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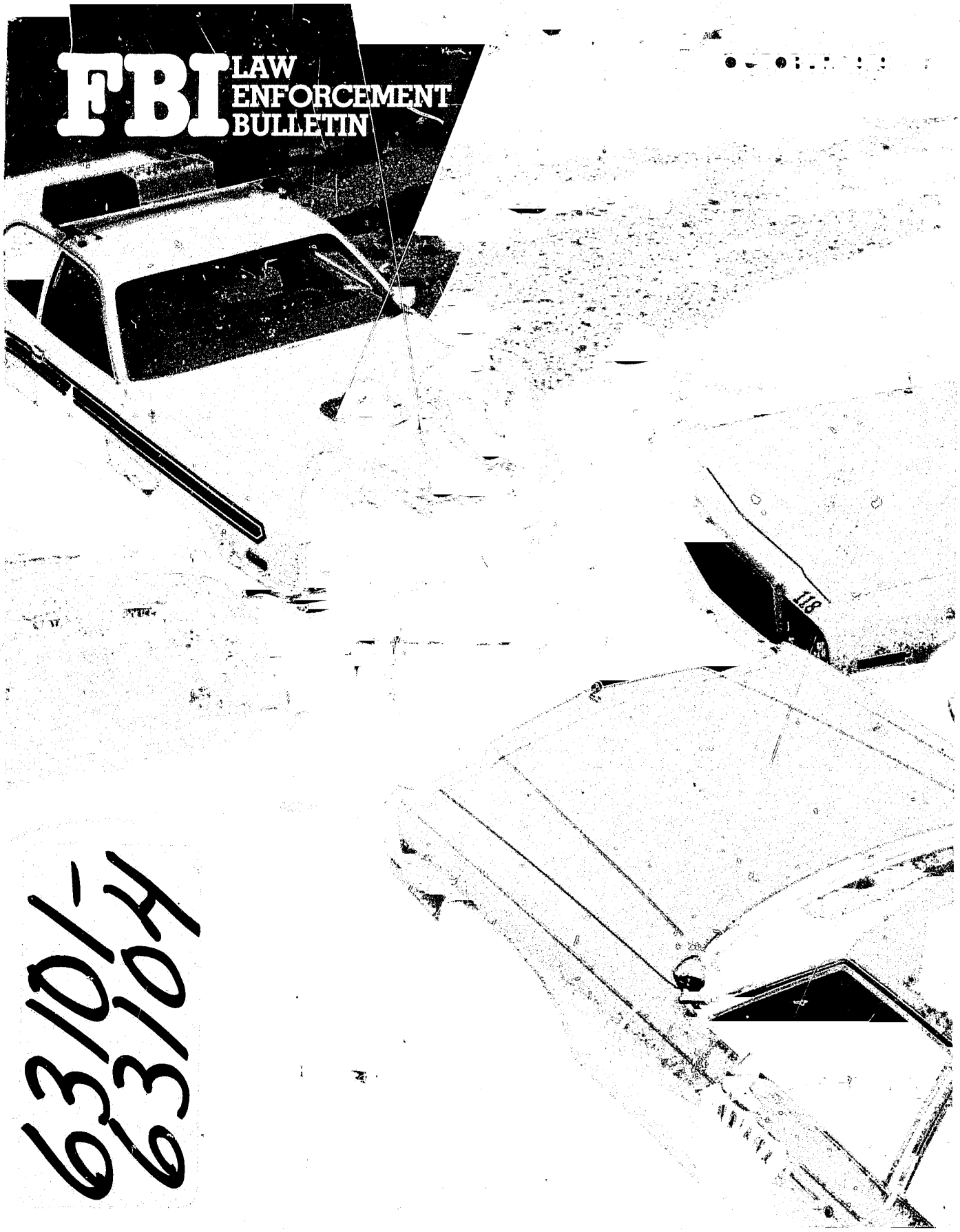

The Plain View Doctrine

(Conclusion)

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Law enforcement officers of other than Federal jurisdiction who are interested in any legal issue discussed in this article should consult their legal adviser. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.

Part I of this article discussed the development of the plain view doctrine in the 1971 Supreme Court case of *Coolidge* v. *New Hampshire*[30] and considered the first of the three elements of a valid plain view seizure, the requirement that the officer have a prior valid reason to be present within the premises or vehicle where the evidence is observed. The conclusion of the article will continue the analysis of the plain view doctrine, focusing on the two remaining requirements for a valid plain view seizure: (1) The discovery of the item must be "inadvertent"; and (2) the item to be seized must be "immediately apparent" as contraband or evidence of a crime.

