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THE “PLAIN FEEL” EXCEPTION: IS THE STANDARD SUFFICIENTLY PLAIN?

STEVEN T. ATNEOSEN & BEVERLY J. WOLFE†

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I. INTRODUCTION

In *Minnesota v. Dickerson*, the United States Supreme Court recognized a "plain feel" exception to the Fourth Amendment's warrant requirement for the seizure of evidence. This newly adopted exception allows an officer to establish probable cause for nonweapon items, such as narcotics, based upon the officer's sense of touch during a *Terry* search, provided that the officer does not exceed the legitimate scope of that *Terry* search. Prior to *Dickerson*, federal and state courts had been divided on the validity of this exception. Like *Dickerson*, most plain feel cases involve the discovery of narcotics on a suspect during a *Terry* search for weapons. The plain feel exception promises to become an important tool against the pervasive and ever increasing problem of drug trafficking.

The principle of the plain feel exception is significant for law enforcement. With its decision in *Dickerson*, the Court conferred on an officer's sense of touch the indicia of reliability that had previously been limited to the senses of sight, smell, and hearing. This new reliability thus allows evidence to be admitted at trial that previously would have been excluded. The Supreme Court's analysis in recognizing the plain feel doctrine is well supported by Fourth Amendment case law; the application of the doctrine, however, is less so. Unfortunately, the Supreme Court failed to articulate a standard as to how the doctrine should be administered, leaving both law enforcement and the legal community uncertain of its limits.

This Article explores the impact that the plain feel doctrine will have on law enforcement and the preservation of individual liberties. Part II examines the evolution of Fourth Amendment requirements for both the weapon pat search and the plain view exception to the warrant requirement for the seizure of evidence. Part III reviews the facts and history of the *Dickerson* case. Part IV explores the problems inherent in the Court's cryptic definition of an "immediately apparent" determination of probable cause which is a prerequisite to plain feel seizures. This Article demonstrates that the absence of either a working example or an accompanying bright line rule will not only hamper law

1. 113 S. Ct. 2130 (1993).
2. See infra note 126.
3. See cases cited infra note 137.
enforcement, but also threatens to erode our Fourth Amendment rights against unreasonable searches and seizures.

II. WARRANTLESS SEARCHES AND SEIZURES

A. The Fourth Amendment

Limitations upon the government’s ability to search and seize are derived from the Fourth Amendment. The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and 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.

Made applicable to each state by the Fourteenth Amendment, the Fourth Amendment’s protection against governmental intrusion is afforded not only to places, but also to a person’s reasonable expectation of privacy. 

What seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. It is this expectation, balanced against governmental interests, which the court


6. A seizure of a person occurs when a police officer “by means of physical force or show of authority, . . . in some way restrain[s] the liberty of [the] citizen.” Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968). See also California v. Hodari, 111 S. Ct. 1547, 1548 (1991).

For Fourth Amendment purposes, “[a] seizure of property occurs when there is some meaningful interference with an individual’s possessory interests in that property.” Jacobsen, 466 U.S. at 136-37 (Brennan, J., dissenting).

7. U.S. Const. amend. IV.

8. See Mapp v. Ohio, 367 U.S. 643, 660 (1961) (stating that the right to privacy is a constitutional right that is “enforceable against the States”).

9. United States v. Jacobsen, 466 U.S. 109, 113 (1984). The protection of the Fourth Amendment applies “only to governmental action; it is wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.” Id. at 113 (quoting Walter v. United States, 447 U.S. 649, 662 (1980) (Blackmun, J., dissenting)).


11. Id.
must weigh when considering the totality of the circumstances surrounding the reasonableness of a search.\textsuperscript{12}

Searches conducted without prior approval of a judge are \textit{per se} unreasonable under the Fourth Amendment, subject only to a few specifically established and clearly delineated exceptions.\textsuperscript{13} One such exception to the warrant requirement is the \textit{Terry} stop and search.

The Supreme Court held in \textit{Terry v. Ohio}\textsuperscript{14} that a police officer may forcibly stop and briefly detain an individual for investigatory purposes where the officer “observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity is afoot.”\textsuperscript{15} This standard requires that the officer be able to articulate “something more than an ‘inchoate and unplicated suspicion or hunch.’”\textsuperscript{16} Rather, the officer must have a “reasonable suspicion based on objective facts” that the individual is involved in criminal activity.\textsuperscript{17} \textit{Terry} not only allows the officer a brief detention, but also allows a patdown of the suspect’s outer clothing.\textsuperscript{18}

The \textit{Terry} search, however, must be limited to the discovery of weapons which might be used to harm the officer or others nearby.\textsuperscript{19} Under \textit{Terry}, a search beyond that required to determine whether the suspect is armed is unreasonable and the ev-

\begin{itemize}
  \item \textsuperscript{14} 392 U.S. 1 (1968).
  \item \textsuperscript{15} \textit{Id.} at 30.
  \item \textsuperscript{16} United States v. Sokolow, 490 U.S. 1, 2 (1989) (quoting \textit{Terry} v. Ohio, 392 U.S. 1, 27 (1968).
  \item \textsuperscript{17} Brown v. Texas, 443 U.S. 47, 51 (1979); \textit{Sokolow}, 490 U.S. at 2.
  \item \textsuperscript{18} \textit{Terry}, 392 U.S. at 24. In \textit{Terry}, the Supreme Court balanced the governmental interest involved against the degree of intrusion upon the individual’s right to be left alone, concluding that the interests of both effective crime prevention and detection and police safety outweighed the limited intrusion on an individual’s personal security resulting from a stop and frisk. \textit{Id.} at 20-27. The Court, therefore, held that under certain circumstances the Fourth Amendment permits an officer to stop and detain a person for investigatory purposes and to subject the person to a limited search for weapons, even though the officer did not have probable cause for an arrest. \textit{Id.} at 30; \textit{see also} \textit{Sokolow}, 490 U.S. at 2.
  \item \textsuperscript{19} \textit{Terry}, 392 U.S. at 30.
\end{itemize}
dence must be excluded, absent another exception to the warrant requirement.

Except for the *Terry* exception which permits limited searches and seizures upon the showing of mere reasonable suspicion, probable cause is the threshold requirement for both warrant and warrantless searches and seizures. An officer’s determination of probable cause must be viewed not upon any one factor, but upon the totality of the circumstances surrounding the intrusion.\(^{20}\)

> [P]robable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer would “warrant a man of reasonable caution in the belief,” . . . that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. A “practical, nontechnical” probability that incriminating evidence is involved is all that is required.\(^{21}\)

In the absence of a warrant, probable cause must be accompanied by exigent circumstances to allow an officer to conduct a search or to seize an object.

Probable cause, in and of itself, is never sufficient to overcome the presumption that a warrantless search and seizure is unreasonable. The Court has been predisposed to strictly adhere to the mandate of the Fourth Amendment and all warrantless searches and seizures must fall under one of the few exceptions to the warrant requirement.\(^{22}\) An exigent circumstance\(^{23}\) must generally be present to justify an exception.\(^{24}\) Generally, a warrant exception occurs when an exigent circumstance makes obtaining a warrant either unreasonable or impractical. One such warrant exception has become known as the “plain view” doctrine.\(^{25}\)

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23. *See Katz*, 389 U.S. at 357.
B. The Plain View Doctrine

1. Development of the Plain View Doctrine

The plain view doctrine was first enunciated by the Supreme Court in 1971 in *Coolidge v. New Hampshire*. This doctrine allows a law enforcement officer to make a warrantless seizure if the officer is lawfully present to view the object, the nature of the object is "immediately apparent," and the officer has a "lawful right to the object itself." Provided that the officer's access to the object has some prior justification under the Fourth Amendment, the officer does not need a warrant to seize the evidence. Once the police have obtained firsthand knowledge of the object, a warrant requirement would be a needless inconvenience that may place the police and public in danger.

