) ("A search without a warrant demands exceptional circumstances . . .").

lice officer who finds himself in an emergency in which he must either seize evidence without the benefit of a warrant or helplessly stand by and watch the evidence destroyed.¹¹ In the interest of effective law enforcement, the Court has recognized a limited number of specific exceptions to the warrant requirement.¹² However, the Court has been scrupulously reluctant to recognize new exceptions.¹³ As a result, unless the facts bring a case within the scope of one of the already recognized exceptions, evidence resulting from a warrantless search or seizure almost certainly will be ruled inadmissible.¹⁴ It would seem that while there is more than one way to skin a cat, or to constitutionally seize evidence without a warrant, there are nonetheless a limited number of ways to do so.

Given this state of fourth amendment law, the significance of the recognized exceptions to the warrant requirement is manifest. They represent a seemingly exhaustive list of factual circumstances under which a police officer may constitutionally conduct a search or seize evidence without a warrant. There are five principal established exceptions to the warrant requirement:¹⁵ the search incident exception,¹⁶ the stop and frisk exception,¹⁷ the vehicle exception,¹⁸ the hot pursuit ex-

11. The Court has held that police were justified in pursuing a fleeing suspect into her home without a warrant where there was "a realistic expectation that any delay would result in destruction of evidence." *United States v. Santana*, 427 U.S. 38, 43 (1976). Similarly, the Court has upheld "no-knock" entries by police when the officers are searching for narcotics because such contraband is "quickly and easily destroyed." *Ker v. California*, 374 U.S. 23, 40-41 (1963).

12. *See infra* notes 15-20 and accompanying text.

13. *United States v. Chadwick*, 433 U.S. 1, 11-13 (1977) (refusing to extend vehicle exception to include warrantless searches of movable containers); *Katz v. United States*, 389 U.S. 347, 358-59 (1967) (refusing to create new exception to the warrant requirement for electronic eavesdropping).

14. "[S]earches 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) (footnotes omitted); *accord Coolidge v. New Hampshire*, 403 U.S. 443, 474-75 (1971).

15. Minor exceptions to the warrant requirement include the border search exception, *see United States v. Ramsey*, 431 U.S. 606, 619 (1977) (authorized agents of the United States may conduct routine searches of vehicles, baggage, and other personal effects at international borders without probable cause); the inventory search exception, *South Dakota v. Opperman*, 428 U.S. 364, 372 (1976) (police may conduct warrantless inventory searches of automobiles lawfully impounded after abandonment); *United States v. Matthews*, 615 F.2d 1279, 1288 (10th Cir. 1980) (police may conduct warrantless inventory searches of automobiles lawfully impounded after the vehicle was involved in illegal activity); the administrative search exception, *see Camara v. Municipal Court*, 387 U.S. 523, 529 (1967) (routine warrantless health, safety, and fire inspections of private dwellings held constitutional).

16. When making a valid arrest, the police may constitutionally conduct a warrantless search of the arrestee's person as well as the area within the suspect's immediate control. *Chimel v. California*, 395 U.S. 752, 768 (1969).

17. When a police officer believes a suspect to be armed and dangerous, but does not have

ception,¹⁹ and the plain view exception.²⁰

B. *The Early Plain View Decisions*

The question of whether a search or seizure is reasonable presupposes the occurrence of a search or seizure. Often a court must decide the threshold issue of whether any search or seizure—meaning any intrusion into an area of constitutionally protected privacy²¹—has in fact

sufficient probable cause to justify an arrest, he may nevertheless conduct a search of the suspect's outer clothing in an effort to discover weapons that might be used against him. *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

18. *Carroll v. United States*, 267 U.S. 132, 149 (1925).

[T]he true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid.

Id.

19. In the presence of exigent circumstances, police officers may conduct a warrantless search or seizure to prevent the destruction of evidence, *United States v. Santana*, 427 U.S. 38, 43 (1976), or to protect either the police officers or the general public, *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967). In both *Santana* and *Hayden*, the exigent circumstances resulted from police pursuit of a suspect, hence the designation "hot pursuit" exception.

20. Evidence in plain view may be seized without a warrant when the plain view observation results from a prior valid intrusion into a constitutionally protected area of privacy, the evidence is discovered inadvertently, and the incriminating nature of the evidence is immediately apparent. *Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971).

21. This definition of a search reflects the modern view that a search need not entail a physical intrusion. This view was first enunciated in *Katz v. United States*, 389 U.S. 347 (1967) (plurality opinion). In *Katz*, appellant was convicted for the interstate transmission of wagering information. At his trial, the government was allowed to introduce "wiretap" evidence gathered by means of an electronic listening device which the FBI had attached to the outside of a public phone booth. *Id.* at 348. The court of appeals rejected appellant's contention that the warrantless surveillance was unconstitutional after it found that there was no physical intrusion into an area occupied by appellant. *Id.* at 348-49. In his plurality opinion, Justice Stewart lashed out at the concept of the fourth amendment as merely the protector of spatially defined areas.

For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

Id. at 351-52 (citations omitted). In a concurring opinion Justice Harlan restated the plurality's holding regarding what objects are protected by the fourth amendment.

[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable." Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.

Id. at 361 (Harlan, J., concurring). Under this abstract analysis, which would protect not only tangible objects, but also activities, statements, and conversations, the Court held that the electronic surveillance at issue constituted a search and seizure. *Id.* at 353. Predictably, Justice Black recoiled from this theoretical approach to the fourth amendment. He characterized such opinions as "broad policy discussions and philosophical discourses on such nebulous subjects as privacy."

occurred. For example, in what generally is regarded as the first plain view case,²² the United States Supreme Court held that no search or seizure occurred when a Coast Guard patrol boat shined its searchlight upon the deck of a ship at sea.²³ In *United States v. Lee*, the searchlight clearly revealed cases of liquor on the deck of the suspects' ship,²⁴ subsequently the boat was boarded and searched and its crew was arrested for violation of the Tariff and Prohibition Acts.²⁵ But the intrusion of boarding was justified under the vehicle exception to the warrant requirement.²⁶ Because *Lee* concerns a plain view observation of evidence made *before* a police intrusion, it is not actually a plain view exception case. In this Comment, the rule of *Lee*—observation of evidence in plain view does not by itself constitute a search—will be referred to as the doctrine of pre-intrusion plain view. The legal principle drawn from the true plain view exception cases—plain view observations made *after* a police intrusion—will be referred to as the doctrine of post-intrusion plain view. This terminology should preclude the application of pre-intrusion plain view law to post-intrusion plain view facts.²⁷ The difference between pre-intrusion and post-intrusion plain view is illustrated by a comparison of the facts of *Lee* and the facts of the first true plain view exception case, *Harris v. United States*.²⁸

In *Harris*, appellant's car was impounded as part of an armed robbery investigation. A local police regulation required the officer taking possession of an impounded car to search the car thoroughly in order to remove all valuables from it and to attach to the car a tag listing the

Id. at 365 (Black, J., dissenting). According to Justice Black, there was no justification for "construing the search and seizure amendment as applying to eavesdropping or the 'seizure' of conversations." *Id.* at 366-67.