Inadvertence

The second requirement for a valid plain view seizure is that the discovery of the item be inadvertent.[31] This was the element of the plain view doctrine found to be lacking in the facts of the *Coolidge* case, because the officers knew the location of the automobile for several days prior to the seizure, had ample opportunity to obtain a search warrant, and intended to seize the automobile when they entered on the suspect's property.[32] Justice Stewart explained the reason for the requirement that the discovery be inadvertent:

"The rationale of the [plain view] exception to the warrant requirement . . . is that a plain-view seizure will not turn an initially valid (and therefore limited) search into a 'general' one, while the inconvenience of procuring a warrant to cover an inadvertent discovery is great. But where the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it, the situation is altogether different. The requirement

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of a warrant to seize imposes no inconvenience whatever, or at least none which is constitutionally cognizable in a legal system that regards warrantless searches as '*per se* unreasonable' in the absence of 'exigent circumstances'." [33]

The "inadvertent discovery" requirement has been the most controversial aspect of the plain view doctrine since it was first articulated by Justice Stewart in *Coolidge.* In fact, this is the element of the plain view doctrine that prompted Justice Black and Justice White to dissent from that portion of Justice Stewart's opinion which dealt with the plain view doctrine.[34] Although legal scholars, and occasionally courts, continue to debate whether this portion of the Supreme Court's opinion in *Coolidge* is binding as precedent,[35] it appears that the overwhelming majority of decisions which have considered it have accepted "inadvertence" as a constitutionally required element of the plain view doctrine.[36] Therefore, for purposes of this article, it will be assumed that this element must be satisfied.

Given the requirement that a discovery must be "inadvertent," a further question remains: Just how "inadvertent" must the discovery be?

A few courts have interpreted inadvertent to mean "unexpected" or "unanticipated," and therefore, have refused to sanction plain view seizures where the officer had *some* expectation that such items would be found. A recent Federal district court decision, *In Re Motion for Return of Property,*[37] illustrates this approach.

In this case, postal inspectors had determined that certain delivery room employees of a large department store were engaged in a scheme whereby merchandise from the store was being mailed, without payment, to wives of the delivery room employees. Postal officials had specifically identified one box, containing name-brand cosmetics, which was mailed on a particular date to the wife of one of the employees. Additionally, they had been informed by another store employee that other packages had been mailed over a period of a year to the home of the same employee to whom the cosmetics were known to have been mailed, although the specific mailing dates and contents of these other packages were not known.

An assistant U.S. attorney, who was consulted in the course of the investigation, advised the postal officials that probable cause existed only for the seizure of the package of name-brand cosmetics. Accordingly, a search warrant was sought and obtained describing only the one package and its contents.

When the search warrant was executed at the employee's residence, a store security officer accompanied the postal authorities for the purpose of identifying any additional merchandise belonging to the store found in the home. The box described in the warrant was never found, but a number of other boxes, identified as containing merchandise from the store, were discovered and seized.

The court noted that the postal inspectors "knew" that other packages had been mailed to the employee's home during the past year, "believed" that items other than the items specified in the warrant would be found, and intended to seize such items. It also noted the presence of the store security officer was indicative of the fact that the authorities "anticipated" discovery of further store merchandise not named in the warrant.[38] The court felt the "inadvertence" element of plain view doctrine was not present, and therefore, ordered suppression of the items seized.[39]

The above case illustrates a "broad" interpretation of the inadvertence requirement, seemingly requiring the suppression of evidence seized where officers "suspected" or "expected" that items not named in the search warrant would be located, but did *not* have *probable cause to believe* the items would be found.

The majority of the cases have interpreted the inadvertence requirement more narrowly and have required the suppression of evidence seized in plain view only where, prior to the seizure, officers had probable cause to believe the items would be present, and therefore, could have obtained a search warrant specifically describing the items.[40]

A recent Federal court of appeals case, *United States* v. *Hare,*[41] illustrates the majority view. In this case, special agents of the Bureau of Alcohol, Tobacco and Firearms (ATF) had gathered evidence that Hare was involved in the illegal interstate transportation of substantial quantities of firearms. In the course of their investigation, the ATF agents had contacted agents of the Drug Enforcement Administration (DEA) and had determined

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the DEA agents were also investigating Hare for suspected narcotics violations. After extensive investigation, an ATF agent obtained a search warrant for Hare's residence, which authorized "any special agent of the Bureau of Alcohol, Tobacco and Firearms" to search Hare's home for an unknown quantity of firearms, ammunition, a sawed-off shotgun, and a machinegun, all possessed in violation of Federal criminal statutes.

