



10-1982

Texas v. Brown

Lewis F. Powell Jr.

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/casefiles>

 Part of the [Constitutional Law Commons](#), [Criminal Law Commons](#), and the [Fourth Amendment Commons](#)

Recommended Citation

Texas v. Brown. Supreme Court Case Files Collection. Box 134. Powell Papers. Lewis F. Powell Jr. Archives, Washington & Lee University School of Law, Virginia.

This Manuscript Collection is brought to you for free and open access by the Lewis F. Powell Jr. Papers at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Supreme Court Case Files by an authorized administrator of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

Kruda

PRELIMINARY MEMORANDUM

October 30, 1981 Conference
List 1, Sheet 4

No. 81-419

Cert to the Texas Court of
Criminal Appeals (Clinton,
Roberts and Odom)

TEXAS

v.

BROWN

State/Criminal

Timely

SUMMARY: Whether the court below erred in holding that despite a police officer's professional judgment that a balloon contained illegal drugs, he may not rely on the "plain view" doctrine to seize the balloon.

Kruda? Although the Texas Court does ^{not} cite state statutes or the state Constitution, ^{it does} ⁵ Texas cases (versus 1 U.S. case) in discussing the seizure issue. And in a dissenting opinion filed in denial of

FACTS: During the course of a routine, fixed-location driver's license check, an officer saw the Respondent pull from his pocket and drop to his seat an opaque, tied-off balloon. As the Respondent opened the glove compartment, the officer observed numerous plastic vials, additional loose balloons, and loose white powder (which turned out to be milk sugar). The officer then ordered the Respondent out of the car and seized the balloon on the car seat. Based on his conclusion from a cursory inspection that the balloon contained a powdery substance, and based on his experiences as an officer, he arrested the Respondent for drug law violations.

Subsequent chemical analysis showed that the balloon contained heroin. The trial court denied the Respondent's motion to suppress the evidence, and he entered a plea of nolo contendere.

HOLDING: The Court of Criminal Appeals overturned the conviction, holding that under Coolidge v. New Hampshire, 403 U.S. 443 (1971), the seizure was unlawful. According to the court below, one of the three elements of the plain view doctrine requires that "it must be immediately apparent to the police that they have evidence before them." Because the officer could not testify what, if anything, was in the opaque balloon, he had not sufficient grounds to believe that he was seizing contraband.

Although the panel opinion was unanimous, three judges dissented from the denial of leave to file a motion for rehearing. Principally, they argued that an officer relying on years of practical experience had probable cause to believe that the balloon contained illegal drugs. In support of their position, the dissenting judges pointed to cases from other state and federal jurisdictions holding that tied-off balloons (and other drug related objects) in plain view can be lawfully seized.

CONTENTIONS:

1. The Petitioner first argues that the decision below conflicts with Coolidge v. United States, 403 U.S. 443 (1971), and United States v. Cortez, 101 S. Ct. 690 (1981). In Coolidge, a plurality of this Court wrote that an item could be seized without a warrant under the plain view doctrine "only where it is immediately apparent to the police that they have evidence before them." 403 U.S. at 466. Since, an experienced police officer would immediately realize that the Respondent's balloon contained illegal drugs, the seizure was lawful. In Cortez, this Court made clear that an officer's experience is a legitimate factor in deciding whether he has probable cause to act. Other cases, while not involving the plain view doctrine, have made clear that the "contents [of some containers] can be inferred from their outward appearance." Arkansas v. Sanders, 442 U.S. 753, 764 n.13 (1979). See Robbins v. California, 101 S. Ct. 2841, 2846 (1981). The Petitioner emphasizes that an officer need not be certain of the balloon's contents before he may act. See Payton v. New

York, 445 U.S. 573, 587 (1980) (holding that the seizure of private property in plain view is presumptively reasonable, "assuming that there is probable cause to associate the property with criminal activity").

2. The Petitioner also urges this Court to grant its petition because the decision below conflicts with the decisions of other state courts.

3. The Respondent opposes granting the petition, insisting that the decision below was based on state law, and not on the Fourth Amendment.

DISCUSSION: A review of the petition below and the cases cited indicates that the decision was based on the Fourth Amendment, and not on Texas law. Nowhere in the opinion below, or in the cases cited, does the Texas court refer to Texas statutes or constitutional provisions.

To the extent that it believed that its holding was compelled by decisions of this Court, the Texas court erred. While the decision below does not conflict squarely with any holdings of this Court, it certainly ignores some of this Court's recent opinions. And as the Petitioner argues, other courts do not hesitate to hold that tied-off balloons and similar objects in plain view may be seized if in the officer's experience the objects are evidence of criminal activity.