22. *United States v. Lee*, 274 U.S. 559 (1927).

23. But no search on the high seas is shown. The testimony of the boatswain shows that he used a searchlight. It is not shown that there was any exploration below decks Such use of a searchlight is comparable to the use of a marine glass or a field glass. It is not prohibited by the Constitution.

Id. at 563.

24. "For aught that appears, the cases of liquor were on deck and . . . were discovered before the motor boat was boarded." *Id.*

25. *Id.* at 560-61.

26. "Under such circumstances, search and seizure of the vessel, and arrest of the persons thereon, by the Coast Guard on the high seas is lawful, as like search and seizure of an automobile, and arrest of the persons therein, by prohibition officers on land is lawful." *Id.* at 563.

27. For a discussion of the misapplication of pre-intrusion plain view law, see *infra* text accompanying notes 127-31. One commentator has theorized that "[t]he phrase 'plain view' . . . continues to possess its chameleon-like quality because of its loose employment to describe . . . visually similar but legally distinct situations." Moylan, *The Plain View Doctrine: Unexpected Child of the Great "Search Incident" Geography Battle*, 26 *MERCER L. REV.* 1047, 1100 (1975).

28. 390 U.S. 234 (1968).

circumstances of the impoundment.²⁹ As the officer performed those tasks, it began to rain. In order to roll up the windows, he opened one of the car doors and discovered on the doorsill a registration card bearing the robbery victim's name. He recognized the registration card as incriminating evidence and seized it. The officer made the inventory search of the car and seized the registration card without obtaining a warrant.³⁰ The trial court held the card admissible as evidence and Harris appealed the ruling.³¹

The Court simplified the case by finding that the inventory search had ended before the officer opened the door and discovered the registration card.³² That meant the discovery of the card was not a fruit of the inventory search; the admissibility of the card as evidence did not depend on the lawfulness of the inventory search.³³ Instead, the Court found that the discovery of the card was the result of a lawful intrusion upon the suspect's privacy motivated solely by the officer's desire to protect the interior of the car from the rain.³⁴ Under this analysis, the only issue before the Court was the lawfulness of the warrantless seizure of the card after a valid intrusion had brought about its plain view discovery.

Clearly, the pre-intrusion plain view doctrine was not applicable. That doctrine dictates only that the observation of evidence in plain view is not an intrusion upon the suspect's privacy. In *Harris*, no contention was made that the plain view observation was an intrusion. The issue of valid intrusion had been dispensed with by the Court's finding that the officer had lawfully opened the door. In *Lee*, a pre-intrusion plain view case, the plain view observation had preceded and helped justify a subsequent intrusion into a constitutionally protected area of privacy under the vehicle exception to the warrant requirement.³⁵ In *Harris*, the officer made his plain view observation after the intrusion had occurred; the plain view observation was the result of, rather than the justification for, an intrusion upon the suspect's privacy.³⁶ Furthermore, in *Lee* the warrantless seizure of evidence which

29. *Id.* at 235.

30. *Id.* at 235-36.

31. *Id.* at 234-35.

32. "[T]he discovery of the card was not the result of a search of the car, but of a measure taken to protect the car while it was in police custody." *Id.* at 236.

33. The Court later upheld the constitutionality of warrantless inventory searches of impounded vehicles in *South Dakota v. Opperman*, 428 U.S. 364, 372-73 (1976).

34. *See supra* note 32.

35. *See supra* notes 22-27 and accompanying text.

36. 390 U.S. at 236.

resulted from the intrusion into the constitutionally protected area of privacy was justified under the vehicle exception to the warrant requirement.³⁷ In *Harris*, the Court did not consider the vehicle exception.

Instead, the *Harris* Court held that after an officer has lawfully intruded into a constitutionally protected area of privacy he may make a warrantless seizure of any incriminating evidence inadvertently discovered in plain view within that area.³⁸ The Court thus established a new exception to the warrant requirement, the plain view exception, and expressed its first formulation of the doctrine of post-intrusion plain view.³⁹ Having lawfully intruded upon the suspect's privacy, the police are not constitutionally obliged to blink at reality and ignore evidence accidentally discovered in plain view.⁴⁰

C. Coolidge v. New Hampshire: *Formulation of the Doctrine*

As the herald of a new exception to the warrant requirement, the *Harris* opinion, less than three pages in length, was disappointingly laconic. The Court's next plain view exception opinion, *Frazier v. Cupp*,⁴¹ was equally terse. In 1971, however, the Court announced its decision in *Coolidge v. New Hampshire*⁴² in an opinion that remains the Court's most comprehensive analysis of post-intrusion plain view law.⁴³ The brevity of the *Harris* and *Frazier* opinions⁴⁴ effectively lim-

37. See *supra* note 26.

38. *Once the door had been lawfully opened*, the registration card, with the name of the robbery victim on it, was plainly visible. It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence.

390 U.S. at 236 (emphasis added).

39. *Id.*

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

Where, once an otherwise lawful search is in progress, the police inadvertently come upon a piece of evidence, [sic] it would often be a needless inconvenience, and sometimes dangerous—to the evidence or to the police themselves—to require them to ignore it until they have obtained a warrant particularly describing it.

Id.

41. 394 U.S. 731 (1969). In *Frazier*, the police inadvertently discovered evidence incriminating the appellant while the officers lawfully searched a duffel bag during an investigation of the appellant's cousin. The Court held that the evidence thus seized was admissible but gave no explanation for its decision. "The officers therefore found evidence against petitioner in the course of an otherwise lawful search. Under this Court's past decisions, they were clearly permitted to seize it." *Id.* at 740.

42. 403 U.S. 443 (1971).

43. "Historical research reveals that [the plain view exception as a] doctrine, seems to have sprung full-blown from [the] plurality opinion in *Coolidge v. New Hampshire* in June, 1971. There had been, to be sure, intimations but nothing resembling a body of doctrine." Moylan, *supra* note 20, at 1047 (citations omitted).

44. In each case, the Court's opinion was less than two pages in length and its legal analysis was contained in a single paragraph.

ited their applicability to their own facts. In contrast, the scholarly thoroughness of Justice Stewart's plurality opinion in *Coolidge* has apparently guaranteed its acceptance as the law of the land⁴⁵ though it attracted the unreserved support of only four Court members.⁴⁶

In *Coolidge*, the Court was asked to rule upon the validity of search and arrest warrants issued by a state attorney general who had participated in a murder investigation that culminated in the arrest of Coolidge in his home and the seizure of his car as evidence under the contested warrants.⁴⁷ The plurality held that the warrants were without legal effect because they were not issued by a "neutral and detached magistrate."⁴⁸ Coolidge's car, seized under the faulty warrants, had contained evidence critical to his murder conviction.⁴⁹ Unless that seizure was justified under one of the established exceptions to the warrant requirement, that critical evidence was inadmissible and Coolidge's conviction would have to be overturned.⁵⁰ According to the state, the car was subject to a warrantless seizure under the plain view exception because the police officers had observed the car in plain view after they had lawfully entered Coolidge's land to arrest him.⁵¹ The plurality found the state's argument unpersuasive.⁵²

At the very core of the plurality's approach to post-intrusion plain view lies its concept of the importance of the warrant requirement as a

45. See Moylan, *supra* note 27, at 1049. ("Indeed, courts generally (perhaps uncritically) seem to be treating . . . the Stewart opinion in *Coolidge v. New Hampshire* as 'the law of the land.'"); see also Y. KAMISAR, W. LAFAVE & J. ISRAEL, *MODERN CRIMINAL PROCEDURE* 327 n.a (5th ed. 1980).