The plain view doctrine is based upon the assumption that the officer has previously obtained probable cause for the search; it may not be used to justify broad, exploratory searches. Without probable cause, the search will be unreasonable under the Fourth Amendment. Underscoring the significance of probable cause, the Supreme Court noted in *Arizona v. Hicks* that the Constitution was designed to protect the privacy of every citizen, even though at times it may also protect those with criminal tendencies. Privacy rights, however, are not absolute; they only bar seizures when an officer conducts a seizure outside of the limits of the plain view doctrine.

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26. 403 U.S. 443, 468-70 (1971). The Court supported its recognition of this exception by noting that when police officers inadvertently came across a piece of evidence while conducting an otherwise lawful search, "it would often be a needless inconvenience, and sometimes dangerous—to the evidence and to the police themselves—to require them to ignore it" until they had obtained a warrant. Id. at 467-68.

Under *Coolidge*, items were considered lawfully seized if the officer was lawfully in a position to view the object, the discovery of the object was inadvertent, and the nature of the object was immediately apparent. The plain view doctrine was subsequently modified by the Court in *Horton v. California*, 496 U.S. 128 (1990), where the Court disposed of the inadvertence requirement.


29. Id. at 739.

30. As the Court stated in *Coolidge*, "[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." *Coolidge*, 403 U.S. at 466; see also *Smith v. Ohio*, 494 U.S. 541, 542 (1990).


32. Id.
2. Elements of the Plain View Doctrine

a. Lawful Vantage Point

The first element of the plain view doctrine requires that the officer observe the object from a lawful vantage point. The scope of this element is demonstrated in *Michigan v. Long*, where the plain view doctrine was used to permit the seizure of a nonweapon item pursuant to a *Terry* search of an automobile. In *Long*, the officers approached the defendant after his car swerved into a ditch. Suspecting that Long was intoxicated, the officers detained him. After Long attempted to return to his car, the police observed a large hunting knife on the car's floor. An officer shined his flashlight into the car and saw an open leather pouch protruding from the armrest, which he presumed was another weapon. The officer lifted the armrest, peered into the pouch and discovered marijuana.

The marijuana had been lawfully seized because the leather pouch could have contained a weapon; therefore the officer's search was characterized as "strictly circumscribed by the exigencies which justifi[ed] its initiation." In essence, the Court extended the scope of *Terry* preventative searches beyond the detained suspect to lawfully encompass the area within the suspect's immediate control which could contain a weapon. More important, the Supreme Court found that the Fourth Amendment did not require an officer to ignore contraband discovered

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33. *Id.*; see also *Coolidge v. New Hampshire*, 403 U.S. 433, 466 (1971). "The doctrine serves to supplement the prior justification—whether it be a warrant for another object, hot pursuit, search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused—and permits the warrantless seizure." *Id.* at 466.

34. 463 U.S. 1032 (1983). In addition to the application of the plain view doctrine, *Long* is also an application of the automobile exception to the warrant requirement. *See id.*

The automobile exception allows officers to search an automobile without a warrant. This exception has been justified upon a number of grounds. When the officers stop a defendant while driving the automobile, the officers may perform a *Terry* search in the interest of safety. *See id.* at 1050. This exception has also been justified in the interest of preserving evidence, because otherwise the automobile could simply be driven away. As the Court stated in *California v. Acevedo*, 111 S. Ct. 1982 (1991), the exception is justified "in light of an exigency arising out of the vehicle's likely disappearance." *Id.* at 1982.


36. *Id.* at 1036.

37. *Id.* at 1050-51 (quoting *Terry v. Ohio*, 392 U.S. 1, 26 (1968)).
during a valid *Terry* search, provided that the search did not exceed the scope of its initial justification.\(^{38}\)

b. *Immediately Apparent*

The second requirement for a seizure under the plain view doctrine is that an object's incriminating nature must be "immediately apparent." An object is considered to be immediately apparent when the officer develops a reasonable belief as to the object's identity.\(^{39}\) When the object's identity is "immediately apparent," the officer has developed probable cause, provided that the officer operated within the legitimate scope of a reasonable search.\(^{40}\) Thus, seizure of the object is justified if the police officer can reasonably conclude that the item in question may be contraband, stolen property, or other evidence of a crime.\(^{41}\)

This "immediately apparent" determination does not require that the officer be "possessed of near certainty" of the object's identity. As demonstrated by the Supreme Court's decision in *Texas v. Brown*,\(^ {42}\) the officer need only have that degree of knowledge required for probable cause—enough to "warrant a man of reasonable caution in the belief."\(^ {43}\) In *Brown*, the defendant was stopped at a routine driver's license check point.\(^ {44}\) During this stop, the officer observed an opaque, green party balloon knotted at the tip, loose white powder, small plastic vials, and an open bag of party balloons in the glove compartment.\(^ {45}\) Because the officer knew, based upon his experience, that similar party balloons were used to package narcotics, the Supreme Court determined that the officer possessed sufficient probable cause to seize the balloons.\(^ {46}\) The Court concluded that it was irrelevant that the police officer could not see through the opaque, balloon fabric. The presence of the balloon itself, under the cir-

\(^{38}\) *Id.* at 1050.


\(^{40}\) See *Coolidge*, 403 U.S. at 466.

\(^{41}\) *Brown*, 460 U.S. at 742. In some instances, an object's outward appearance may give an officer probable cause to believe that it is contraband or other evidence of a crime even when the object proves to be something other than what the officer thought it was.

\(^{42}\) *Id.* at 730.

\(^{43}\) *Id.* at 741-42.

\(^{44}\) *Id.* at 733.

\(^{45}\) *Id.* at 734.

cumstances, strongly indicated that drugs were likely to be found inside.47

The character of some evidence is less immediately apparent than are objects which are themselves illegal to possess, such as weapons or contraband. Arizona v. Hicks48 provides an example of an officer both failing to satisfy the "immediately apparent" requirement and exceeding the scope of the initial intrusion. In Hicks, officers responded to a shooting and entered the defendant's apartment without a warrant49 to search for the shooter, other victims, and weapons.50 During the search, an officer observed two sets of stereo components which he thought appeared out of place in the otherwise squalid apartment.51 He moved some of the equipment, recorded their serial numbers, and later discovered that one turntable had been stolen during an armed robbery.52

Writing for the Court, Justice Scalia reasoned that the officer went beyond the legitimate rationale for the original warrantless entry.53 The officer's movement of the equipment was a search separate and distinct from the search for the shooter, victims, and weapons which was the lawful objective of entry into the apartment.54 Thus, mere suspicion that the stereo equipment was stolen did not rise to the level of probable cause. Because the officer needed to move the equipment, thereby conducting an additional, more intrusive search to confirm his suspicion, the incriminating nature of the equipment was not immediately apparent.55

47. Id. at 743. The Court stated the distinctive nature of the balloon was particularly meaningful to the trained eye of the police officer. Id.
49. The police were initially justified in entering the apartment without a warrant due to the exigency caused by the report of the shooting. Hicks, 480 U.S. at 325.
50. Id. at 323.
51. Id.
53. Id. at 324-25.
54. Id. The Supreme Court did find that the "mere recording of the serial numbers did not constitute a seizure." Id. at 324.
55. Id. at 326. The State of Arizona conceded that the officer's suspicion did not rise to the level of reasonable suspicion, let alone probable cause. Id.

