C. Probable Cause and Warrants

Silas J. Wasserstrom and Louis Michael Seidman, The Fourth Amendment as Constitutional Theory, 77 Geo. L.J. 19, 23-25 (1988). Do you agree? Does Hicks represent a strong argument for less focus on probable cause and warrants and more focus on reasonableness as the touchstone of Fourth Amendment interpretation? Or is there more to the majority’s approach?

4. Consider the relationship between Hicks and Mincey v. Arizona, page 463 supra. In Mincey, the police conducted “an exhaustive and intrusive search” of the defendant’s apartment in the wake of a shooting; the police did not obtain a warrant for the search. The Court held that the search lasted longer than exigent circumstances would justify. In Hicks too, the police entered the defendant’s apartment based on probable cause and exigent circumstances—and as in Mincey, the Court held that the police exceeded their legal authority once inside. Both exigent circumstances doctrine in Mincey and plain view doctrine in Hicks serve to limit police officers’ ability to conduct wide-ranging searches of private dwellings in the absence of a warrant.

That sounds sensible. But plain view doctrine does not, by its terms, differ for warrant-based and warrantless searches—if the officers had been in Hicks’ apartment pursuant to a warrant to search for weapons, the plain view issue should be analyzed precisely the same as in the actual case. Is that sensible?

5. Justice O’Connor suggests that the Hicks majority is fixated on establishing a bright-line test for plain view doctrine. Does the majority achieve this goal? How far does the concept of a “plain view search” go? Would the police in Hicks have been permitted to search the contents of a suitcase if they had probable cause to believe the suitcase contained drugs?

6. Notice that when Hicks was decided, at least some of the Justices were of the view that there were three requirements for a plain view search or seizure: (1) that the police must lawfully be in a position from which they can view particular items and gain physical custody over them; (2) that it must be “immediately apparent” to the police that the items they observe are subject to seizure; and (3) that these items are discovered “inadvertently”—that the police weren’t looking for what they stumbled upon. Hicks elaborated on the second of these requirements. The next case focused on whether the third “requirement” is an aspect of plain view doctrine at all.

HORTON v. CALIFORNIA

Certiorari to the Court of Appeal of California, Sixth Appellate District
496 U.S. 128 (1990)

Justice Stevens delivered the opinion of the Court.

In this case we revisit . . . [the question whether] the warrantless seizure of evidence of crime in plain view is prohibited by the Fourth Amendment if the discovery of the evidence was not inadvertent. We conclude that even though inadvertence is a characteristic of most legitimate “plain-view” seizures, it is not a necessary condition.

Petitioner was convicted of the armed robbery of Erwin Wallaker, the treasurer of the San Jose Coin Club. When Wallaker returned to his home after the Club's
annual show, he entered his garage and was accosted by two masked men, one armed with a machine gun and the other with an electrical shocking device, sometimes referred to as a "stun gun." The two men shocked Wallaker, bound and handcuffed him, and robbed him of jewelry and cash. During the encounter sufficient conversation took place to enable Wallaker subsequently to identify petitioner's distinctive voice. His identification was partially corroborated by a witness who saw the robbers leaving the scene, and by evidence that petitioner had attended the coin shows.

Sergeant LaRault ... investigated the crime and determined that there was probable cause to search petitioner's home for the proceeds of the robbery and for the weapons used by the robbers. His affidavit for a search warrant referred to police reports that described the weapons as well as the proceeds, but the warrant issued by the Magistrate only authorized a search for the proceeds, including three specifically described rings.

Pursuant to the warrant, LaRault searched petitioner's residence, but he did not find the stolen property. During the course of the search, however, he discovered the weapons in plain view and seized them. Specifically, he seized an Uzi machine gun, a .38 caliber revolver, two stun guns, a handcuff key, a San Jose Coin Club advertising brochure, and a few items of clothing identified by the victim. LaRault testified that while he was searching for the rings, he also was interested in finding other evidence connecting petitioner to the robbery. Thus, the seized evidence was not discovered "inadvertently."

The trial court refused to suppress the evidence found in petitioner's home and, after a jury trial, petitioner was found guilty and sentenced to prison. The California Court of Appeal affirmed, rejecting petitioner's argument that ... suppression of the seized evidence that had not been listed in the warrant was not inadvertent. ...

... The "plain view" doctrine is often considered an exception to the general rule that warrantless searches are presumptively unreasonable, but this characterization overlooks the important difference between searches and seizures. If an article is already in plain view, neither its observation nor its seizure would involve any invasion of privacy. A seizure of the article, however, would obviously invade the owner's possessory interest. If "plain view" justifies an exception from an otherwise applicable warrant requirement, therefore, it must be an exception that is addressed to the concerns that are implicated by seizures rather than by searches.

The criteria that generally guide "plain view" seizures were set forth in Coolidge v. New Hampshire, 403 U.S. 443 (1971). The Court held that [the seizure of] two automobiles parked in plain view on the defendant's driveway in the course of arresting the defendant, violated the Fourth Amendment. Accordingly, particles of gunpowder that had been subsequently found in vacuum sweepings from one of the cars could not be introduced in evidence against the defendant. The State endeavored to justify the seizure of the automobiles, and their subsequent search at the police station, on four different grounds, including the "plainview" doctrine. The scope of that doctrine as it had developed in earlier cases was fairly summarized in ... Justice Stewart's opinion. ... Justice Stewart described the two limitations on the doctrine that he found implicit in its rationale: First, "that plain view alone is never enough to justify the warrantless seizure of evidence," id., at 468; and second, "that the discovery of evidence in plain view must be inadvertent." Id., at 469.
Justice Stewart’s analysis of the “plain view” doctrine did not command a majority.