46. Justice Stewart's lengthy opinion is divided into three major parts. Part II deals with the topic of warrantless search and seizure and is divided into four sections. Part II-C specifically addresses the doctrine of the plain view exception. Justices Black and White filed separate opinions dissenting to part II in its entirety. Part II-D is Justice Stewart's rebuttal to those dissenting opinions and consists of an enthusiastic defense of some of the principles enunciated in part II-C. 403 U.S. at 453-84. Justices Burger, Black, White, and Blackmun dissented to both part II-C and part II-D. Justices Douglas, Brennan, and Marshall joined Justice Stewart in both part II-C and part II-D. Justice Harlan concurred in the result reached by the Stewart plurality but neither concurred nor dissented in part II-C. However, in his separate opinion, Justice Harlan did concur in part II-D. *Id.* at 490-527. Hence an argument can be made that Justice Harlan's concurrence in part II-D was in reality a begrudging fifth vote cast for Part II-C.

47. 403 U.S. at 446-47.

48. *Id.* at 453.

49. *Id.* at 447-48.

50. *Id.* at 453.

51. *Id.* at 464.

52. *Id.*

protection against police intrusions. The plurality postulates two primary objectives served by the warrant requirement. First, the warrant requirement minimizes the number of police intrusions into constitutionally protected areas of privacy by demanding that the police seek an objective magistrate's permission to make intrusions whenever practicable. Second, the warrant requirement limits the scope of any necessary police intrusion upon the individual's privacy by demanding that warrants extend only to particularly described persons, places, and objects.⁵³ The plain view exception must not be applied, the plurality reasons, when the results would conflict with the two objectives of the warrant requirement.⁵⁴ Therefore, the proper application of the plain view exception requires: (1) The plain view observation must follow a prior valid intrusion, (2) it must be immediately apparent that the object seized is evidence of a crime, and (3) the discovery must be inadvertent.⁵⁵

The first requirement for the proper application of the plain view exception dictates that the plain view observation must follow, rather than precede, a prior valid intrusion; the observation of evidence in plain view can never, by itself, justify a subsequent warrantless intrusion into a constitutionally protected area of privacy.⁵⁶ Hence the application of the plain view exception does not increase the number of police intrusions and the first objective of the warrant requirement—to minimize the number of police intrusions—is not hindered.

The second requirement for the proper application of the plain view exception demands that it must be immediately apparent that the

53. The rationale for the "plain view" exception is evident if we keep in mind the two distinct constitutional protections served by the warrant requirement. First, the magistrate's scrutiny is intended to eliminate altogether searches not based on probable cause. The premise here is that *any* intrusion in the way of search or seizure is an evil, so that no intrusion at all is justified without a careful prior determination of necessity. . . . The second, distinct objective is that those searches deemed necessary should be as limited as possible. Here, the specific evil is the "general warrant" abhorred by the colonists, and the problem is not that of intrusion *per se* but of a general, explanatory [sic] rummaging in a person's belongings.

403 U.S. at 467 (emphasis in original; citations omitted).

54. "The limits on the doctrine are implicit in the statement of its rationale." *Id.* at 468.

55. What the "plain view" cases have in common is that the police officer in each of them had a *prior justification for an intrusion* in the course of which he came *inadvertently* across a piece of evidence incriminating the accused. . . . Of course, the extension of the original justification is legitimate only where it is *immediately apparent to the police that they have evidence before them*.

Id. at 466 (emphasis added).

56. "[P]lain view *alone* is never enough to justify the warrantless seizure of evidence." *Id.* at 468 (emphasis in original).

object in plain view is evidence of a crime.⁵⁷ The police are not permitted to seize everything situated in plain view and sift through it at their leisure to determine which objects actually are incriminating. This requirement promotes the second objective of the warrant requirement—to limit the scope of necessary police intrusions.

The third requirement, established by the *Coolidge* plurality, dictates that the discovery of the evidence in plain view must be inadvertent.⁵⁸ The police are not permitted to make a warrantless seizure of evidence in plain view after they have intruded into a constitutionally protected area of privacy knowing what they would “discover” inside. Under the facts of *Coolidge*, the plurality found that the police had entered Coolidge’s land knowing that their entrance would afford them a plain view of Coolidge’s car. Consequently, the plain view exception did not justify the warrantless seizure of the car, notwithstanding the assumed lawfulness⁵⁹ of the police intrusion to arrest Coolidge.⁶⁰ This finding, however, is unnecessary in light of the plurality’s own concept of the protective functions of the warrant requirement. When the police are justified in making an intrusion into a constitutionally protected area of privacy—as the police were justified in entering onto Coolidge’s land to place him under arrest—they may take advantage of that privilege and maneuver themselves into a plain view observation without hindering either of the objectives of the warrant requirement. Assuming, *arguendo*, that the police entered onto Coolidge’s land to arrest him *and* to make a plain view observation of his car, there still was only one police intrusion. Furthermore, precisely because the police knew which object they wished to seize, the scope of that intrusion was not widened; no broad rummaging search was conducted. As Justice White wrote in his dissent, “the inadvertence rule is unnecessary to further any Fourth Amendment ends and will accomplish nothing.”⁶¹

57. “[T]he ‘plain view’ doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges.” *Id.* at 466.

58. *Id.* at 469.

59. “We assume that the arrest of Coolidge inside his house was valid.” *Id.* at 455. Ten years later, the Court reconsidered its assumption and held that, absent exigent circumstances, the police need a warrant to arrest a suspect in his own home. *Payton v. New York*, 445 U.S. 573, 590 (1980).

60. In the light of what has been said, it is apparent that the “plain view” exception cannot justify the police seizure of the Pontiac car in this case. The police had ample opportunity to obtain a valid warrant; they knew the automobile’s exact description and location well in advance; they intended to seize it when they came upon Coolidge’s property.
403 U.S. at 472.

61. *Id.* at 517 (White, J., dissenting).

In fact, it was the establishment of the inadvertence requirement that triggered all four dissenting votes in *Coolidge*.⁶²

The Court's next major plain view decision, *Washington v. Chrisman*,⁶³ was the product of a more united Court.⁶⁴ Although the *Chrisman* Court expressed itself in a more conservative voice,⁶⁵ it nevertheless showed a marked deference toward the doctrine of post-intrusion plain view enunciated by the *Coolidge* plurality. By undertaking the refinement of that doctrine, the *Chrisman* Court indicated its own unwillingness to completely abandon it.