[T]he distinction between "looking" at a suspicious object in plain view and "moving" it even a few inches is much more than trivial for purpose of the Fourth Amendment. It matters not that the search uncovered nothing of any great personal value to respondent—serial numbers rather than (what might conceivably have been hidden behind or under the equipment) letters or pho-
C. Plain View's Extension to Other Senses

The Supreme Court has recognized that senses other than sight may also satisfy the requirement of probable cause, requiring only that the object in question be obvious to the senses. To be sufficiently obvious, "contraband need only reveal itself in a characteristic way to one of the senses." The sense of smell, for example, has long been regarded as reliable enough to support a finding of probable cause.\(^{56}\)

For example, in *Johnson v. United States*,\(^{57}\) the Supreme Court recognized that the sense of smell may be used to develop probable cause. In *Johnson*, an officer conducted a search of a room based upon his firm belief that the distinct odor from the room was opium.\(^{58}\) The Court stated that the officer's recognition of a distinctive odor, which he was qualified to detect,\(^{59}\) established probable cause for a warrant.\(^{60}\) However, because the officer failed to obtain a warrant before entering the defendant's home and there was no showing of any exigent circumstances, evidence of the opium found during the search was excluded.\(^{61}\)

More recently, in *United States v. Johns*,\(^{62}\) customs agents investigating a suspected drug smuggling ring detected the odor of marijuana emanating from two fully loaded pickup trucks; the cargo area of each being covered by a blanket.\(^{63}\) Justice O'Connor, writing for the majority, found that the establishment of probable cause terminated any reasonable expectation of pri-
vacy in containers whose contents could be inferred from their outward appearance.\textsuperscript{64}

The Supreme Court has effectively distinguished contraband, whose incriminating character may be immediately apparent, from other evidence whose incriminating character depends not upon its physical attributes, but upon collateral information.\textsuperscript{65} Because certain contraband possesses unique characteristics, such as shape, texture, and form, its incriminating nature tends to be more immediately apparent to the various sensory perceptions of well-trained officers.\textsuperscript{66} The difficulty for an officer is limiting the sensory exploration so that it does not violate an individual’s Fourth Amendment protections.\textsuperscript{67} If an officer identifies an object in the course of a \textit{Terry} patdown, the officer must stay within the scope of the exception which justified the initial intrusion.\textsuperscript{68} The scope of this exception is at the core of the confusion that \textit{Dickerson} is likely to engender.

III. MINNESOTA V. DICKERSON

A. \textit{The Arrest}

At 8:15 p.m. on November 9, 1989, Minneapolis Police Officers Vernon D. Rose and Bruce Johnson were on routine patrol in North Minneapolis.\textsuperscript{69} Officer Vernon Rose, a fourteen-year veteran of the police force, had participated in approximately

\begin{flushleft}
\textsuperscript{64} \textit{Id.} at 486 (citing Arkansas v. Sanders, 442 U.S. 753, 764-65 (1979)). The finding of probable cause was coupled with the automobile exception to the warrant requirement.


\textsuperscript{66} Several studies have shown that haptic identification—the perceptual system which includes the hands as well as other parts of the body—is remarkably fast and accurate in recognizing object qualities such as texture, hardness, thermal conductivity and absolute size. \textit{See} Roberta L. Klatzky, et al., \textit{Haptic Integration of Object Properties: Textures, Hardness, and Planer Contour}, 15 J. OF EXPERIMENTAL PSYCHOL.: HUM. PERCEPTION & PERFORMANCE 45, 56 (1989); Roberta L. Klatzky, et al., \textit{There's More to Touch Than Meets the Eye: The Salience of Object Attributes for Haptics With and Without Vision}, 116 J. OF EXPERIMENTAL PSYCHOL.: GEN., 356, 357 (1987); Roberta L. Klatzky, et al., \textit{Identifying Objects by Touch: An "Expert System"}, 37 PERCEPTION & PSYCHOPHYSICS 299, 300-01 (1985). In one study, 100 objects no larger than a human hand were placed before twenty individuals. On the average, the twenty participants were able to identify 94 of the 100 objects within five seconds using their sense of touch. \textit{Id.} at 301.


\textsuperscript{68} \textit{Id.} at 325-26.

\end{flushleft}
seventy-five drug related warrants. During the execution of these warrants, he had felt crack cocaine in the pockets of suspects on fifty to seventy-five separate occasions. As Officers Johnson and Rose were patrolling the 1000 block of Morgan Avenue North, Officer Rose observed the defendant, Timothy Eugene Dickerson, emerged from a multi-unit apartment house that had a well-known reputation as a crackhouse. Officer Rose had personally participated in the execution of numerous narcotics search warrants at this apartment house. These searches had uncovered crack cocaine, handguns, sawed-off shotguns and knives.

Dickerson began walking down the front sidewalk of the building toward the squad car, but when he looked up and saw Officer Rose, Dickerson turned around and headed for the alley. Officer Rose became suspicious and asked Officer Johnson to pull the squad car into the alley to intercept Dickerson. Fearing that Dickerson might be armed, Officer Rose conducted a weapons frisk of Dickerson. Officer Rose testified that the search occurred as follows:

I started down from the shoulders to the underarms. I then went across the waistband and I came back up to the chest and I hit a nylon jacket that had a pocket and the nylon jacket was very fine nylon and as I pat-searched the front of his body I felt a lump, a small lump, in the front pocket. I examined it with my fingers and it slid and it felt to be a lump of crack cocaine in cellophane.

Because Officer Rose had felt crack cocaine in suspects' pockets on numerous occasions, he believed he had probable cause to seize the contents of Dickerson's pocket, which proved to consist of .20 grams of crack cocaine wrapped in a cellophane

70. Id. at 464.
71. Id. The apartment house was located at 1030 Morgan Avenue North. Id.
72. Id.
73. Id. at 464.
74. Dickerson, 469 N.W.2d at 464. Dickerson testified that he turned toward the alley immediately after leaving the building. He denied observing the squad car or making an abrupt change for the alley. State v. Dickerson, 481 N.W.2d 840, 842 (Minn. 1992).
75. Dickerson, 469 N.W.2d at 464.
76. Officer Rose testified that he searched Dickerson because other weapons had been seized from persons at the apartment building from which Dickerson exited. Id.
78. Dickerson, 481 N.W.2d at 843.
package. Officer Rose testified that he "knew immediately" that the bag contained crack cocaine. Dickerson was subsequently charged with controlled substance crime in the fifth degree.

B. Trial Court

Dickerson challenged the reasonableness of Officer Rose's search which produced the crack cocaine, contending that Terry v. Ohio did not warrant an officer's seizure of contraband unless the officer reasonably believed that the contraband was a weapon. Judge Robert H. Lynn, of the Fourth District Court of Minnesota, ruled that the crack cocaine was seized pursuant to a lawful Terry patdown. Judge Lynn found that Officer Rose formed the requisite probable cause to conclude that the object in Dickerson's pocket was crack cocaine during the Terry search. In rejecting Dickerson's claim that probable cause could not be based on the sense of feel, the trial court stated:

To this Court there is no distinction as to which sensory perception the officer uses to conclude that the material is contraband. An experienced officer may rely upon his sense of smell in DWI stops or in recognizing the smell of burning marijuana in an automobile. The sound of a shotgun being racked would clearly support certain reactions by an officer. The sense of touch, grounded in experience and training, is as reliable as perceptions drawn from other senses. "Plain feel," therefore, is no different than plain view and will equally support the seizure here.

Following the trial court's refusal to suppress the evidence, Dickerson was found guilty but the court deferred the finding of guilt and placed him on probation for two years. Dickerson

80. Officer Rose stated that, based upon his experience, he knew immediately it was cocaine. Id.
81. Transcript at 45-46, Dickerson, No. 89067687. Although Dickerson challenged the scope of the Terry search, he did not challenge the initial stop and search justification. See Minnesota v. Dickerson, 113 S. Ct. 2130, 2138 (1993).
82. Dickerson, 113 S. Ct. at 2134.
83. See id.
84. The deferral was made pursuant to Minnesota Statute section 152.18, subd. 1 (1989).
85. Transcript at 69, State v. Dickerson, No. 89067687 (D.C. Minn. filed Feb. 20, 1990). Dickerson successfully completed his probation on April 28, 1992, and his deferral of guilt was dismissed pursuant to Minnesota Statute section 152.18 (1989).
appealed this deferral of guilt to the Minnesota Court of Appeals.