Nevertheless, I am not sure this case is certworthy. The effect of the decision below is limited to Texas, and the court may have ruled differently if the officer had slightly more information before seizing the balloon.

I recommend denial.

There is a response.

10/14/81 Dwyer Opinion in petition

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 9, 1982

D

MEMORANDUM TO THE CONFERENCE

Re: Cases held for United States v. Ross,
No. 80-2209

1) Texas v. Brown, No. 81-419

In this case the State of Texas seeks review of a decision of the Texas Court of Criminal Appeals. That court ruled that the trial court erred in denying respondent's motion to suppress evidence.

Respondent's automobile was stopped as part of a "routine and nonrandom license check." When asked to produce his driver's license, respondent put his hand into the right front pocket of his trousers. After fumbling inside the pocket, respondent withdrew a dollar bill that was partially folded and "a small green balloon stuck between his fingers." Still seeking his driver's license, respondent looked into the glove compartment of his car. As he did so the investigating officer saw some empty plastic vials, a white powdery substance that was later determined not to be a controlled substance, and a bag of party balloons. At some point, respondent dropped the green balloon onto the seat of the car. The officer ordered respondent to get out of the car; he then reached into the car and seized the green balloon. The balloon contained heroin. No warrant had been obtained.

The trial court denied a motion to suppress. On appeal, the State argued that the warrantless search was justified under the "plain view" doctrine. A three-judge panel of the Texas Court of Criminal Appeals disagreed. It stated that it did not question either the validity of the officer's initial stop of respondent's vehicle or "the propriety of the arrest since [respondent] failed to produce

Not a Ross case.

Deny. If you think the issue merits attention, a Knicker would be in order. ju

a driver's license." The court rejected the State's "plain view" argument, however, on the ground that the allegedly incriminating contents of the balloon--unlike the balloon itself--were not in plain view. The court analogized the seizure of the balloon to a seizure of a translucent vial or photographic negative.

The State petitioned for rehearing en banc. The court denied the motion, with three judges dissenting. The dissenting judges believed that, since the balloon itself was in plain view, a warrantless seizure was justified if the officer had probable cause to believe that it was connected with criminal activity. They found such probable cause present in this case; "the permissible deduction that [a tied-off balloon] is commonly linked to heroin forms a legitimate basis to the trained law enforcement officer for suspicion."

Although this case involves the search of a "container," it is not affected by our decision in Ross. It was unnecessary in Ross to adopt an "unworthy container" exception to the warrant requirement. There is no suggestion in this case that the officer had probable cause to search respondent's vehicle; our analysis in Ross is thus inapplicable. Nor does the State contend that the search was justified as incident to respondent's arrest. This case does present, however, the question of just how "incriminating" an object must be to justify a warrantless search under the plain view doctrine. Although that is not an insubstantial question, I am inclined to defer to the state court's appraisal of the incriminating character of balloons in Texas. I will vote to deny.

No. 81-419

VB.

Grant
~~Chas. H. Grant~~
~~Chas. H. Grant~~

[illegible]

Revised 12/29 -

mfs 12/12/82

I agree with Mike that this is an easy case that probably should not have been granted.

The officer, in a lawful license check stop, observed suspicious behavior by the driver who ~~was~~ pulled a "tied-off" balloon from his pocket & dropped it on the seat.

The driver (Rush) had no license & when he opened glove compartment the officer saw white powder, etc.

Officer then seized the ~~balloon~~ balloon that was in "plain view".

BENCH MEMORANDUM

No. 81-419

Texas v. Brown

Michael F. Sturley

December 12, 1982

The 4th amendment standard as to plain view requires probably cause. We can hold that this clearly existed here.

Question Presented

Reverses

Does the Fourth Amendment permit the warrantless seizure of a tied-off balloon that a police officer lawfully observes in plain view, when the officer was aware of previous cases in which heroin was carried in such balloons?

Plain view
Tex Ct App
applied state
law only.
Then in
frivolous.

I. BackgroundA. Facts

The essential facts appear to be undisputed. On the evening of June 18, 1979, the Fort Worth police set up a routine, nonrandom license checkpoint. At about 11:00 p.m., Officer Maples stopped resp's automobile and asked resp to produce his driver's license. Resp put his hand in his pocket, and kept it there long enough to worry the officer. The officer therefore shined his flashlight into the car at resp's hand. Resp partially removed his hand from his pocket, allowing Officer Maples to see a tied-off balloon between resp's middle fingers. Resp dropped the balloon to the car seat and rummaged in the glove compartment, where Officer Maples was able to see some small plastic vials, some white powder, and a bag of balloons. After about a minute resp told Officer Maples that he was unable to find his license, so the officer requested resp to get out of the car. After resp did so, Officer Maples saw the tied-off balloon on the car seat and seized it. The balloon was later found to contain heroin.