D. *Washington v. Chrisman: The Doctrine Refined*

In *Chrisman*, a campus police officer arrested Carl Overdahl as he left a college dormitory carrying a half-gallon bottle of gin. Overdahl appeared to be under age and told the officer that his identification was in his dormitory room. The officer allowed Overdahl to re-enter the

62. Justice White opposed "a condition that discovery of the disputed evidence be 'inadvertent,'" *id.* at 516 (White, J., dissenting), and contended that the car was properly seized "whether or not the officers expected that it would be found where it was," *id.* at 522. Justice Black's dissent is founded upon a belief that the Court should have resolved *Coolidge* as a search incident case, *see supra* note 16, and therefore did not need to address the issue of the applicability of the plain view exception. According to Justice Black, "the seizure of petitioner's automobile was valid under the well-established right of the police to seize evidence in plain view at the time and place of the arrest." *Id.* at 505 (Black, J., dissenting). Justice Black then voiced his displeasure with the inadvertence requirement in terms of the search incident exception. "Only rarely can it be said that evidence seized incident to an arrest is truly unexpected or inadvertent. . . . It appears to me that the rule adopted by the Court today, for all practical purposes, abolishes seizure incident to arrest." *Id.* at 509.

Inadvertence was the issue that split the Court with regard to the plain view exception. It is worth noting that Justice Harlan's concurrence in part II-D of the plurality opinion evidenced his support for the proposition that inadvertence is a requirement for valid warrantless seizures under the plain view exception. *Id.* at 491-92 (Harlan, J., concurring); *see supra* note 46. Part II-D spoke expressly to the issue of inadvertence:

We are convinced that the result reached in this case is correct, and that the principle it reflects—that the police must obtain a warrant *when they intend to seize an object* outside the scope of a valid search incident to arrest—can be easily understood and applied by courts and law enforcement officers alike.

Id. at 484 (emphasis added).

63. 455 U.S. 1 (1982).

64. *Washington v. Chrisman* was a 6-3 decision. Justices Burger, Blackmun, Powell, Rehnquist, Stevens, and O'Connor made up the majority. Justices Brennan, White, and Marshall dissented. *Id.*

65. During the ten years between *Coolidge* and *Chrisman*, two of the four members of the *Coolidge* plurality were succeeded by more conservative Justices. Justice Douglas was succeeded by Justice Stevens in 1975; Justice Stewart by Justice O'Connor in 1981. Justice Harlan, whose separate concurrence in *Coolidge* had proved the deciding vote, *see supra* notes 46 & 62, was succeeded by the present Court's most conservative member, Justice Rehnquist, in 1972. With this change in the make-up of the Court, it is not surprising that the *Chrisman* opinion embodies an attitude more sympathetic to the plight of the police officer and less protective of the fourth amendment rights of the accused.

dormitory to retrieve his identification but accompanied him inside. Neil Chrisman, Overdahl's roommate, was in the dormitory room when Overdahl and the police officer arrived. The officer stationed himself in the doorway of the room and watched Overdahl's and Chrisman's movements inside the room. Chrisman appeared nervous at the sight of a police officer.⁶⁶ From the doorway, the officer noticed seeds and a small seashell pipe lying on a desk inside the room. Believing the seeds to be marijuana, the officer entered the room, seized the seeds and pipe, and arrested Chrisman and Overdahl.⁶⁷ They were subsequently charged with possession of controlled substances. A pretrial motion to suppress the evidence seized in the room was denied and Overdahl and Chrisman were convicted.⁶⁸ Their convictions were affirmed at the intermediate appellate level,⁶⁹ but the Supreme Court of Washington reversed.⁷⁰ The state appealed and the United States Supreme Court granted certiorari.⁷¹

Under a *Coolidge* analysis, the observation of evidence in plain view, by itself, cannot justify a subsequent warrantless intrusion into a constitutionally protected area of privacy; the intrusion must precede the plain view observation.⁷² In *Chrisman*, the officer testified that he entered the dormitory room with the sole purpose of seizing the pipe and seeds *after* he observed them from the doorway.⁷³ The plain view observation had preceded the intrusion and therefore the plain view exception seemingly was inapplicable. But the *Chrisman* Court held that the intrusion preceded the plain view observation⁷⁴ and upheld the warrantless seizure of the pipe and seeds under the plain view exception.⁷⁵ To reach this conclusion, the Court had to give a new gloss to the term "intrusion."

The Court reasoned that from the moment the campus police officer stopped Overdahl outside the dormitory he had the right to accompany him into constitutionally protected areas of privacy to keep

66. 455 U.S. at 3.

67. Following their arrest, Chrisman and Overdahl voluntarily produced a box containing marijuana and handed it to the officer. They also consented to a search of the room which disclosed more marijuana and a quantity of LSD. *Id.* at 4.

68. *Id.*

69. 24 Wash. App. 385, 600 P.2d 1316 (1979).

70. 94 Wash. 2d 711, 619 P.2d 971 (1980).

71. 452 U.S. 959 (1981).

72. *Coolidge*, 403 U.S. at 467-68; *see supra* note 56 and accompanying text.

73. 455 U.S. at 10 n.1 (White, J., dissenting).

74. *See supra* note 65 and accompanying text.

75. 455 U.S. at 9.

the arrestee under surveillance.⁷⁶ Therefore, when Overdahl entered the dormitory room to retrieve his identification, he unknowingly bestowed upon the officer the right to enter the room. The intrusion occurred when the officer was granted the right to enter. The Court viewed an intrusion as a matter of a legal right rather than a matter of physical encroachment.⁷⁷ The intrusion occurred when the officer was granted the right to enter, not when he exercised that right and left the doorway to seize the pipe and seeds.⁷⁸ Applying this definition of intrusion to the facts of *Chrisman*, the plain view observation of the pipe and seeds occurred after Overdahl entered the room and, thus, after the police intrusion. Having redefined the term "intrusion," the Court accordingly restated the first of the *Coolidge* plurality's requirements for the proper application of the plain view exception.⁷⁹ The *Coolidge* plurality had held that the intrusion must precede the plain view observation; the *Chrisman* Court held that the evidence must be "discovered in a place where the officer has a right to be."⁸⁰ *Chrisman* is the United States Supreme Court's most recent enunciation of the doctrine of post-intrusion plain view.

III. OKLAHOMA DECISIONS

The first eight amendments to the United States Constitution do not apply directly to the states.⁸¹ However, many of the personal rights safeguarded against federal action by those amendments are also safe-

76. We hold, therefore, that it is not "unreasonable" under the Fourth Amendment for a police officer, as a matter of routine, to monitor the movements of an arrested person, as his judgment dictates, following the arrest. The officer's need to ensure his own safety—as well as the integrity of the arrest—is compelling. Such surveillance is not an impermissible invasion of the privacy or personal liberty of an individual who has been arrested.

Id. at 7. In his dissenting opinion, Justice White countered: "I perceive no justification for what is in effect a *per se* rule that an officer in [such] circumstances could always enter the room and stay at the arrestee's elbow." *Id.* at 14.

77. "It is of no legal significance whether the officer was in the room, on the threshold, or in the hallway, since he had a *right* to be in any of these places as an incident of a valid arrest." *Id.* at 8 (emphasis added).

78. The "intrusion" in this case occurred when the officer, quite properly, followed Overdahl into a private area to a point from which he had an unimpeded view of and access to the area's contents and its occupants. . . .