C. Minnesota Court of Appeals

Reversing the lower court, the Minnesota Court of Appeals ruled that an officer may seize an object during a Terry search only if, after feeling it, the officer believes that it is a weapon.66 Although the court of appeals found the initial stop and search to be reasonable, it stated that "the scope of a [Terry] search must be strictly limited to a search for weapons."87 More important, the court declined to adopt a "plain feel" exception to the warrant requirement, stating that "the proper analysis in [Dickerson] must focus upon the limited purpose associated with a [Terry] search."88

D. Minnesota Supreme Court

The Minnesota Supreme Court affirmed the court of appeals, rejecting the plain feel exception to the warrant requirement.89 The court concluded that a Terry search must be restricted to the search and seizure of weapons.90 Moreover, the court refused to accept the proposition supporting the plain feel exception, that the "senses of sight and touch are equivalent."91

The court also found that Officer Rose exceeded the legitimate scope of the Terry search.92 Based upon Officer Rose's testimony, the court determined that his intent93 to search Dickerson for drugs combined with his manipulation of the object demonstrated that he "set out to flaunt the limitations of

87. Id.
88. Id. at 467.
89. State v. Dickerson, 481 N.W.2d 840, 843-44 (Minn. 1992).
90. Id. at 844.
91. Id. at 845.
92. Id. at 843. The Minnesota Supreme Court deferred to the trial court's findings of law and fact regarding the legitimacy of the initial Terry stop, but the court stated that this deference was not unlimited and vehemently disagreed with the trial court's findings regarding the extent of the Terry search. Id.
93. The Minnesota Supreme Court majority recognized that an officer's improper motive does not invalidate a search. However, in its analysis, the court based its findings of a Fourth Amendment violation on its perceived improper motive by Officer Rose. The court inferred from Officer Rose's subjective intent to search for contraband that his manipulation of the object must have exceeded that which was necessary to determine whether it was a weapon. See id. at 844 n.1.
The court questioned Officer Rose's testimony that he "immediately" knew what he had found by referring to his direct examination. The court stated:

When the officer assures himself or herself that no weapon is present, the frisk is over. During the course of the frisk, if the officer feels an object that cannot possibly be a weapon, the officer is not privileged to poke around to determine what that object is; for purposes of a Terry analysis, it is enough that the object is not a weapon.

The court was similarly unyielding with its consideration of the plain feel corollary to the plain view doctrine. The majority rejected the trial court's recognition of the plain feel exception as a valid extension of the plain view doctrine because the sense of touch was perceived to be both unreliable and intrusive. The majority did not believe that "the senses of sight and touch [were] equivalent." Instead, the court found that touch "is inherently less immediate and less reliable" than sight. Moreover, this inherent reliability would require an unreasonable intrusiveness in the course of Terry searches that produce objects other than weapons.

The plain feel corollary to the plain view doctrine would require, the majority stated, a fundamental violation of an individual's personal privacy guaranteed by the Fourth Amendment. The validity of the plain view doctrine is predicated on the use of sight, a sense that does not involve a search. But whereas sight merely requires an officer's passive observation, touch, on the other hand, requires physical contact with the suspect. "Physically touching a person cannot be considered anything but a search." Concluding that plain feel was not the equivalent of

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94. State v. Dickerson, 481 N.W.2d 840, 844 (Minn. 1992). For a discussion of Officer Rose's testimony, see supra text accompanying note 77.

95. "As I pat searched the front of his body, I felt a lump . . . . I examined it with my finger and slid it and it felt to be a lump of crack cocaine in cellophane." Id. at 842-43.

96. Id. at 844.

97. Id. at 845.

98. Id.


100. Id.

101. Id. at 845.

102. Id.

103. State v. Dickerson, 481 N.W.2d 840, 846 (Minn. 1992). In rejecting plain feel as a valid exception, the majority stated: "The [United States] Supreme Court never has recognized it and neither have we." Id.
plain view, the Minnesota Supreme Court rejected any claim that there was a plain feel exception to the warrant requirement.

E. United States Supreme Court

The United States Supreme Court accepted review of Dickerson\(^\text{104}\) and reversed the Minnesota Supreme Court’s rejection of the plain feel exception. Eight of nine justices concurred with the Court’s ruling that police officers may seize nonthreatening contraband identified as such during a Terry search.\(^\text{105}\) The Court flatly rejected the Minnesota Supreme Court’s conclusion that nonweapons may not be seized during a Terry search, noting the reasoning that supported its decision in Michigan v. Long.\(^\text{106}\) “If, while conducting a legitimate Terry search of the interior of the automobile, the officer should, as here, discovers contraband other than weapons, he clearly cannot be required to ignore the contraband, and the Fourth Amendment does not require its suppression in such circumstances.”\(^\text{107}\) Thus, although the underlying rationale for the search is supported


\(^{107}\) Justice Scalia, in his concurring opinion, engaged in a fanciful challenge to Terry itself. Scalia suggested that had he felt Terry was incorrectly decided, he may have voted to exclude all evidence incidently discovered—i.e., nonweapons. Dickerson, 113 S. Ct. at 2141 (Scalia, J., concurring).
under *Terry*, it is the plain view doctrine which justified the seizure.\(^{108}\)

The Supreme Court found that an officer's identification of contraband using the sense of touch is analogous to using the sense of sight under the plain view doctrine.\(^{109}\) As set forth in *Horton v. California*,\(^ {110}\) the plain view doctrine requires only that an officer be in a lawful position to view the object and that the object's character be immediately apparent.\(^ {111}\) Provided that these two elements are satisfied, an officer may make a warrantless seizure of contraband or other evidence of a crime.\(^ {112}\)

The tension surrounding the plain feel doctrine centers upon the notion of reliability. There is little controversy that the sense of sight is inherently reliable, but implicit in the *Dickerson* reasoning is the assumption that the sense of touch is also inherently reliable. The Supreme Court categorically rejected the contention that the sense of touch is unreliable.\(^ {113}\) The Court pointed out that:

*Terry* itself demonstrates that the sense of touch is capable of revealing the nature of an object with sufficient reliability to support a seizure. The very premise of *Terry*, after all, is that officers will be able to detect the presence of weapons through the sense of touch and *Terry* upheld precisely such a seizure.\(^ {114}\)

After determining the sense of touch to be sufficiently reliable, the Court indicated that the application of the plain feel doctrine is not to be unlimited. The confines of the search must still operate within that set forth in *Terry*.\(^ {115}\) The officer must have reasonable, articulable suspicion that a crime is or has been committed before the patdown is performed. Similarly, the scope of the search must initially be limited to that necessary for the officer's safety; a search more intrusive than that required to

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108. *See id.* at 2137.
109. *Id.* "We think that [the plain view] doctrine has an obvious application by analogy to cases in which an officer discovers contraband through the sense of touch during an otherwise lawful search." *Id.*
112. Minnesota v. Dickerson, 113 S. Ct. 2130, 2137 (1993). Thus, when an officer makes an observation from a lawful vantage point, such as during a *Terry* search, there has not been a "search" warranting Fourth Amendment protection. *Id.* (citing Illinois v. Andreas, 463 U.S. 765, 771 (1983); Texas v. Brown, 460 U.S. 730, 740 (1983)).
113. *Id.*
114. *Id.*
115. *Dickerson*, 113 S. Ct. at 2136.
determine whether the defendant is armed and dangerous loses its validity and any resulting evidence must be excluded.116 By analogy to the plain view doctrine, if the officer determines during the patdown that the defendant possesses contraband, the officer may seize the item.117 The Court stated that an individual’s privacy is not protected “by a categorical rule barring the seizure of contraband plainly detected through the sense of touch.”118