It is, of course, an essential predicate to any valid warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed. There are, moreover, two additional conditions that must be satisfied to justify [a] warrantless seizure. First, not only must the item be in plain view, its incriminating character must also be “immediately apparent.” Id., at 466; see also Arizona v. Hicks, 480 U.S., at 326-327. Thus, in Coolidge, the cars were obviously in plain view, but their probative value remained uncertain until after the interiors were swept and examined microscopically. Second, not only must the officer be lawfully located in a place from which the object can be plainly seen, but he or she must also have a lawful right of access to the object itself. . . . In Coolidge . . . the seizure of the cars was accomplished by means of a warrantless trespass on the defendant’s property . . . [W]e are satisfied that the absence of inadvertence was not essential to the Court’s rejection of the State’s “plain-view” argument in Coolidge.

Justice Stewart concluded that the inadvertence requirement was necessary to avoid a violation of the express constitutional requirement that a valid warrant must particularly describe the things to be seized. He explained:

“The rationale of the exception to the warrant requirement, as just stated, 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 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.’

“If the initial intrusion is bottomed upon a warrant that fails to mention a particular object, though the police know its location and intend to seize it, then there is a violation of the express constitutional requirement of ‘Warrants . . . particularly describing . . . [the] things to be seized.’” 403 U.S., at 469-471.

We find two flaws in this reasoning. First, evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer. The fact that an officer is interested in an item of evidence and fully expects to find it in the course of a search should not invalidate its seizure if the search is confined in area and duration by the terms of a warrant or a valid exception to the warrant requirement. If the officer has knowledge approaching certainty that the item will be found, we see no reason why he or she would deliberately omit a particular description of the item to be seized from the application for a search warrant. Specification of the additional item could only permit the officer to expand the scope of the search. On the other hand, if he or she has a valid warrant to search for one item and merely

9. The portion of Justice Stewart’s opinion in Coolidge that discussed plain view was joined by Justices Douglas, Brennan, and Marshall. Justice Harlan was the fifth vote in Coolidge; his opinion did not mention plain view.—Eds.
a suspicion concerning the second, whether or not it amounts to probable cause, we fail to see why that suspicion should immunize the second item from seizure if it is found during a lawful search for the first. The hypothetical case put by Justice White in his concurring and dissenting opinion in Coolidge is instructive:

"Let us suppose officers secure a warrant to search a house for a rifle. While staying well within the range of a rifle search, they discover two photographs of the murder victim, both in plain sight in the bedroom. Assume also that the discovery of the one photograph was inadvertent but finding the other was anticipated. The Court would permit the seizure of only one of the photographs. But in terms of the 'minor' peril to Fourth Amendment values there is surely no difference between these two photographs: the interference with possession is the same in each case and the officers' appraisal of the photograph they expected to see is no less reliable than their judgment about the other. And in both situations the actual inconvenience and danger to evidence remain identical if the officers must depart and secure a warrant." Id., at 516.

Second, the suggestion that the inadvertence requirement is necessary to prevent the police from conducting general searches, or from converting specific warrants into general warrants, is not persuasive because that interest is already served by the requirements that no warrant issue unless it "particularly describ[es] the place to be searched and the persons or things to be seized," see Maryland v. Garrison, 480 U.S. 79, 84 (1987), and that a warrantless search be circumscribed by the exigencies which justify its initiation. See, e.g., Mincey v. Arizona, 437 U.S. 385, 393 (1978). Scrupulous adherence to these requirements serves the interests in limiting the area and duration of the search that the inadvertence requirement inadequately protects. Once those commands have been satisfied and the officer has a lawful right of access, however, no additional Fourth Amendment interest is furthered by requiring that the discovery of evidence be inadvertent.

In this case, the scope of the search was not enlarged in the slightest by the omission of any reference to the weapons in the warrant. Indeed, if the three rings and other items named in the warrant had been found at the outset — or petitioner had them in his possession and had responded to the warrant by producing them immediately — no search for weapons could have taken place. Again, Justice White's concurring and dissenting opinion in Coolidge is instructive:

"Police with a warrant for a rifle may search only places where rifles might be and must terminate the search once the rifle is found; the inadvertence rule will in no way reduce the number of places into which they may lawfully look." 403 U.S., at 517.

[The items seized from petitioner's home were discovered during a lawful search authorized by a valid warrant. When they were discovered, it was immediately apparent to the officer that they constituted incriminating evidence. He had probable cause, not only to obtain a warrant to search for the stolen property, but also to believe that the weapons and handguns had been used in the crime he was investigating. The search was authorized by the warrant; the seizure was authorized by the "plain view" doctrine. The judgment is affirmed.

[The dissenting opinion of Justice Brennan, joined by Justice Marshall, is omitted.]