B. Decisions Below

Resp was charged with possession of heroin. He moved to suppress the evidence seized from the car, particularly the tied-off balloon. The TC, after a hearing, denied the motion. Preserving his right to appeal the suppression decision, resp pleaded nolo contendere to the charge and was sentenced to four years imprisonment.

On appeal the Tex. Ct. Crim. App. reversed, holding that it was not "immediately apparent" to Officer Maples that the balloon contained contraband, so the "plain view" exception to the warrant requirement did not apply. It treated the balloon as being similar to a plastic bag, a photographic negative, or a translucent vial--the objects in three previous cases in which the Texas courts had held the plain view exception inapplicable.

II. Discussion

Much of the argument in this case has been at cross-purposes. Resp devotes most of his brief to the argument that the decision below was based on state law. Since this issue should have been resolved at the cert petn stage, the State did not even address it in its principal brief. See part II.A, infra. The State and the SG, on the other hand, devote much of their attention to the proper legal standard under the Fourth Amendment--an issue on which resp concedes. See part II.B, infra. In the end, the key question is whether the arresting officer had probable cause to believe that the balloon contained narcotics. See part II.C, infra.

The
Q

A. The Basis of the Lower Court's Decision

Resp's principal argument is that the decision below was based on state law, and thus is not reviewable here. This contention was considered at the cert petn stage and properly rejected. The Tex. Ct. Crim. App. applied the Fourth Amendment, and gave no indication of relying on state law.

Resp contends
decision of Tex Ct App
was based on
State law & not
unreviewable - but
is frivolous

The only mention of any constitutional provision in the opinion below is in the summary of resp's contentions:

In [resp's] sole ground of error he complains that the trial court erred in denying his motion to suppress because the evidence was seized in contravention of the Fourth Amendment of the United States Constitution, and the Texas Constitution, Article I, §9.

Petn A-1. In its resolution of the plain view issue, the court relied on Coolidge v. New Hampshire, 403 U.S. 443 (1971), for the statement of the general rule. It then relied on four state cases to clarify the rule and explain its application: Howard v. State, 599 S.W.2d 597 (Tex. Crim. App. 1979); DeLao v. State, 550 S.W.2d 289 (Tex. Crim. App. 1977); Duncan v. State, 549 S.W.2d 730 (Tex. Crim. App. 1977); Nicholas v. State, 502 S.W.2d 169 (Tex. Crim. App. 1973).¹

On the basis of a simple "case count" it might appear that the decision below is based primarily on state law, but the treatment of the plain view issue in the four state cases disproves the theory. Nicholas, the earliest of the four, relied only on Coolidge, the federal case, for its conclusion that photographic negatives in plain view could not be seized under the plain view exception.² DeLao and Duncan, which were decided just

¹The court also cited Taylor v. State, 599 S.W.2d 403 (Tex. Crim. App. 1967). It cannot be said to have relied on Taylor for the proposition at issue here, however, since Taylor upheld a plain view seizure. In any event, Taylor itself relied primarily on federal law.

²Nicholas also cited four decisions of the Tex. Ct. Crim. App. that upheld plain view seizures. None of these cases suggests any limitation on the plain view exception, let alone a limitation unique to state law.

two weeks apart, each relied on Coolidge, the federal case, and Nicholas, the state case based on Coolidge.³ Finally, Howard relied principally on Coolidge and the other three state cases.⁴

The relationships among these cases are rather like the relationships among the royal families of Europe. Just as the royal blood line always leads back to Queen Victoria, the legal rationale underlying the Tex. Ct. Crim. App.'s suppression of evidence seized under the plain view doctrine always leads back to Coolidge. There is no suggestion in any of these cases that the court is also relying on state law. This Court is justified in concluding that only the Fourth Amendment was involved.

B. The Proper Legal Standard

By now there should be little doubt that the Fourth Amendment permits the police to seize property in plain view if, among other things, "there is probable cause to associate the property with criminal activity." Payton v. New York, 445 U.S. 573, 587 (1980) (dicta). Justice Stewart's opinion in Colorado v. Bannister, 449 U.S. 1 (1980) (per curiam), is particularly

³In discussing the plain view issue, DeLao also cited Jackson v. State, 489 S.W.2d 565 (Tex. Crim. App. 1973), which upheld the seizure of marijuana in plain view.