As in all searches under the Fourth Amendment, the barometer used to gauge a permissible search under the plain feel doctrine is probable cause. It is this notion of probable cause—that the object’s identity was immediately apparent to the officer such to give rise to a reasonable belief that the object was contraband—that places limits upon the scope of the plain feel doctrine.119

Although the Court rejected the Minnesota Supreme Court’s conclusions regarding plain feel, six justices affirmed the state supreme court’s finding that Officer Rose exceeded the bounds of a legitimate patdown.120 Based upon the Minnesota Supreme Court’s “interpretation” of the record, the Court concurred in its conclusion that Officer Rose went beyond the “strictly circumscribed” search for weapons authorized under Terry. Officer Rose concluded the item was contraband only after he made a further search that could not be authorized by Terry or any other exception to the warrant requirement.121

IV. ANALYSIS

In its quest to have the plain feel exception recognized, law enforcement lost the battle but won the war. The Supreme

116. Id.

117. The Court concluded that the concern that touch is somehow more intrusive than sight is inapposite because they had previously authorized the lawful search for weapons and because the seizure of readily identifiable items does not involve further invasions of privacy. Minnesota v. Dickerson, 113 S. Ct. 2130, 2138 (1993) (citing Soldal v. Cook County, 113 S. Ct. 538, 544 (1992); Horton v. California, 496 U.S. 128, 141 (1990); United States v. Jacobsen, 466 U.S. 109, 120 (1984)).

118. Id.

119. Dickerson, 113 S. Ct. at 2137.

120. Id. The Court deferred to the Minnesota Supreme Court’s interpretation of the record, specifically, that Officer Rose “determined that the lump [in Dickerson’s pocket] was contraband only after ‘squeezing, sliding and otherwise manipulating the contents of [Dickerson’s] pocket.’ ” Id. at 2138 (quoting State v. Dickerson, 481 N.W.2d 840, 844 (Minn. 1992)).

121. Dickerson, 113 S. Ct. at 2139.
Court's decision to recognize the plain feel exception is logical and well-supported, but its failure to articulate a standard based upon objective facts in *Dickerson* leaves it wanting in clarity and definition.\(^\text{122}\)

*Dickerson* relied upon the exigency of a *Terry* search to provide the officer a lawful vantage point from which to discover the crack cocaine.\(^\text{123}\) The Court found that the officer exceeded the lawful scope of *Terry*, but it failed to establish a bright line rule specifying the deterministic facts that would satisfy the "immediately apparent" requirement under these circumstances. The Court's analysis merely supports adoption of the plain feel doctrine.

A. What is "Immediately Apparent"?

Writing for the Court, Justice White analogized "plain feel" to the doctrine of plain view, recognizing "an obvious application by analogy to cases in which an officer discovers contraband through the sense of touch" while conducting an otherwise lawful search.\(^\text{124}\) Thus, when an officer observes contraband from a lawful vantage point, there has been no search within the meaning of the Fourth Amendment.\(^\text{125}\) If the resulting seizure is supported by probable cause\(^\text{126}\) and the object's incriminating

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\(^\text{122}\) *See* Minnesota v. Dickerson, 113 S. Ct. 2130, 2138 (1993).
\(^\text{123}\) *See* id. at 2135.
\(^\text{124}\) *Id.* at 2137.
\(^\text{125}\) At least there has been no search independent of the initial intrusion that gave the officer the vantage point. *Id.* (citing Illinois v. Andreas, 463 U.S. 765, 771 (1983)); *see also* Texas v. Brown, 460 U.S. 730, 740 (1983).
\(^\text{126}\) Prior to the Supreme Court's adoption of the plain feel exception, two jurisdictions required that an officer know of the presence of contraband or other evidence of a crime to a "reasonable certainty" before lawfully seizing it. United States v. Williams, 822 F.2d 1174, 1184 (D.C. Cir. 1987); State v. Vasquez, 815 P.2d 659, 664 (N.M. Ct. App. 1991), *cert. denied*, 815 P.2d 1178 (N.M. 1991).

The Supreme Court subsequently repealed this stringent and inconsistent standard. *See* Texas v. Brown, 730, 741-42 (1983). The justification for this repeal is twofold. First, the Court has stated that probable cause is all that is necessary to justify a search or seizure in plain view situations. *See id.* Second, it would be burdensome and confusing to law enforcement to require a higher standard merely because the sense of touch was one of the components used in the probable cause formula. *See, e.g.*, New York v. Belton, 453 U.S. 454, 459 (1981). Probable cause requires a reasonable belief, not reasonable certainty.

In *United States v. Pace*, the California District Court adopted the plain feel doctrine as did the court in United States v. Williams, 822 F.2d 1174 (D.C. Cir. 1987). The *Pace* court disagreed with the assertion "that the tactile sense is inherently less reliable than the sense of sight." United States v. Pace, 709 F. Supp. 948, 955 (C.D. Cal. 1989), *aff'd*, 893 F.2d 1103 (9th Cir. 1990). In rejecting the "reasonable certainty" standard, the *Pace*
character is "immediately apparent," the search and seizure will be deemed reasonable.\textsuperscript{127} Likewise:

If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain view context.\textsuperscript{128}

\textit{Terry} provides an officer with a lawful vantage point from which to conduct a limited search for weapons.\textsuperscript{129} This limited search allows an officer to feel every item on a suspect which may be a weapon.\textsuperscript{130} \textit{Terry} and its progeny demand that when an officer determines that an object could not be a weapon, the officer's handling of that object must cease.\textsuperscript{131} In \textit{Dickerson}, the Court now permits seizure of nonweapon evidence if the officer's determination that the object is not a weapon is contemporaneous with a determination that the object is contraband.\textsuperscript{132} Thus, the "immediately apparent" determination of probable cause must either precede or be contemporaneous with the officer's determination that the object is not a weapon.\textsuperscript{133} Yet, what constitutes immediately apparent within the scope of a \textit{Terry} search remains unclear.

The "immediately apparent" standard is a time measure during which the officer must determine probable cause. It appears not to be reduced to a fixed period; rather it is dependent upon reasonableness. The plain feel rule provides an officer with a reasonable opportunity to develop probable cause within the confines of the Fourth Amendment. Any inclination to engage in a protracted or otherwise unreasonable search is thwarted by the Court's reliance on \textit{Terry} standards.\textsuperscript{134}

\textsuperscript{128.} Id. (footnote omitted).
\textsuperscript{129.} See \textit{Terry} v. Ohio, 392 U.S. 1, 30 (1968).
\textsuperscript{130.} See id.
\textsuperscript{132.} Minnesota v. Dickerson, 113 S. Ct. 2130, 2137 (1993).
\textsuperscript{133.} Id.
\textsuperscript{134.} Id.; see also Arizona v. Hicks, 480 U.S. 321, 329 (1987).
The conspicuous absence of guidelines for the immediately apparent requirement suggests that trial courts will be unable to uniformly apply this new Fourth Amendment exception. Applying the *Dickerson* plain feel exception in *State v. Buchanan*, the Wisconsin Court of Appeals found that an officer's *Terry* search of a suspect under circumstances similar to those of *Dickerson* was reasonable. In that case, the officer testified that "he [had] immediately recognized that the large bag of rice had cocaine in it." The court held that he had probable cause to seize the bag and its contents because the officer "immediately recognized the incriminating character of the plastic bag."  