. . . This is a classic instance of incriminating evidence found in plain view when a police officer, for unrelated but entirely legitimate reasons, obtains lawful access to an individual's area of privacy. The Fourth Amendment does not prohibit the seizure of evidence of criminal conduct found in these circumstances.

Id. at 8-9 (footnote omitted).

79. *Id.* at 5-6; see *supra* note 56 and accompanying text.

80. 455 U.S. at 6.

81. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 464, 468 (1833).

guarded against state action by the due process clause of the fourteenth amendment.⁸² The Supreme Court has held that the fourth amendment right to be free from unreasonable searches and seizures is protected against state encroachment by the due process clause.⁸³ The Court also has ordered the states to follow all the "ins and outs" of its fourth amendment decisions.⁸⁴ As a result, the Oklahoma Court of Criminal Appeals, as the court of last resort in Oklahoma criminal cases,⁸⁵ is bound by all United States Supreme Court decisions relating to the plain view exception to the warrant requirement. While it is debatable whether such specific federal guidelines make any less burdensome the state courts' task of deciding plain view exception cases, those guidelines provide a clear standard for judging the merits of state court decisions. Simply put, if an Oklahoma Court of Criminal Appeals decision conflicts with fourth amendment law as pronounced by the United States Supreme Court, that Oklahoma decision is wrong.

*Coolidge v. New Hampshire*⁸⁶ contains the Supreme Court's most detailed treatment of the plain view exception. The *Coolidge* opinion put forth three requirements for the proper application of the plain view exception: (1) the mere observation of evidence in plain view cannot justify a subsequent intrusion into a constitutionally protected area of privacy; instead, the intrusion must precede the plain view observation; (2) the discovery of the evidence must be inadvertent; and (3) it must be immediately apparent that the object seized is evidence of a crime.⁸⁷ In *Washington v. Chrisman*,⁸⁸ the Court recently softened the first of these requirements by holding that an intrusion occurs when the police gain the right to enter an area of constitutionally protected pri-

82. The Fourteenth Amendment denies the States the power to "deprive any person of life, liberty, or property, without due process of law." In resolving conflicting claims concerning the meaning of this spacious language, the Court had looked increasingly to the Bill of Rights for guidance; many of the rights guaranteed by the first eight Amendments to the Constitution have been held to be protected against state action by the Due Process Clause of the Fourteenth Amendment.

Duncan v. Louisiana, 391 U.S. 145, 147-48 (1968); *accord* *Twining v. New Jersey*, 211 U.S. 78, 99-100 (1908) ("[I]t is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law.").

83. *Wolf v. Colorado*, 338 U.S. 25 (1949).

84. *Coolidge v. New Hampshire*, 403 U.S. 443, 490 (1971) (Harlan, J., concurring) (discussing the ramifications of *Ker v. California*, 374 U.S. 23 (1963)).

85. "The appellate jurisdiction of the Supreme Court shall be coextensive with the State and shall extend to all cases at law and in equity; except that the Court of Criminal Appeals shall have exclusive appellate jurisdiction in criminal cases . . ." OKLA. CONST. art. VII, § 4.

86. 403 U.S. 443 (1971).

87. *Id.* at 466; *see supra* text accompanying notes 55-58.

88. 455 U.S. 1 (1982).

vacy rather than when the police physically enter the area.⁸⁹

The Oklahoma Court of Criminal Appeals seemingly espouses the doctrine of post-intrusion plain view enunciated in *Coolidge* and *Chrisman*. The Oklahoma court has frequently voiced its support of two of the three requirements set forth in those cases—the requirement that the discovery of the evidence in plain view be inadvertent⁹⁰ and the requirement that it be immediately apparent that the object seized is evidence of a crime.⁹¹ But the court has vacillated with regard to the requirement that any intrusion into a constitutionally protected area of privacy precede, rather than follow, the observation of evidence in plain view. A comparison of the court's holdings in the cases of *Clayton v. State*⁹² and *Blackburn v. State*⁹³ illustrates its indecision.

In *Clayton*, a police officer entered a public recreation hall because he smelled the odor of burning marijuana. The hall was open to the public,⁹⁴ so the police officer's entry was clearly not a search.⁹⁵ Inside

89. See *supra* text accompanying notes 76-79.

90. See *Tucker v. State*, 620 P.2d 1314, 1316-17 (Okla. Crim. App. 1980) ("To justify seizure of an object in plain view . . . the discovery of the evidence must be inadvertent."); *Blackburn v. State*, 575 P.2d 638, 644 (Okla. Crim. App. 1978) ("[I]f law enforcement officials know in advance what they are going to find, then they should get a search warrant."); *Abbott v. State*, 565 P.2d 691, 693 (Okla. Crim. App. 1977) ("The second requirement, an inadvertent discovery, also appears to have been satisfied. The record indicates that the officers had no prior knowledge of the existence or location of the [stolen automobile] eventually found on the defendant's property."); *Faulkner v. State*, 554 P.2d 29, 31 (Okla. Crim. App. 1976) (quoting *Coolidge v. New Hampshire*, 403 U.S. at 466) ("Additionally, the observation of the [stolen property] was an inadvertent extension of [the police officer's valid] presence which made it 'immediately apparent to the police that they [had] evidence before them.'"); *Morris v. State*, 507 P.2d 1327, 1329 (Okla. Crim. App. 1973) ("[I]n *Coolidge v. New Hampshire*, . . . the Supreme Court of the United States held that for the 'plain view' doctrine to apply, the discovery of evidence in plain view must be inadvertent and that the discovery must not be anticipated." (citation omitted)).

91. See *Jones v. State*, 632 P.2d 1249, 1250 (Okla. Crim. App. 1981) ("[I]t is equally true that the . . . container was in plain view. However, under the facts herein presented, we are of the opinion that there was no probable cause to believe that the content of the container was contraband. Consequently, its seizure and subsequent search was illegal."); *Abbott v. State*, 565 P.2d 691, 693 (Okla. Crim. App. 1977) ("The third requirement, that the incriminating nature of the object be immediately apparent, is supported by the evidence. The record reveals a sufficient factual basis which would give the officers reasonable cause to believe the [car] was stolen."); *Kinsey v. State*, 602 P.2d 240, 243 n.3 (Okla. Crim. App. 1979) ("[T]he previously quoted testimony indicates that the officers [seized] items they 'assumed' were stolen. To justify seizing an object in 'plain view' it must be immediately apparent that it is evidence of a crime." (citation omitted)); *Satterlee v. State*, 549 P.2d 104, 110 (Okla. Crim. App. 1976) ("Therefore, Officer McCullough, having personal knowledge of the robbery of Gates Pharmacy, had probable cause to believe the objects observed within his plain view were fruits of the robbery and, thus, the objects were reasonably and constitutionally subject to a warrantless plain view seizure."); *State v. Baxter*, 528 P.2d 347, 349 (Okla. Crim. App. 1974) ("We find this an unreasonable seizure based upon the officer's mere suspicion . . . that the bottle contained contraband . . .").

92. 555 P.2d 1310 (Okla. Crim. App. 1976).