⁴Howard also relied on Kolb v. State, 532 S.W.2d 87 (Tex. Crim. App. 1976), in which the court found that marijuana seized by the police had not been in plain view as a factual matter. Kolb, in turn, relied on five state cases for the existence of the plain view exception, but it cited no authority for the invalidity of the seizure. There is certainly no indication in Kolb that state law places a more severe restriction on the plain view doctrine than that found in Coolidge.

relevant here. In Bannister, a police officer stopped an automobile to issue a traffic citation and saw some chrome lug nuts and two lug wrenches in plain view. Since these items matched the description of property just stolen in the area, and since the occupants of the car matched the description of the suspects in the robbery, he had probable cause to arrest the occupants and seize the stolen property.

Resp concedes that probable cause is the appropriate standard for plain view seizures under the Fourth Amendment. Brief 9, 13, 23. The Tex. Ct. Crim. App., however, applied a much higher standard. It took Coolidge's phrase "immediately apparent to the police that they have evidence before them," 403 U.S., at 466, out of context and required the State to prove that the arresting officer "kn[e]w" that there was incriminating evidence in the balloon when he seized it. At the very least, the Court should correct this error. *Yes*

C. The Application of the Probable Cause Standard

The TC denied the suppression motion, but it is not clear that it did so on the proper grounds. It would have been better if the TC explicitly had found that Officer Maples had probable cause to believe that narcotics were in the tied-off balloon, but here I think the Court can reach that conclusion alone. Officer Maples testified that he once had made an arrest in a case where narcotics were carried in balloons such as the one at issue here. He had also heard of similar cases from other

officers.⁵ Even the Tex. Ct. Crim. App. has recognized that a balloon is a common container for carrying illegal narcotics. See DeLao v. State, supra.

What is even more important, there does not seem to be any innocent item that is commonly carried in an uninflated, tied-off balloon. (Air, water, and helium are all innocent, but they give the balloon a different appearance than narcotics.) This case is thus very different from those on which the Tex. Ct. Crim. App. relied. Photographic negatives commonly contain innocent pictures, not evidence of crime. Cf. Nicholas, supra. Although "baggies" are common containers for narcotics, they are used even more frequently for innocent food. Cf. Duncan, supra. Finally, pill containers are used not only for illegal drugs but legitimate prescriptions. Cf. Howard, supra.

Here Officer Maples plainly viewed an uninflated, tied-off balloon with something inside. Narcotics are commonly carried in this way, but innocent items rarely are. Under the circumstances, he had probable cause to believe that there were narcotics in the balloon.

Resp's arguments to the contrary are nothing more than an attempt to impose a standard higher than probable cause. He points out that no one could tell what was in the balloon without subjecting the contents to chemical analysis. Brief 7. While this is true, the argument proves too much. Even if the heroin

⁵This is resp's interpretation of the Maples testimony. See Brief 6. The testimony itself is not a model of clarity.

itself had been in plain view, the officer would not know what it was without chemical analysis. The point, of course, is that the officer does not have to know that he is seizing an illegal drug. This is the mistake that the Tex. Ct. Crim. App. made. It is enough if he has probable cause to believe that what he is seizing is an illegal drug. Officer Maples had that probable cause here.

III. Conclusion

Although the Tex. Ct. Crim. App. would be free on remand to reaffirm its earlier decision on state law grounds, the decision below was based on the Fifth Amendment. The proper Fifth Amendment standard here is admittedly the probable cause standard. Under the circumstances of this case, the arresting officer had the probable cause necessary to justify the seizure at issue. The decision below should be reversed.

Mike

81-419 TEXAS v. BROWN

Argued 1/12/83

"Balloon" case

Marshall (Arrest DC of Tarrant County, Tex)

License check.

Resp. had no license.

Small opaque balloon observed by officer.

BRW referred to Tex Ct/app statement that arrest was lawful - A10 9t addressed only "plain view" question - tho if arrest was valid, the search ^{also} was valid as incident to arrest. Eg Belton

Under Coolidge contraband / plain view, there was probable cause.

Relies on Colo v Bannister (recent decision here). Also U.S. v Cortez.

Ct/Apps held officer must have "known" there were drugs in balloon.

J.P.S. thinks there is a "container" case & says probable ^{cause} ~~arrest~~ to "seize" doesn't permit opening container.

Council, however, says record in this case doesn't show whether or when the balloon was opened.

(I'd say no expectation of privacy in a balloon)

Butcher (Resp)

Case should be "Knived" as
not clear whether Fed law was applied
(S O'C cited a case saying
Art I, § 9 of Tex. Const & ~~that~~
Fourth Amend are identical)
Coledge a only U.S. case cited,
& it can be a starting point for applying
state law.

x x x x

Not a Belton case.

Altho State Ct. said arrest
was valid, counsel (~~Butcher~~ says record
is to contrary. See A 28, 31, 25, 27 -
arrest was not made on

Under Texas law, a custodial
~~arrest~~ arrest may be made lawfully
for driving w/out license. But here
arrest was made because of balloon
- not absence of license. (~~But record~~
is not clear on this (see A 28, 29)

Officer didn't say there was
probable cause - thus it is immaterial
if it existed. (BRW disagreed - saying
courts may find probable cause on the
facts regardless of what officer thought)

Butcher (cont.)