136. *Id.*  
137. *Id.* at 404. Other state and federal courts have applied the plain feel exception since its adoption in *Dickerson*. See *State v. Wilson*, 437 S.E.2d 387 (N.C. Ct. App. 1993) (allowing crack cocaine into evidence, the court considered the officer's seven years of prior service, the fact that the officer was called to the scene to investigate alleged drug dealings, and that cocaine was identified in the midst of the weapon search); *State v. Crawford*, 1993 Ohio App. LEXIS 4488 (Ohio Ct. App. Sept. 23, 1993) (allowing crack cocaine into evidence, the court considered the officer's years of experience and the fact that there was no continued exploration since identification was immediate); *Commonwealth v. Johnson*, 31 A.2d 1335 (Pa. Super. Ct. 1993) (allowing cocaine into evidence, the court considered the officer's years of experience, the perceived consistency and location of the drug package, and the fact that there was no need to manipulate or alter the package because identity of the cocaine was "immediately apparent").  

Courts have also applied the plain feel exception to suppress the admittance of evidence at trial. *United States v. Ponce*, 8 F.3d 989 (5th Cir. 1993) (suppressing evidence where the officer fingered a bump in the defendant's pocket after determining that no weapon was in the pocket); *United States v. Brooks*, 2 F.3d 838 (8th Cir. 1993) (suppressing evidence where the record did not support finding that the officer recognized cocaine base as contraband during protective search for weapons); *United States v. Taylor*, 997 F.2d 1551 (D.C. Cir. 1993) (suppressing evidence where the officer made second search of a pocket that he did not believe contained a weapon); *United States v. Ross*, 827 F. Supp. 711 (S.D. Ala. 1993) (suppressing evidence where the officer did not reasonably suspect that a matchbox contained an instrument of assault); *United States v. Winter*, 826 F. Supp. 33 (D. Mass. 1993) (suppressing evidence where contents were identified only after removed from jacket and examined); *Hicks v. State*, 631 A.2d 6 (Del. 1993) (suppressing evidence where the officer removed a pouch from defendant and subsequently reexamined the pouch's contents); *Howard v. State*, 625 So. 2d 1240 (Fla. Dist. Ct. App. 1993) (suppressing evidence where the officer felt a small object in the defendant's pocket, then "took and rolled object between [his] finger to get a better feel"); *State v. Parker*, 622 So. 2d 791 (La. Ct. App. 1993) (suppressing evidence where the officer felt a matchbox, and since it did not feel like contraband, removed it from the defendant's pocket and opened it); *State v. Beveridge*, 436 S.E.2d 912 (N.C. Ct. App. 1993) (suppressing evidence where the officer continued to search after concluding that the defendant's pocket contained no weapon); *State v. Sanders*, 435 S.E.2d 842 (N.C. Ct. App. 1993) (suppressing evidence where officer did not testify whether identity was "immediately apparent"); *State v. Cloud*, 1993 Ohio App. LEXIS 5094 (Ohio Ct. App. Oct. 21, 1993) (suppressing evidence where the officer testified that he did not know what the object was, but had determined that it was not a weapon); *In re S.D.*, 1994
The justification for seizure of evidence in *Buchanan* is far more tenuous than that in *Dickerson*. In *Dickerson*, the officer testified that he was "absolutely sure" that the package in Dickerson's pocket contained crack cocaine. In *Buchanan*, the officer merely asserted that he "immediately identified" the cocaine. *Buchanan* illustrates the potential for wide disparity in the application of the plain feel exception. This disparity likely will continue as courts struggle to define the plain feel doctrine within the parameters of the Fourth Amendment. In the meantime, it remains unclear what guidance *Dickerson* will offer not only to trial court judges, but also to police officers who must make the immediate determination.

The purpose of the Fourth Amendment exclusionary rule is to deter law enforcement officials from violating an individual's freedom from unreasonable searches and seizures. The rule itself provides a legal remedy for an unreasonable search and seizure. The Supreme Court's intent, however, is to prevent the abridgment of an individual's rights within the strictures of the Fourth Amendment. *Dickerson* fails to delineate those strictures. If the police do not understand the lawful scope of *Terry* and its relationship to probable cause for seizures of nonweapon objects, the exclusionary rule's deterrent capacity will be significantly diminished.

**B. The Need for a Bright Line Rule**

The Supreme Court should articulate a clear standard to insure that Fourth Amendment rights not only are preserved by

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Appeal of S.D., 633 A.2d 172 (Pa. Super. Ct. 1993) (suppressing evidence where the officer felt a bulge, then retrieved the object but never perceived what it was that he felt).


139. *Buchanan*, 504 N.W.2d at 404.

140. *See supra* text accompanying note 8.


142. *See id.*

143. *See generally* David A. Harris, *On Race, Place and Being a Suspect*, Nat'l L.J., Nov. 1, 1993, at 15, col. 1. Harris suggests that the plain feel exception will further the unequal treatment of African Americans and Hispanics. A disproportionate number of African Americans and Hispanics live and work in high crime areas, and thus they are more likely to be stopped and searched. "[A]n untold number of stop-and-frisk incidents never make it to court because the police find no evidence." *Id.* at 16, col. 4. Therefore, it is likely that the impact of this arguably arbitrary standard may adversely affect countless individuals.
the courts, but, more important, are not violated in the first place. In the absence of a bright line rule, the Court may indeed be faced with the unacceptable situation it foresaw in Dickerson itself—that an officer may exceed specific authorization for a plain feel search and engage in a seizure at will.\footnote{144} By failing to provide a bright line rule, the Supreme Court has ignored its own history of defining acceptable Fourth Amendment behavior for the specific audience whose behavior the court aspires to limit: the police.\footnote{145} Thus, bright line standards are less the articulation of a rule than they are a drafting objective of Fourth Amendment search and seizure law.\footnote{146} The importance of clarity in search and seizure decisions was articulated by Justice White, who stated that "[a] single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront."\footnote{147}

The question posed to the Court in \textit{Dickerson} is one of Fourth Amendment interpretation, pure and simple. The plain feel standard, therefore, must be stated in terms that are unambiguously straightforward to encourage consistent application and predictable enforcement. But in crafting a standard, the Court is bound to be mindful of three Fourth Amendment principles. First, the standard should be easily applied by rank-and-file, trained police officers. Second, it should be reasonable. Third,

\footnote{144. \textit{Dickerson}, 113 S. Ct. 2130, 2138 (1993).}
\footnote{145. Fourth Amendment doctrine, given force and effect by the exclusionary rule, is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. New York v. Belton, 453 U.S. 454, 458 (1981) (quoting Wayne R. LaFave, "Case-by-Case Adjudication" versus "Standardized Procedures": \textit{The Robinson Dilemma}, Sup. Ct. Rev. 127, 141 (1974)).}
\footnote{146. "[T]he protection of the Fourth Amendments can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement." \textit{Id.} (quoting Wayne R. LaFave, "Case-by-Case Adjudication" versus "Standardized Procedures": \textit{The Robinson Dilemma}, Sup. Ct. Rev. 127, 142 (1974)).}
\footnote{147. Dunaway v. New York, 442 U.S. 200, 213-14 (1979); \textit{see also Belton} 453 U.S. at 458.}
the standard should be objective, not dependent on the subjective belief of individual police officers.\textsuperscript{148}

The plain feel standard fails to measure up to the Court's well-established drafting standards. It is simply too vague. Although the concept and legal underpinnings of the plain feel doctrine are reasonable, the standard as articulated is not easily applied by police officers in general. The resulting confusion may give too much latitude to the subjective interpretation of the officer.