The search warrant was executed by ATF agents, while three DEA agents guarded the doors to the residence. The ATF case agent testified that the DEA agents were there to provide additional manpower and to identify narcotics in the event that any were found in the course of the search.

In the living room, on a table in plain view, the agents found narcotics and narcotics paraphernalia which were immediately recognizable as such. The trial court held the seizure of the narcotics could not be justified under the plain view doctrine because the discovery of the narcotics was "expected" and the agents intended to seize any drugs found in plain view.[42]

On appeal, the court of appeals reversed the lower court and upheld the seizure under the plain view exception. The court of appeals interpreted *Coolidge* as requiring that warrantless plain view seizures be condemned only when a warrant could have been obtained, that is, when prior to the seizure the officers had probable cause to believe the evidence seized would be located in the premises. The court explained:

"If 'inadvertent' is interpreted as 'unexpected,' an absurd scenario would take place every time the police execute a search warrant on the premises of a person suspected of engaging in a variety of criminal activities, but when they have probable cause (and a warrant) to search for the fruits of only one crime. In such a case, whenever evidence of one of these other crimes turns up, even though it would have been impossible to obtain a warrant previously, someone must be sent to obtain a new warrant to authorize the seizure. . . . At the same time, the intrusion has already occurred in a fully legal, limited manner, so Fourth Amendment interests are not served by delay. The courts do try to avoid imposing significant limitations and burdens on the ability of the police to do their job when those burdens would serve no purpose. *We conclude that unless the police had the ability and opportunity to obtain a warrant prior to the seizure and failed to do so, the inadvertency requirement of the plain view doctrine has not been violated.*" [43] (Emphasis added).

The court concluded that no probable cause to believe narcotics would be found existed prior to the officers' entry; therefore, the seizure was inadvertent within the meaning of *Coolidge.*[44]

The view of the inadvertence requirement expressed in *Hare* reflects the approach of a growing majority of the cases which have considered this issue.[45] It appears to offer a workable rule that upholds the established fourth amendment principle that whenever practicable a search warrant must be obtained prior to a search or seizure, while not penalizing law enforcement officers for seizures of contraband or other incriminating items discovered in plain view in situations where the officers had insufficient facts prior to the seizure to apply for and obtain a search warrant.

Immediately Apparent

The third and final requirement for a valid plain view seizure is that the incriminating nature of the item to be seized be "immediately apparent" to the officer. As Justice Stewart explained in *Coolidge:*

"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; the 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges." [46]

Thus, it is clear that not all objects within the plain view of an officer who is lawfully present are subject to seizure—only if the item's incriminating nature is readily apparent may it be taken.

The requirement that an item be immediately apparent as contraband or evidence has been universally accepted as a necessary limitation on plain view seizures. However, the interpretation of the requirement and its application to real-life fact situations has created some division among the lower courts.[47]

The controversy has centered around the degree of certainty with which the items in plain view must be apparent as evidence. Put another way, the question is: Is a mere *suspicion* that the item is contraband or evidence enough to justify its seizure or is *probable cause,* or even a higher standard, such as *virtual certainty,* required? Neither *Coolidge* nor subsequent Supreme Court cases shed any light on this issue.

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A few decisions have appeared to allow plain view seizures of items on mere suspicion, or at least a lesser standard than probable cause.[48] Going to the other extreme, at least one Federal case has indicated that although "absolute certainty" is not required, the officer must have "*more* than probable cause to believe" that the item is contraband or evidence of a crime to justify its seizure.[49] However, the clear majority of cases which have considered this issue have concluded that "probable cause" is the appropriate standard of certainty to justify a warrantless plain view seizure.[50]

A Federal court of appeals case, *United States* v. *Truitt,*[51] mentioned earlier in this article, illustrates the majority view. In *Truitt,* officers had obtained a search warrant for a fishing tackle and gun shop in Louisville, Ky. The warrant described various gambling records as the items to be seized.