Objected to seizure but did not object
to opening the balloon.

Marshall

Texas looks to objective facts
— not what officer thought.

Then can be reversed on ~~an~~
search incident to arrest ~~to~~ as well
as a plain view case.

Rev 8-1

The Chief Justice

Rev.

Routine random license stop. This is lawful. Once stop is lawful, police may act on what ever is observable.

Officer knew drugs were housed in these little bags. Then ~~as~~ constituted probable cause to seize bag - & contents of 4 cone compartments.

Would it analyze under "plain view" doctrine. There is merely a short hand descriptive term.

Under Belton since stop ~~was~~ was lawful officer could search ~~any~~ things in passenger compartment

Justice Brennan

Rev. or Rem. for recommendation on Belton

Tex. Ct. said propriety of arrest was not questioned. In view of this, no reason to reach plain view issue.

Justice White

Rev or

Not clear there was an arrest until after officer saw balloon, saw the

There was probable cause to arrest after he ~~saw~~ balloon, & therefore officer could search balloon & contents of passenger compartment.

Belton controls.

But can argue there was on "state grounds". Could decide with reference to Belton if not decided on state grounds

Tex. Ct. cited Coleidge & arguments
"Narrow" & applied Fed. const. properly

Justice Marshall

App. mem

Justice Blackmun

Rev.

Easy case.

*Not based on Tex. law. & No Tex case
relied on.*

Colo. v. Bannister compels result.

Ron

Justice Powell

Rev.

Agree on any of grounds mentioned

Justice Rehnquist Rev.

~~Agree~~ with LFP - could Rev. on
any ground - including State Ct ~~perception~~
of "plain view".
Decided on Fed law.

In Robinson (WHR wrote & I concurred)
we characterized "custodial arrest"
as when decision is made to take one
to station housing.

Justice Stevens Rev. Knickerbocker ? If reach merits would Rev.

Only "plain view" was argued by Rehnquist.

There was probable cause, but we
shouldn't make factual decision.

Decided on fed. law - not state law.

On plain view analysis, the balloon
was in view - but not its contents. Chadwick
& Sanderson so require. (But "container" here

Every ~~case~~ ^{arrest} is "custodial". But Belton
emphasized "custodial" ~~arrest~~ ^{there} ~~arrest~~
every arrest - even for "traffic violation" - is
custodial.

Justice O'Connor Rev.

Prefer plain view doctrine, &
this est. probable cause.

But could join any other of grounds
decided.

Not clear as to
John's theory

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

L.F.P.

See p 6 for three requirements
of the "plain view" exception
to the warrant clause.

I think all three were
met in this case. Why
can't we decide it on this
basis?

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-419

TEXAS, PETITIONER v. CLIFFORD JAMES BROWN

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL
APPEALS OF TEXAS

[February —, 1983]

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Clifford James Brown was convicted in the District Court of Tarrant County, Texas, for possession of heroin in violation of state law. The Texas Court of Criminal Appeals reversed his conviction, holding that evidence introduced at his trial should have been suppressed because it was obtained in violation of the Fourth Amendment to the United States Constitution.¹ That court rejected the state's con-

¹ Brown argues that the decision below rested on an independent and adequate state ground, and therefore that this Court lacks jurisdiction. *Fox Film Corp. v. Muller*, 296 U. S. 207, 210 (1935). The position is untenable. The opinion of the Texas Court of Criminal Appeals rests squarely on the interpretation of the Fourth Amendment to the United States Constitution in *Coolidge v. New Hampshire*, 403 U. S. 443 (1971), and on Texas cases interpreting that decision, e. g., *Howard v. State*, 599 S.W. 2d 597 (Tex.Cr.App. 1979); *DeLao v. State*, 550 S.W. 2d 289 (Tex.Cr.App. 1977); *Duncan v. State*, 549 S.W. 2d 730 (Tex.Cr.App. 1977); and *Nicholas v. State*, 502 S.W. 2d 169 (Tex.Cr.App. 1973). The only mention of the Texas Constitution occurs in a summary of Brown's contentions at the outset of the lower court's opinion. In a field like the Fourth Amendment, where the federal courts have been so active in imposing standards on state and local activities, a more affirmative indication in the opinion of the state court of reliance on state law is necessary before we will reject the likely explanation that "the [state] court felt compelled by what it understood to be federal constitutional considerations" to reach the result it did. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U. S. 562, 568 (1977).