1. A Workable Standard

The standard, as articulated in Dickerson, is not clear enough to be understood and applied by a line officer. Although an officer may understand the implications regarding the groping of an object that is clearly not a weapon during a Terry search, the nuances of identifying nonthreatening objects while staying within the bounds of a legitimate search are less clear. The articulation of specific guidelines for lawful search behavior is eminently feasible, evidenced by the standards set forth in Terry for a patdown:

\begin{quote}
[T]he officer must feel with sensitive fingers every portion of the prisoner's body. A thorough search must be made of the prisoner's arms and armpits, waistline and back, groin and the area about the testicles, and entire surface of the legs down to the feet.\textsuperscript{149}
\end{quote}

But in Dickerson, the Supreme Court developed no such standard, deferring to the Minnesota Supreme Court's interpretation of the record. Without further analysis, the Court accepted its findings that Officer Rose engaged in a "continued exploration of [Dickerson's] pocket after [he] concluded that it contained no weapon."\textsuperscript{150} This unquestioning reliance on the record deterred the Court from articulating what would have been an acceptable search.\textsuperscript{151} This oversight is especially curious in light of numerous state and federal cases that previously ex-


\textsuperscript{149} Terry v. Ohio, 392 U.S. 1, 17 n.13 (1968) (quoting L.L. Priar & T.F. Martin, Searching and Disarming Criminals, 45 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 481 (1954)).


\textsuperscript{151} See id.
Amined the viability of plain feel seizures. Moreover, the trial record could have been used for guidance. The Court simply declined to utilize these resources.

An example of the type of a workable rule that the Court could have adopted is illustrated in United States v. Salazar. In Salazar, the Court of Appeals for the Second Circuit upheld an officer's seizure of crack cocaine which was discovered pursuant to a Terry search. The defendant walked into the midst of a police search of an apartment that police suspected was being used to sell crack cocaine. During a Terry patdown of Salazar, an officer felt what he described as crack cocaine in Salazar's pocket. Specifically, the officer testified that he believed the object to be crack cocaine, stating "as I was patting down his [the defendant's] coat, I squeezed the outside of the pocket and I felt what appeared to be plastic—I heard and felt the

152. See, e.g., United States v. Coleman, 969 F.2d 126, 128 (5th Cir. 1992) (justifying seizure where the officer could feel the outline of a gun in a "pouch" removed from the defendant's car); United States v. Salazar, 945 F.2d 47, 48 (2d Cir. 1991), cert. denied, 112 S. Ct. 1975 (1992) (arresting officer "squeezed the outside of the pocket and . . . felt the crackling of plastic"); United States v. Pace, 709 F. Supp. 948, 951 (C.D. Cal. 1989), aff'd, 893 F.2d 1103 (9th Cir. 1990) (identifying objects through the clothing as "having the size and shape of two kilos of cocaine packaged in the form of 'bricks'"); United States v. Ceballos, 719 F. Supp. 119, 122 (E.D.N.Y. 1989) (admitting cocaine where the officer "felt a large bulge" inside the suspect's jacket); People v. Thurman, 257 Cal. Rptr. 517, 521 (Cal. Ct. App. 1989) (believing that an object was a gun, the officer stuck his hand inside jacket pocket, squeezed the object and realized it was "rock cocaine" in a bag); People v. Lee, 240 Cal. Rptr. 32, 34, 37 (Cal. Ct. App. 1987) (patting the chest area of defendant, the officer "felt a clump of small resilient objects" that he believed were heroin-filled balloons); People v. Hughes, 767 P.2d 1201, 1203 (Colo. 1989) (arresting officer felt a "hard cylindrical object" and pulled out a film canister containing cocaine); Doctor v. State, 596 So. 2d 442, 444 (Fla. 1992) (arresting officer who had felt crack cocaine over 800 times, felt plastic bag with "peanut brittle type feeling in it" which he "equated to the texture of rock cocaine"); State v. Bearden, 449 So. 2d 1109, 1116 (La. Ct. App. 1984), cert. denied, 452 So. 2d 179 (La. 1984) (arresting officers "felt an object [in the suspect's sock], which was obviously not a weapon, but which could be tactiley identified as a large quantity of pills" in a bag); see also State v. Alamont, 577 A.2d 665, 668 (R.I. 1990) (affirming seizure pursuant to a probable cause arrest where the officer could detect a vial of crack based upon "its distinctive size and shape").

154. Salazar, 945 F.2d at 51.
155. Id. at 48.
156. Id. at 48. Salazar's coat was, according to the officer, a "bulky coat." Id. Dickerson's coat, on the other hand, was a thin, nylon jacket. See State v. Dickerson, 481 N.W.2d 840, 843 (Minn. 1992).
crackling of plastic." The officer based his identification on his past experience feeling packages like the one in question.

The Salazar court held that the officer's seizure of the crack cocaine was permissible because the officer developed probable cause as to the object's identity while conducting a Terry search. In support of its decision, the court cited two significant facts: the extent of the officer's experience in handling similar contraband and his belief that the item was contraband. The factual basis for the Salazar decision was reasonable. More important, it is remarkably similar to the record in Dickerson.

2. A Reasonable Standard

Despite its shortcomings as a workable standard, Dickerson fairly satisfies the Court's second drafting objective: reasonableness. Rules adopted in the name of the Fourth Amendment must preserve an individual's reasonable expectation of privacy. In Dickerson, the Court has fashioned a rule that is reasonable because it preserves an expectation of privacy subject only to the exceptions defined in Terry and the plain view doctrine. Terry, as well as the plain view doctrine, are well-established exceptions to Fourth Amendment protection against unreasonable searches and seizures. The combination of the two, therefore, should not upset the sensibilities of constitutional analysis. However, the rule must be crafted in a way that guarantees objective application by law enforcement and consistent review by the courts.

3. An Objective Standard

The final drafting goal in creating an articulable standard requires the standard to be objective, rather than dependent on the subjective belief of individual officers. As set forth in Dickerson, the plain feel doctrine permits too much latitude to subjective interpretation. The Court eloquently described the

157. Salazar, 945 F.2d at 48.
159. Id. at 51.
160. See id.
161. "[F]or example, it would be absurd to recognize as legitimate an expectation of privacy where there is only a minimal probability that the contents of a particular container had been changed" during the continuous surveillance of that container. Illinois v. Andreas, 463 U.S. 765 (1983).
inherent subjectivity in Terry. "If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers and effects,' only in the discretion of the police." Thus, objectivity is the standard that most adequately protects an individual's Fourth Amendment rights. It is not the officer's intent, but rather the officer's actions that should determine whether the officer's behavior exceeded constitutional parameters. Of equal or greater importance is the corollary to this concept: an objective evaluation of an officer's conduct is necessary to maintain the bright line rule for protective pat searches.

The Dickerson Court did apply what appeared to be the objective standard to determine whether Officer Rose's actions exceeded the lawful scope of a Terry search. However, in so doing, the Court unquestioningly relied upon the Minnesota Supreme Court's factual conclusions which, as noted by Minnesota Supreme Court Justice Coyne in her dissent, resulted from the majority's incorrect application of the subjective standard when it assessed Officer Rose's intent in the search. Under the plain feel exception, a weapons frisk of a suspect does not constitute a search, regardless of the officer's motivation, as long as the officer does not exceed the lawful objective of the weapons search.

164. See State v. Dickerson, 481 N.W.2d 840, 849 (Minn. 1992) (Coyne, J., dissenting). The Minnesota Supreme Court's findings were based upon the subjective intent of Officer Rose's search, as opposed to the trial court record. The court clearly relied upon Officer Rose's intent to find "weapons and contraband." Transcript at 9, State v. Dickerson, No. 89067687 (D.C. Minn. filed Feb. 20, 1990). Although the court identified the appropriate objective standard, "that an improper motive does not invalidate an otherwise lawful search," it chose to ignore this standard. Dickerson, 481 N.W.2d at 844 (citing Horton v. California, 496 U.S. 128, 138 (1990)). The Minnesota Supreme Court found that "the officer's testimony that he intended to conduct a warrantless search for drugs, combined with his testimony about squeezing, sliding and otherwise manipulating the contents of [Dickerson's] pocket, convince us that he set out to flaunt the limitations of Terry." Id. But, as the Supreme Court reasoned in Horton, the appropriate test is an objective one:

Enhanced 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.