During the course of the search, and before the gambling records were located, one of the officers discovered a sawed-off shotgun lying on top of two boxes which were underneath a counter. A repair tag with the defendant's name on it was attached to the weapon. The gun was seized and later offered as evidence in a prosecution of the defendant for unlawful possession of an unregistered sawed-off shotgun, a violation of Federal firearms statutes.

The defendant argued that since a sawed-off shotgun was not *per se* contraband, because it may be lawfully possessed if it is validly registered, it should not have been seized. The court of appeals, in affirming the trial court's ruling, held that the weapon was seized properly under the plain view doctrine. The court noted that the question was "not primarily whether the object is contraband, but whether its discovery under the circumstances would warrant a police officer of reasonable caution in believing that an offense has been or is being committed and that the object is evidence incriminating the accused. . . . The question is one of probability. . . ." [52] The court went on to conclude that in this case probable cause was present to believe the item was incriminating, and therefore, the seizure and admission of the weapon as evidence was proper.[53]

A second closely related, but separate, question is also emerging with regard to the "immediately apparent" requirement. The question is: Must the incriminating nature of the item be immediately apparent *at first glance,* or is a closer, more careful examination of the item permissible in order to determine whether it is contraband or evidence? Several courts have taken the position that if there is not probable cause to believe the item is incriminating at first glance, then a more careful examination of the item may constitute a further search or seizure which is not permissible under the plain view doctrine.[54] Copying down the serial number of a weapon or a television set, in the absence of probable cause to believe the item was stolen or otherwise incriminating, has been condemned in several cases, with the result that a later seizure of the item pursuant to a search warrant also has been invalidated.[55]

On the other hand, some courts have taken the position that if an officer's reasonable suspicion has been aroused concerning an item, he may then examine it more closely and if its incriminating nature then becomes apparent, at least without leaving the premises, then the "immediately apparent" requirement is sufficiently satisfied.[56] There does not seem to be any clear majority view on this issue, and officers would be well-advised to ascertain the view their State and local courts have taken with regard to such limited examinations.

Summary

The fourth amendment to the Constitution prohibits "unreasonable" searchs and seizures. The Supreme Court has repeatedly interpreted the fourth amendment as prohibiting warrantless searchs and seizures—subject only to a few specifically established and carefully delineated exceptions to the warrant requirement. One such exception is the plain view doctrine.

Simply put, the doctrine permits the warrantless seizure of items within the plain view of an officer if three conditions or limitations are satisified.

1. The officer must be present within the premises or other area entitled to fourth amendment protection pursuant to a search or arrest warrant or some other traditionally recognized exception to the warrant requirement.

2. The officer must come across the item inadvertently. If the officer has "probable cause" to believe the item will be located within the premises prior to the entry, and hence, could have obtained a search warrant specifically describing it, the discovery will not be considered inadvertent. Most courts have concluded that a *suspicion* or *expectation* that an item might be present which does not rise to the level of probable cause will not render the plain view seizure invalid.

3. The item seized must be "immediately apparent" as contraband or evidence of a crime. The standard adopted by the majority of the courts has been "probable cause" to believe that the item is contraband or otherwise incriminating. Although some courts have allowed a closer examination of the item by the officer in order to ascertain whether it is contraband or evidence, several courts have held that the item must be apparent at first glance as evidence or contraband and have considered closer examinations to be impermissible searches or seizures.

The plain view doctrine is a relatively recent exception to the warrant requirement. Further refinement by the courts will be helpful in resolving the differing interpretations of certain aspects of the doctrine. **FBI**