Brown relies principally on *Howard v. State*, *supra*, and *Duncan v.*

From: Justice Rehnquist

Circulated: FEB 9 1983

Recirculated:

Renewed
2/11

I have
problems
with
some of the
language
in this
case.

Stone v. Powell ?

tention that the so-called "plain view" doctrine justified the police seizure. Because of apparent uncertainty concerning the scope and applicability of this doctrine, we granted certiorari, — U. S. —, and now reverse the judgment of the Court of Criminal Appeals.

On a summer evening in June, 1979, Harold Maples, an officer of the Fort Worth police force, assisted in setting up a routine driver's license checkpoint on East Allen Street in that city. Shortly before midnight Maples stopped an automobile driven by respondent Brown, who was alone. Standing alongside the driver's window of Brown's car, Maples asked him for his driver's license. At roughly the same time, Maples shined his flashlight into the car and saw Brown withdraw his right hand from his right pants pocket. Caught between the two middle fingers of the hand was an opaque, green party balloon, knotted about one half inch from the tip. Brown let the balloon fall to the seat beside his leg, and then reached across the passenger seat and opened the glove compartment.

Because of his previous experience in arrests for drug offenses, Maples testified that he was aware that narcotics fre-

State, supra. Neither decision supports the proposition that the Texas Court of Criminal Appeals based its decision upon state law. In *Howard*, the State argued that the plain view doctrine justified the seizure of a closed translucent medicine jar from an automobile. The Court of Criminal Appeals rejected the claim, relying on *Coolidge v. New Hampshire, supra*, and stating that the State's arguments "cannot be squared with the Supreme Court's interpretation of the plain view doctrine." 599 S.W. 2d, at 602. The court also relied on *Thomas v. State, supra*, which it characterized as "[f]ollowing the teachings of *Coolidge v. New Hampshire*." *Id.* An additional opinion of the court on the State's Motion for Rehearing merely elaborated upon the application of the plain view doctrine set forth in the court's original opinion. Similarly, in *Duncan*, the Court of Criminal Appeals rejected the State's reliance on the plain view theory, citing to *Coolidge* for a statement of the applicable law, as well as to *Nicholas v. State*, 502 S.W. 2d 169 (Tex.Cr.App. 1973). Like the court's other decisions in the area, *Nicholas* relied only on *Coolidge*.

quently were packaged in balloons like the one in Brown's hand. When he saw the balloon, Maples shifted his position in order to obtain a better view of the interior of the glove compartment. He noticed that it contained several small plastic vials, quantities of loose white powder, and an open bag of party balloons. After rummaging briefly through the glove compartment, Brown told Maples that he had no driver's license in his possession. Maples then instructed him to get out of the car and stand at its rear. Brown complied, and, before following him to the rear of the car, Maples reached into the car and picked up the green balloon; there seemed to be a sort of powdery substance within the tied-off portion of the balloon.

Maples then displayed the balloon to a fellow officer who indicated that he "understood the situation." The two officers then advised Brown that he was under arrest.² They

² It is not clear on the record before us when Brown was arrested. The Court of Criminal Appeals stated, at one point in its opinion, that it did not question "the propriety of the arrest since appellant failed to produce a driver's license." This statement might be read to suggest that Brown was arrested upon his failure to produce a license, instead of at some point following seizure of the balloon from the car. The transcript of the suppression hearing, however, indicates rather clearly that Brown was not formally arrested until after seizure of the balloon. J. App. 28-31. In the face of such indications, we decline to interpret the above-quoted clause from the Court of Criminal Appeals' opinion as evidencing a belief that an arrest occurred prior to seizure of the balloon. Rather, we think it likely that the court was simply reasoning that Brown's arrest, whenever it may have taken place, was justified because of his failure to produce a driver's license.

We do not address the argument that seizure of the balloon would have been justified under *New York v. Belton*, 453 U. S. 454 (1982), which permits warrantless searches of the passenger compartment of an automobile incident to an arrest, because of the absence of clear factual findings regarding the time at which, and the reason for which, Brown was arrested and because the lower court was not able to consider that decision. Likewise, we do not rest our decision on *United States v. Ross*, — U. S. — (1982).

Neither
Belton
nor Ross
is applicable
because
seizure
have
occurred
prior to
arrest.

also conducted an on-the-scene inventory of Brown's car, discovering several plastic bags containing a green leafy substance and a large bottle of milk sugar. These items, like the balloon, were seized by the officers. At the suppression hearing conducted by the District Court, a police department chemist testified that he had examined the substance in the balloon seized by Maples and determined that it was heroin. He also testified that narcotics frequently were packaged in ordinary party balloons.