93. 575 P.2d 638 (Okla. Crim. App. 1978).

94. 555 P.2d at 1311.

95. See *supra* note 21.

the hall, the officer encountered Clayton, who owned the hall, and asked her, "Who's got the grass?"⁹⁶ The public part of the hall was separated from a private kitchen area by a door constructed so the top half could be open while the bottom half was closed. The officer could look through the open top half and see into the kitchen, but the bottom half was closed to keep out the general public.⁹⁷ Peering into the kitchen, the officer saw a small plastic bag filled with marijuana and Clayton's purse lying on top of the cabinets. The officer opened the bottom half of the door, entered the kitchen, and seized the purse and marijuana.⁹⁸ He then returned to the public part of the hall and arrested Clayton, who was later convicted of possession of a controlled substance after the bag of marijuana was admitted as evidence at her trial.⁹⁹ Upon appeal, the Oklahoma Court of Criminal Appeals upheld the warrantless seizure of the bag of marijuana.¹⁰⁰ "This Court has held on numerous occasions that property which an officer has probable cause to believe is related to some crime may be seized *if it is observed by the officer from a position that he has a lawful right to be in.*"¹⁰¹ According to the *Clayton* court, the mere observation of evidence in plain view justifies a subsequent intrusion into a constitutionally protected area of privacy.

Two years after the *Clayton* decision, the Oklahoma Court of Criminal Appeals was asked to determine the legitimacy of a warrantless seizure of evidence under circumstances similar to those encountered in *Clayton*. In *Blackburn v. State*,¹⁰² a county sheriff standing in a neighboring yard observed a large plastic-wrapped bundle of marijuana lying in plain view in appellants' back yard.¹⁰³ As in *Clayton*, the lawfulness of the officer's vantage point was indisputable. Suspecting that the appellants were selling marijuana, the owner of the land from which the sheriff made his observations had alerted the sheriff and freely consented to the use of her land during the investigation.¹⁰⁴ When the sheriff saw the marijuana, he walked onto appellants' private property and seized it as evidence. Meanwhile, the

96. 555 P.2d at 1311.

97. *Id.* at 1312.

98. *Id.* at 1311-12.

99. *Id.* at 1311.

100. *Id.* at 1312.

101. *Id.* (emphasis added).

102. 575 P.2d 638 (Okla. Crim. App. 1978).

103. *Id.* at 640.

104. *Id.* The landowner, appellants' landlord, became suspicious when she noticed her tenants

sheriff's deputies knocked on appellants' door and told them they were under arrest. The seizure and arrests were made without a warrant.¹⁰⁵ Subsequently, the marijuana was admitted into evidence at the appellants' trial¹⁰⁶ and they were convicted of possession of marijuana with intent to sell.¹⁰⁷ As in *Clayton*, the evidence had been seized during a police intrusion motivated by the observation of marijuana from a lawful vantage point. The *Clayton* court had ruled that the plain view exception justifies the warrantless seizure of evidence under such circumstances.¹⁰⁸ But in *Blackburn* the court ignored its own *Clayton* holding and held that the marijuana had been seized as the result of an unlawful police intrusion and therefore was inadmissible as evidence.¹⁰⁹ Citing *Coolidge*, the court explained that "the fact that an object is in plain view is never by itself a justification for a warrantless seizure";¹¹⁰ the observation of evidence in plain view from a lawful vantage point does not justify a subsequent intrusion into a constitutionally protected area of privacy. The court seemingly overruled *Clayton*, *sub silentio*, by expressly rejecting the state's argument that since the sheriff "was where he had a legal right to be when he saw the marijuana . . . he was justified in seizing the marijuana as contraband in plain view."¹¹¹

The *Clayton* and *Blackburn* holdings are contradictory; they cannot coexist. *Blackburn* came after *Clayton*, and one might have assumed that *Blackburn* signaled the end of *Clayton*'s influence. But the cat is in danger of being swallowed by the canary, for the vitality of *Clayton* continues so unabated that one must presume it is *Blackburn*'s influence that has waned. In 1981, three years after *Blackburn* was decided, the Oklahoma Court of Criminal Appeals cited *Clayton* as support for the proposition that "[i]t is well settled that evidence observed within the plain view of an officer from a position that he has a lawful right to be in, is subject to search and seizure."¹¹² Even more recently,

had numerous visitors who only stayed for five or ten minutes. On one occasion she saw a box filled with "dark-colored dried leaves" in appellants' yard. *Id.*

105. *Id.*

106. *Id.* at 641.

107. *Id.* at 639.

108. *See supra* text accompanying note 101.

109. 575 P.2d at 643-44. The court also ruled that the discovery of the bundle of marijuana was not inadvertent. *Id.*

110. 575 P.2d at 643-44.

111. *Id.* at 643.

112. *Swann v. State*, 637 P.2d 888, 890 (Okla. Crim. App. 1981) (court held there was no unreasonable search or seizure when police officer poked his head through curtains of peep show booth in pornographic book store after hearing suspicious sounds coming from inside).

the Oklahoma Court of Criminal Appeals held that “[t]o justify a seizure of an object in plain view . . . the officer must have a prior justification for his presence and a lawful right to be there”¹¹³ The exact meaning of such a requirement is obscure¹¹⁴ until one notes the court’s reliance upon *Clayton* as the sole precedent for its pronouncement.¹¹⁵ Clearly, *Clayton* has survived *Blackburn*.¹¹⁶ As a result, the Oklahoma court’s position as to whether the mere observation of evidence in plain view justifies a subsequent police intrusion remains inconsistent.

IV. ANALYSIS

The Oklahoma Court of Criminal Appeals—in strict accordance with the United States Supreme Court’s decisions—has ruled that the plain view exception justifies a warrantless seizure only when the discovery of the evidence is inadvertent and it is immediately apparent that the object seized is evidence of a crime.¹¹⁷ Because the Oklahoma court’s contradictory decisions in *Clayton* and *Blackburn* make it unclear whether the mere observation of evidence in plain view justifies a subsequent warrantless intrusion upon a suspect’s privacy, the Oklahoma Court of Criminal Appeals must repudiate either *Clayton* or *Blackburn* if Oklahoma plain view law is to be made consistent and, consequently, predictable. Like all state courts, the Oklahoma Court of Criminal Appeals is bound by the plain view opinions handed down by the United States Supreme Court.¹¹⁸ The Oklahoma decision that conflicts with the pronouncements of the Supreme Court is an improper expression of plain view law. *Clayton* is that conflicting decision.

113. *Brown v. State*, 644 P.2d 566, 568 (Okla. Crim. App. 1982) (quoting *Tucker v. State*, 620 P.2d 1314, 1316-17 (Okla. Crim. App. 1980)) (court upheld constitutionality of seizure of gun and note observed by police during arrest of suspect in his home).

114. The confusion stems from the court’s use of the ambiguous phrase “right to be there.” Under *Clayton*, the police officer must merely have a right to be at whatever vantage point offers him a view of the evidence to be seized. *See supra* text accompanying note 101. Under *Blackburn*, the officer must also have the right to be in the immediate area occupied by the evidence to be seized. *See supra* text accompanying notes 109-11. Therefore, it is not clear from the quoted passage whether the court is citing the *Clayton* rule or the *Blackburn* rule, since it is unclear what the court means by “there.”