Horton, 496 U.S. at 138.
search.\textsuperscript{165} Despite the mandate of \textit{Terry}, the majority's tainted factual findings regarding Officer Rose's intent were accepted by a deferential United States Supreme Court.

The Supreme Court, however, was not bound to follow the legal or factual findings made by the Minnesota courts; several alternatives were available. First, it could have deferred to those determinations made by the trial court. Second, it could have made its own factual determinations, or third, it could have vacated the judgment and remanded for further factual findings as proposed by the three member dissent.\textsuperscript{166}

There is ample precedent for deferring to the factual findings of the trial court. The Court has long held that "the reasonableness of a search in the first instance is a substantive determination to be made by the trial court from the facts and circumstances of the case in light of the 'fundamental criteria' laid down by the Fourth Amendment and in opinions of this Court applying that Amendment."\textsuperscript{167} Thus, a thorough review of the record is not only paramount, but necessary to insure that the appellate courts properly reviewed and applied constitutional criteria to the facts presented to them.\textsuperscript{168}

Had the Court rejected the Minnesota Supreme Court's interpretation of the facts and accepted the trial court's findings, the \textit{Dickerson} decision would have clarified when a seizure is proper under the plain feel exception. Because Officer Rose's testimony was not challenged by the appellate courts, dichotomous conclusions reached in \textit{Dickerson} were the result not of choosing between the testimony of witnesses, but of the interpretations applied to the testimony by the appellate courts.

\textsuperscript{165} \textit{Dickerson}, 113 S. Ct. at 2137.

\textsuperscript{166} \textit{See id.} at 2141 (Rehnquist, C.J., dissenting). The three dissenting members advocated vacating the judgment because "the Supreme Court of Minnesota employed a Fourth Amendment analysis which differs significantly from that now adopted by this Court." \textit{Id.}


\textsuperscript{168} This principle was summarized in \textit{Ker v. California} as follows:

\begin{quote}
While this Court does not sit as \textit{in nisi prius} to appraise contradictory factual questions, it will, where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings, and the record so that it can determine for itself whether in the decision as to the reasonableness the fundamentals—i.e., constitutional-criteria established by this Court have been respected.
\end{quote}

\textit{Id.} at 34.
Officer Rose testified that he "was absolutely sure" that the object in Dickerson's pocket was crack cocaine.\textsuperscript{169} The facts found by the trial court support Officer Rose's determination of probable cause pursuant to the plain feel exception. Justice Coyne, in her dissent, stated that:

This simple act of feeling the outline and shape of the lump was permissible under \textit{Terry}, and it appears from Rose's testimony that, because of his extensive experience in discovering crack cocaine while patting down previous suspects, he was "absolutely sure" that the substance was crack cocaine "before" he reached into the pocket and removed it.\textsuperscript{170}

Whether Officer Rose's manipulation of the object exceeded the scope of \textit{Terry} is unclear because the record of the lower courts did not describe with particularity the manner in which Rose slid, manipulated, and felt the contraband.\textsuperscript{171} Most significantly, the Court failed to determine the length of time in which this manipulation occurred, casting a cloud of uncertainty over the reasonableness of future "plain feel" seizures under similar circumstances. This important omission—the time in which an officer's legitimate \textit{Terry} search turns illegitimate—begs the question of the Court: How could the court have determined that Rose exceeded the scope of \textit{Terry} when no clear record exists as to the time frame in which it occurred? No testimony exists as to the length of time or intensity of this "manipulation."

\begin{footnotesize}
\begin{enumerate}
\item[169.] Transcript at 10, State v. Dickerson, No. 89067687 (4th D.C. Minn. filed Feb. 20, 1990).
\item[170.] State v. Dickerson, 481 N.W.2d 840, 849 (Minn. 1992) (Coyne, J., dissenting).
\item[171.] The Minnesota Supreme Court incorrectly quoted Officer Rose as testifying that, "I examined it with my fingers and slid it and felt it to be a lump of crack cocaine in cellophane." \textit{Dickerson}, 481 N.W.2d at 843 (emphasis added). The correct quote is as follows: "I examined it with my fingers and it slid and felt it to be a lump of crack cocaine in cellophane." Transcript at 10, \textit{Dickerson}, No. 89067687 (emphasis added). This misstatement became part of the rationale which justified the court's holding that, because of Officer Rose's "sliding [the crack cocaine] within [Dickerson's] pocket," this behavior belied "any notion that he 'immediately' knew what he had found." \textit{Dickerson}, 481 N.W.2d at 844. The United States Supreme Court deferred to "[t]he Minnesota Supreme Court, [which] after a 'close examination of the record,' held that the . . . officer determined that the lump was contraband only after 'squeezing, sliding and otherwise manipulating the contents of the defendant's pocket'—a pocket which the officer already knew contained no weapon." Minnesota v. Dickerson, 113 S. Ct. 2130, 2138 (1993) (quoting \textit{Dickerson}, 481 N.W.2d at 844). In so doing, however, the Supreme Court correctly quoted the trial court record. \textit{See id. at} 2133.
\end{enumerate}
\end{footnotesize}
Because the majority\textsuperscript{172} of the Supreme Court deferred to the findings of the Minnesota Supreme Court, which erroneously relied upon Officer Rose's subjective intent,\textsuperscript{173} no objective facts remain to guide future law enforcement behavior. Without a bright line rule, law enforcement agencies and trial courts have no recourse but to experiment with individual liberties in the hope of staying within Fourth Amendment boundaries. Regrettably, this outcome simply "represents a departure from common sense and common experience."\textsuperscript{174}

V. Conclusion

Adoption of the plain feel exception in \textit{Dickerson} recognizes the realities of police work and, in theory, provides law enforcement with an important tool. The plain feel exception provides a logical and acceptable method of establishing probable cause without offending the protections of the Fourth Amendment. Nonetheless, \textit{Dickerson} leaves unanswered the question as to when an officer’s feel of an object exceeds his or her justification for initially touching it. Clarifying the "immediately apparent" requirement will define the bright line rule necessary to preserve individual liberties; at the same time it affords law enforcement officers the opportunity to use all of their senses in the battle against crime. The United States Supreme Court, by deferring to the Minnesota Supreme Court’s interpretation of the facts, bypassed an opportunity to provide this bright line rule. Consequently, both the police and the lower courts bear the burden of determining precisely when the feel of an object exceeds the boundaries of the plain feel exception.

\footnotesize{\textsuperscript{172} The three member dissent, written by Chief Justice Rehnquist and joined by Justices Blackmun and Thomas, provides the most logical compromise in determining whether Officer Rose stayed within the bounds of a \textit{Terry} pat search. \textit{See Dickerson}, 113 S. Ct. at 2141. In light of the Minnesota Supreme Court's application of a standard of review not adopted by the Supreme Court, Chief Justice Rehnquist suggested that the state court's judgment be vacated and the case remanded for a proper determination of whether Officer Rose exceeded a legitimate \textit{Terry} search. \textit{Id}. Although the dissent did not elaborate, it is apparent that the dissent believed that the state court could not have made an objective determination using a subjective standard. \textit{Id}.  

\textsuperscript{173} \textit{Dickerson}, 481 N.W.2d 840, 843-44 (Minn. 1992).

\textsuperscript{174} \textit{Id}. at 846 (Coyne, J., dissenting).}