The Court of Criminal Appeals, discussing the Fourth Amendment issue, observed that "plain view *alone* is never enough to justify the warrantless seizure of evidence." Pet. A-10, quoting *Coolidge v. New Hampshire*, 403 U. S. 443, 468 (1971) (opinion of Stewart, Douglas, BRENNAN and MARSHALL, JJ.) It further concluded that "Officer Maples had to know that 'incriminatory evidence was before him when he seized the balloon.'" Pet. A-11 (emphasis supplied), quoting *DeLao v. State*, 550 S.W. 2d 289, 291 (Tex. Cr. App. 1977). On the state's petition for rehearing, three judges dissented, stating their view that "[t]he issue turns on whether an officer, relying on years of practical experience and knowledge commonly accepted, has probable cause to seize the balloon in plain view." Pet. A-15, 16.

Because the "plain view" doctrine generally is invoked in conjunction with other Fourth Amendment principles, such as those relating to warrants, probable cause, and search incident to arrest, we rehearse briefly these better understood principles of Fourth Amendment law. That amendment secures the persons, houses, papers and effects of the people against unreasonable searches and seizures, and requires the existence of probable cause before a warrant shall issue. Our cases hold that procedure by way of a warrant is preferred, although in a wide range of diverse situations we have recognized flexible, common-sense exceptions to this preference. See, e. g., *Warden v. Hayden*, 387 U. S. 294 (1967) (hot pursuit); *United States v. Jeffers*, 342 U. S. 48, 51-52

Tex Ct

these are usually called "a few jealously and carefully drawn exceptions." See your opinion in Sanders, 442 U.S., at 759.
Yes

(1951) (exigent circumstances); *United States v. Ross*, — U. S. — (1982) (automobile search); *Chimel v. California*, 395 U. S. 752 (1969); *United States v. Robinson*, 414 U. S. 218 (1973); and *New York v. Belton*, 453 U. S. 454 (1982) (search of person and surrounding area incident to arrest); *Almeida-Sanchez v. United States*, 413 U. S. 266 (1973) (search at border or "functional equivalent"); *Zap v. United States*, 328 U. S. 624, 630 (1946) (consent). We have also held to be permissible intrusions less severe than full-scale searches or seizures without the necessity of a warrant. See, e. g., *Terry v. Ohio*, *supra*, (stop and frisk); *United States v. Brignoni-Ponce*, *supra*, (seizure for questioning); *Delaware v. Prouse*, *supra*, (roadblock). One frequently mentioned "exception to the warrant requirement," *Coolidge v. New Hampshire*, *supra*, 403 U. S., at 443, is the so-called "plain view" doctrine, relied upon by the state in this case.

While conceding that the green balloon seized by Officer Maples was clearly visible to him, the Court of Criminal Appeals held that the state might not avail itself of the "plain view" doctrine. That court said:

"For the plain view doctrine to apply, not only must the officer be legitimately in a position to view the object, but it must be immediately apparent to the police that they have evidence before them. This 'immediately apparent' aspect is central to the plain view exception and is here relied upon by appellant. (Citation omitted). In this case then, Officer Maples had to know that 'incriminatory evidence was before him when he seized the balloon.'" Petn. A-10, A-11.

The Court of Criminal Appeals based its conclusion primarily on the plurality opinion of this Court in *Coolidge v. New Hampshire*, *supra*. In the *Coolidge* plurality's view, the "plain view" doctrine permits the warrantless seizure by po-

lice of private possessions where three requirements are satisfied.³ First, the police officer must lawfully make an "initial intrusion" or otherwise properly be in a position from which he can view a particular area. *Id.*, at 465-468. Second, the officer must discover incriminating evidence "inadvertently," which is to say, he may not "know in advance the location of [certain] evidence and intend to seize it," relying on the plain view doctrine only as a pretext. *Id.*, at 470. Finally, it must be "immediately apparent" to the police that the items they observe may be evidence of a crime, contraband, or otherwise subject to seizure. *Id.*, at 469-470. While the lower courts generally have applied the *Coolidge* plurality's discussion of "plain view," it has never been expressly adopted by a majority of this Court. On the contrary, the plurality's formulation was sharply criticized at the time, see, *Coolidge v. New Hampshire*, *supra*, 403 U. S., at 506 (Black, J., dissenting); *id.*, at 516-521 (WHITE, J., dissenting). While not a binding precedent, as the considered opinion of four Members of this Court it should obviously be the point of reference for further discussion of the issue.