Footnotes

[30] 403 U.S. 443 (1971).
[31] *Id.* at 469
[32] *Id.* at 472.
[33] *Id.* at 469-71.
[34] *Id.* at 506 (Concurring and dissenting Opinion of J. Black) and at 516 (Concurring and Dissenting Opinion of J. White).
[35] Comment, *"Plain View"—Anything But Plain: Coolidge Divides the Lower Courts,* 7 Loyola of L.A. L. Rev. 489, 508 (hereinafter cited as Comment: *Plain View*); Moylan, *The Plain View Doctrine: Unexpected Child of the Great "Search Incident" Geography Battle,* 26 Mercer L. Rev. 1047, 1048-49 (hereinafter cited at Moylan).
[36] Comment: *Plain View, supra* note 35; Moylan, *supra* note 35 at 1082.
[37] 24 Crim. L. Rep. 2418, —— F. Supp. —— (S.D.N.Y. 1/3/79).
[38] *Id.*
[39] *Id.* at 2419.
[40] Comment, *Plain View, supra* note 35; Moylan, *supra* note 35: C. WHITEBREAD, CONSTITUTIONAL CRIMINAL PROCEDURE, sec. 6.7, at 95-98 (1978). *See, e.g., United States* v. *Bolts,* 558 F. 2d 316 (5th Cir. 1977), *cert. denied,* 434 U.S. 930 (Inadvertent does not mean a foreseeable possibility, if discovery was "unplanned" and officer did not intend to seize it before his entry, seizure was "inadvertent"). *Mapp* v. *Warden,* 531 F. 2d 1167 (2d Cir. 1976), *cert. denied,* 429 U.S. 982 (Seizure was inadvertent even though officers knew of *existence* of item prior to seizure, because the *location* of the item was unknown prior to entry and officers did *not intend to seize* the item at the time of their entry.)
[41] 589 F. 2d 1291 (6th Cir. 1979).
[42] *Id.* at 1293.
[43] *Id.* at 1295.
[44] *Id.* at 1296.
[45] Authorities cited *supra* note 40, and in *Hare, supra* note 41.
[46] *Supra* note 30, at 466.
[47] Comment, *Plain View, supra* note 35, at 502-507; Moylan, *supra* note 35, at 1084.
[48] *State* v. *Hoffman,* 190 S.E. 2d 842 (N.C. 1972) (While lawfully in house, officer lawfully seized rifle as a "suspicious object"); *State* v. *Anderson,* 489 P. 2d 722 (Ariz. Ct. App. 1971) (Officer lawfully present in residence seized seeds he believed to be contraband); *United States* v. *Hill,* 447 F. 2d 817 (7th Cir. 1971) (Officers seized keys on ground near suspect, opened garage nearby and seized stolen auto parts, based on "suspicion").
[49] *United States* v. *Smollar,* 357 F. Supp. 628 (S.D.N.Y. 1972).
[50] Comment, *Plain View, supra* note 35, at 505 and n. 121; Moylan, *supra* note 35, at 1084 states, "The broad and evolving consensus, however, is that the standard of certainty must be probable cause." *See, e.g., Shipman* v. *State,* 282 So. 2d 700 (Ala. 1973); *People* v. *La Rocco,* 496 P. 2d 314 (Colo. 1972); *United States* v. *Clark,* 531 F. 2d 928 (8th Cir. 1976); *State* v. *Elkins,* 422 P. 2d 250 (Ore. 1966).
[51] 521 F. 2d 1174 (6th Cir. 1975).
[52] *Id.* at 1177.
[53] *Id.* at 1178.
[54] *United States* v. *Sokolow,* 450 F. 2d 324 (5th Cir. 1971); *Stanley* v. *Georgia,* 394 U.S. 557, 571-72 (1969) (Concurring opinion by J. Stewart); *United States* v. *Clark,* 531 F. 2d 928 (8th Cir. 1976); *United States* v. *Scios,* 590 F. 2d 956 (D.C. Cir. 1978); *United States* v. *Gray,* 484 F. 2d 352 (6th Cir. 1973), *cert. denied,* 414 U.S. 1158 (1974); *State* v. *Williams,* 377 N.E. 2d 1013 (Ohio 1978); *United States* v. *Robinson,* 535 F. 2d 881 (5th Cir. 1976).
[55] *United States* v. *Clark, supra* note 54; *United States* v. *Gray, supra* note 54; *United States* v. *Sokolow, supra* note 54.
[56] *United States* v. *Schire,* 586 F. 2d 15 (7th Cir. 1978) (Further investigation on premises while executing a search warrant led to information that automobile was probably stolen. The court said, "We do not interpret the 'immediately apparent' requirement to connote apparent at first glance, but rather, apparent without other information than that which the officers properly possessed before their search was over"); also see the dissenting opinion of Judge MacKinnon in *United States* v. *Scios, supra* note 54, at 975-78, wherein he argues that the plain view doctrine allows an officer to examine more closely "suspicious items" to determine if his "suspicion" is justified; *United States* v. *Griffin,* 530 F. 2d 739 (7th Cir. 1976) (Officers investigating report of stolen mailbag were justified in picking up and examining addresses on unopened letters seen on floor and table in apartment.)

END