115. 644 P.2d at 568.

116. The continuing influence of *Clayton* is apparent in one Oklahoma commentator’s one-sentence formulation of the plain view exception: “Houses, vehicles or other property always may be searched without a warrant when an officer is observing or searching from a position that he has a *lawful right to be in*.” Turpen, *The Law of Warrantless Search and Seizure* (pt. 2), 51 OKLA. B.J. 1007, 1007 (1980) (emphasis in original).

117. *Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971); *see supra* notes 71-72.

118. *Ker v. California*, 374 U.S. 23 (1963); *see supra* notes 83-85 and accompanying text.

The *Clayton* court cited three cases as authority for its holding that the mere observation of evidence in plain view justifies a subsequent intrusion into a constitutionally protected area of privacy:¹¹⁹ *Harris v. United States*,¹²⁰ a United States Supreme Court decision; *Ferguson v. State*¹²¹ and *Turci v. State*,¹²² both Oklahoma Court of Criminal Appeals decisions. A careful reading of these three cases disproves their fitness as precedent for the *Clayton* holding for each is easily distinguished from *Clayton*.

In *Clayton*, a police officer intruded into a private kitchen in order to seize a bag of marijuana he had observed from a public area.¹²³ The intrusion *followed* the plain view observation. In contrast, the police officer in *Harris* intruded into the suspect's car in order to roll up the car windows and only then discovered the registration card lying on the doorsill.¹²⁴ The intrusion *preceded* the plain view observation. Clearly, the two cases are distinguished by their facts. However, the *Harris* opinion contains language which could be misconstrued to support the *Clayton* holding. In announcing its holding, the *Harris* Court said, "[O]bjects falling in the plain view of an officer *who has a right to be in the position to have that view* are subject to seizure and may be introduced into evidence."¹²⁵ The *Clayton* court announced its holding in similar language, "[P]roperty which an officer has probable cause to believe is related to some crime may be seized *if it is observed by the officer from a position that he has a lawful right to be in.*"¹²⁶

But the factual differences that distinguish *Harris* from *Clayton* make it clear that this similarity in language masks an underlying difference in judicial philosophies. When the *Harris* Court refers to "an officer who has a right to be in the position to have that view," it refers to a policeman who already has lawfully intruded into a suspect's car for the purpose of closing its windows against a falling rain. The plain view observation followed a lawful intrusion.¹²⁷ But when the *Clayton*

119. 555 P.2d at 1312.

120. 390 U.S. 234 (1968).

121. 520 P.2d 819 (Okla. Crim. App. 1974).

122. 482 P.2d 611 (Okla. Crim. App. 1971).

123. 555 P.2d at 1311-12.

124. 390 U.S. at 235-36.

125. *Id.* at 236 (emphasis added).

126. 555 P.2d at 1312 (emphasis added).

127. "*Harris* did not rely on the plain view doctrine to justify the warrantless intrusion into the automobile. The Court emphasized that the police officer had already lawfully entered the car when he saw incriminating evidence in plain view inside the car and seized it . . ." *Washington v. Chrisman*, 455 U.S. 1, 12 n.4 (1982) (White, J., dissenting).

court refers to an officer occupying "a position that he has a lawful right to be in," it refers to an officer about to unlatch a door and intrude into a private kitchen area for the sole purpose of seizing a bag of marijuana. The plain view observation preceded the intrusion. When the *Clayton* court relies upon *Harris*, it relies upon only the single sentence from that opinion that is quoted above and then construes the meaning of that single sentence without proper regard for the facts to which it originally applied. The *Clayton* court relies upon the language, rather than the law, of *Harris*.

Similarly, neither *Ferguson*¹²⁸ nor *Turci*¹²⁹ can withstand scrutiny as suitable precedent for the *Clayton* holding. Whereas *Harris* and *Clayton* are distinguishable upon their facts, both *Ferguson* and *Turci* are easily distinguished from *Clayton* upon matters of law. *Ferguson* and *Turci* involve applications of the doctrine of pre-intrusion plain view.¹³⁰ That doctrine dictates only that the mere observation of evidence in plain view does not constitute an intrusion upon the suspect's privacy.¹³¹ Application of the doctrine of pre-intrusion plain view to the facts of *Clayton* yields only the conclusion that there was no police intrusion when the officer observed the bag of marijuana lying on the kitchen cabinet. It does not yield the conclusion reached by the *Clayton* court that the mere observation of the marijuana permitted the officer to enter the private kitchen area in order to seize it as evidence. The doctrine of pre-intrusion plain view addresses the question of whether a police intrusion has occurred. Once the court determines that a police intrusion has occurred, the doctrine of pre-intrusion plain view can serve no further purpose. The intrusion in *Clayton* occurred when the officer opened the door and entered the private kitchen area. Pre-intrusion plain view law is therefore not applicable.

While the *Clayton* court erroneously relied upon *Harris*, *Ferguson*, and *Turci* as support for its holding, it ignored *Coolidge v. New Hamp-*

128. 520 P.2d 819 (Okla. Crim. App. 1974).

129. 482 P.2d 611 (Okla. Crim. App. 1971).

130. In both cases, a police officer standing alongside a vehicle he had stopped for a traffic violation observed conspicuously unconcealed incriminating evidence within the vehicle. Both courts held that the mere observation of evidence in plain view does not constitute an intrusion upon the suspect's privacy but may supply probable cause for such an intrusion under the vehicle exception to the warrant requirement, *Ferguson*, 520 P.2d at 819-20, or the search incident exception, *Turci*, 482 P.2d at 612-13. Neither court invoked the plain view exception.

131. *See supra* notes 21-27 and accompanying text. Explaining its holding, the *Clayton* court reasoned that evidence seized after being "observed by the officer from a position that he has a lawful right to be in . . . does not result from a search and is admissible in evidence." 555 P.2d at 1312.

shire,¹³² the leading United States Supreme Court post-intrusion plain view case.¹³³ Justice Bussey, the author of *Clayton* and a dissenter in *Blackburn*, later explained this disregard for *Coolidge*.

I believe the holding in *Blackburn* was based upon an incorrect interpretation of prior case law, particularly *Coolidge v. New Hampshire*. . . . Dicta in that opinion, supported by only four members of the court, was interpreted by the majority of this Court as purporting to limit the plain view exception to the securing of a search warrant to situations in which exigent circumstances existed independent of the plain view. However, I believe this is not the prevailing precedent nor the law in Oklahoma. The most recent controlling statement by the United States Supreme Court concerning the doctrine of plain view is found in *Harris v. United States*¹³⁴

Considering the complexity of the alignment of justices in the *Coolidge* decision,¹³⁵ Justice Bussey's curt dismissal of the plurality's opinion as something less than controlling authority is an oversimplification.

Assuming, arguendo, that Justice Bussey's assessment of the precedential weight due the *Coolidge* plurality opinion was justified when he made the above remarks, the esteem accorded *Coolidge* in *Blackburn* has since been vindicated by the United States Supreme Court's opinion in *Washington v. Chrisman*.¹³⁶ In that case, a clear majority of the Court reiterated the *Coolidge* plurality's dictate that the mere observation of evidence in plain view cannot justify a warrantless intrusion into a constitutionally protected area of privacy.¹³⁷ The *Coolidge* plurality told police officers under what circumstances they cannot lawfully intrude into a constitutionally protected area of privacy to make a warrantless seizure:

[P]lain view *alone* is never enough to justify the warrantless seizure of evidence. . . . Incontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. But even where the object is contraband, the Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless

132. 403 U.S. 443 (1971).

133. See *supra* note 45 and accompanying text.

134. *Phelps v. State*, 598 P.2d 254, 262 (Okla. Crim. App. 1979) (Bussey, J., concurring in part, dissenting in part).

135. See *supra* notes 46 & 62.

136. 455 U.S. 1 (1982).

137. See *supra* notes 64 & 78.

seizure.¹³⁸

The *Chrisman* majority, in contrast, told police officers when they have intruded into a constitutionally protected area of privacy and consequently may make valid warrantless seizures: "The 'plain view' exception to the Fourth Amendment warrant requirement permits a law enforcement officer to seize what clearly is incriminating evidence or contraband when it is discovered in a place where the officer has a right to be."¹³⁹ Therefore, the *Clayton* court contradicted both *Coolidge* and *Chrisman* when it held that the plain view exception permits a police officer to enter a private kitchen area to make a warrantless seizure of marijuana observed from a public area. Applying the *Coolidge* approach, the police officer's observation of the marijuana was not enough by itself to justify the warrantless entry into the kitchen. Applying the *Chrisman* approach, the marijuana was not discovered in a place where the officer had a right to be; therefore, his observation of the marijuana did not by itself give him the right to enter the kitchen.

In *Clayton*, the Oklahoma Court of Criminal Appeals was forced to distort the doctrine of post-intrusion plain view in order to justify the police officer's intrusion. The approach taken by the court seems to indicate that it assumed that the police officer's intrusion into the kitchen could be justified only under the plain view exception. But the possibilities of fourth amendment law are not so limited. One search or seizure may be justified by several different exceptions to the warrant requirement. The court should have realized that whether or not the officer's intrusion was justified under the plain view exception, it was probably justified under another exception—the hot pursuit exception.

Under the hot pursuit exception, a police officer may make a warrantless intrusion into a constitutionally protected area of privacy if two conditions are met: (1) the officer has probable cause to believe that evidence of a crime is contained within that area and (2) the intrusion is necessary to prevent the destruction of evidence or the risk of harm either to the officer or the general public.¹⁴⁰ In *Clayton*, the police of-

138. 403 U.S. at 468 (emphasis in original; citations omitted).

139. 455 U.S. at 5-6.

140. See *supra* note 19. The Oklahoma Court of Criminal Appeals has frequently applied the hot pursuit exception to justify a warrantless intrusion into a constitutionally protected area of privacy. *E.g.*, *Chaney v. State*, 612 P.2d 269, 277 (Okla. Crim. App. 1980) ("If the time required to secure a warrant could result in the loss of evidence, the escape of a suspect, or above all the death of a victim, then law enforcement officials may act without a warrant if probable cause exists."); *Johnson v. State*, 554 P.2d 51, 54 (Okla. Crim. App.) (court upheld warrantless search of suspect's car trunk because police believed it contained a kidnapping victim), *cert. denied*, 429 U.S. 943 (1976); see also *Sitsler v. State*, 603 P.2d 1142, 1143 (Okla. Crim. App. 1979) ("We . . . cannot

ficer had probable cause to believe that there was marijuana in the kitchen; he had the testimony of his own senses to that effect. It was also likely that Clayton would have destroyed or removed the marijuana if the officer had left the recreation hall to seek a warrant. Once the officer had asked Clayton, "Who's got the grass?"¹⁴¹ it is very likely that she would have availed herself of any opportunity to dispose of the marijuana before the officer could seize it. Therefore, the officer's intrusion into the kitchen to seize the bag of marijuana was probably justified under the hot pursuit exception to the warrant requirement. It is also instructive to note that the warrantless police intrusion in *Blackburn* was not justified under the hot pursuit exception. In *Blackburn*, the appellants had no knowledge or warning that the police suspected them of possessing and selling marijuana. The sheriff could have left his vantage point and sought a warrant without seriously risking destruction or removal of the evidence. The *Blackburn* court, in fact, took express notice of the inapplicability of the hot pursuit exception under such circumstances.¹⁴²

The applicability of the hot pursuit exception to the facts of *Clayton* coupled with its inapplicability to those of *Blackburn* suggests that the two contradictory plain view cases can be reconciled, though not as two plain view decisions. Rather *Clayton* should be recognized as a hot pursuit decision and *Blackburn* as a true plain view decision. By adopting *Clayton* as a hot pursuit case rather than a plain view case, the Oklahoma Court of Criminal Appeals would resolve the inconsistency it engendered through its contradictory pronouncements of plain view law in the two cases. The court should take the approach that the result reached in *Clayton* is correct and the bag of marijuana was lawfully seized without a warrant, but that the process of reasoning which led to that result was faulty. There is no need to overrule *Clayton*, only to repudiate it as an expression of Oklahoma plain view law. That repu-

conclude that a warrantless search was justified on the ground that it was impractical to obtain a warrant.").

141. 555 P.2d at 1311.

142. [The sheriff] passed up two opportunities to obtain a search warrant. He could have obtained one before he went to the defendants' residence; and failing that, he could have returned to town to obtain a search warrant after verifying the presence of contraband. When he went to the defendants' residence he was accompanied by three deputies. They could have stayed to watch the premises while he returned to town if the defendants had attempted to destroy the marijuana, or to flee, in that case there would have been exigent circumstances justifying an immediate entry onto the property.

575 P.2d at 643.

diation will bring consistency and predictability to the doctrine of post-intrusion plain view in Oklahoma.

V. CONCLUSION

According to the United States Supreme Court, the plain view exception to the fourth amendment warrant requirement permits a police officer to seize incriminating evidence when three requirements are met: (1) the evidence is discovered in a place where the officer already has a right to be; (2) it is immediately apparent that the object seized is evidence of a crime; and (3) the discovery of the evidence is inadvertent.¹⁴³ In Oklahoma, the second and third requirements must be met for a valid plain view seizure. But in *Clayton*, the Oklahoma Court of Criminal Appeals ruled that the plain view exception permits a police officer to intrude into a place where he has no right to be in order to seize evidence discovered in plain view.¹⁴⁴ The Oklahoma court continues to cite *Clayton* with approval;¹⁴⁵ it cannot be dismissed as an isolated case or a momentary aberration. In the interest of reconciling Oklahoma law with the law of the land as enunciated by the United States Supreme Court, the Oklahoma Court of Criminal Appeals should repudiate *Clayton* as an expression of Oklahoma plain view law.

Dale J. Gilsinger

143. See *supra* note 55 and accompanying text.

144. See *supra* text accompanying notes 94-101.

145. See *supra* notes 112-16 and accompanying text.