The *Coolidge* plurality observed, "It is important to keep in mind that, in the vast majority of cases, *any* evidence seized by the police will be in plain view, at least at the moment of seizure," simply as "the normal concomitant of any search, legal or illegal." 403 U. S., at 465. The question whether property in plain view of the police may be seized therefore must turn on the legality of the intrusion that en-

³The plurality also remarked that "plain view *alone* is never enough to justify the warrantless seizure of evidence." *Coolidge v. New Hampshire*, *supra*, 403 U. S., at 468. The court below appeared to understand this phrase to impose an independent limitation upon the scope of the plain view doctrine articulated in *Coolidge*. The context in which the plurality used the phrase, however, indicates that it was merely a rephrasing of its conclusion, discussed below, that in order for the plain view doctrine to apply, a police officer must be engaged in a lawful intrusion or must otherwise legitimately occupy the position affording him a "plain view."

Plain
view
requirements

Of course!

yes

ables them to perceive and physically seize the property in question. The *Coolidge* plurality, while following this view of the "plain view" doctrine, characterized the doctrine as an exception to the warrant requirement. We think this may be somewhat inaccurate. That characterization, for example, describes application of the doctrine to seizures of property found in public areas very poorly. If police encountered contraband or evidence of a crime concealed in a public park few would suggest that the warrant clause had any applicability at all, and reliance upon some "exception" would be completely unnecessary.

"Plain view" can probably be better understood simply as an application of the reasonableness requirement of the Fourth Amendment to seizures of property. It is grounded on the recognition that when a police officer has observed an object in "plain view," the owner's remaining interests in the object are merely those of possession and ownership, see *Coolidge v. New Hampshire*, *supra*, 403 U. S., at 515 (WHITE, J., dissenting). Likewise, it reflects the fact that requiring police to obtain a warrant once they have obtained a first-hand perception of contraband, stolen property or incriminating evidence generally would be a "needless inconvenience," 403 U. S., at 468, that might involve danger to the police and public. *Id.* We have said previously that "the permissibility of a particular law enforcement practice is judged by balancing its intrusion on . . . Fourth Amendment interests against its promotion of legitimate governmental interests." *Delaware v. Prouse*, *supra*, 440 U. S., at 654. In light of the private and governmental interests just outlined, our decisions have come to reflect the rule that if, while lawfully engaged in an activity in a particular place, police officers perceive a suspicious object, they may seize it immediately. See *Marron v. United States*, 275 U.S. 192 (1927); *Go-Bart Importing Co. v. United States*, 282 U. S. 344, 358 (1931); *United States v. Lefkowitz*, 285 U. S. 452, 465 (1932); *Harris v. United States*, 390 U. S. 234, 236 (1968); *Frazier v.*

No- warrant required not only for searches but also for seizures. public park seizure OK from abandonment, or from prob cause & exigent circum

attempt to reduce Fourth Amendment to general reasonableness test?

if they have probable cause & exigent circum

?
Cupp, 394 U. S. 731 (1969). This rule merely reflects an application of the Fourth Amendment's central requirement of reasonableness to the law governing seizures of property.

Applying these principles, we conclude that Officer Maples properly seized the green balloon from Brown's automobile. The Court of Criminal Appeals stated that it did not "question . . . the validity of the officer's initial stop of appellant's vehicle as a part of a license check," Pet. A-10, and we agree. *Delaware v. Prouse*, 440 U. S. 648, 654-655 (1979). It is likewise beyond dispute that Maples' action in shining his flashlight to illuminate the interior of Brown's car trenching upon no right secured to the latter by the Fourth Amendment. The Court said in *United States v. Lee*, 274 U. S. 559, 563 (1927), that "[The] use of a searchlight is comparable to the use of a marine glass or a field glass. It is not prohibited by the Constitution." Numerous other courts have agreed that the use of artificial means to illuminate a darkened area simply does not constitute a search, and thus triggers no Fourth Amendment protection.⁴

Likewise, the fact that Maples "changed [his] position" and "bent down at an angle so [he] could see what was inside" Brown's car, J. App., at 16, is irrelevant to Fourth Amendment analysis. The general public could peer into the interior of Brown's automobile from any number of angles; there

another try at gutting
Fourth Amendment

would be different if
field glass used to look
into someone's home

yes

⁴E. g., *United States v. Chesher*, 678 F. 2d 1352, 1356-1357, n. 2 (CA 9 1982); *United States v. Ocampo*, 650 F. 2d 421, 427 (CA 2 1981); *United States v. Pugh*, 566 F. 2d 626, 627, n. 2 (CA 8 1977), cert. denied, 435 U. S. 1010 (1978); *United States v. Coplen*, 541 F. 2d 211 (CA 9 1976), cert. denied, 429 U. S. 1073 (1977); *United States v. Lara*, 517 F. 2d 209 (CA 5 1975); *United States v. Johnson*, 506 F. 2d 874 (CA 8 1974), cert. denied, 421 U. S. 917 (1975); *United States v. Booker*, 461 F. 2d 990, 992 (CA 6 1972); *United States v. Hanahan*, 442 F. 2d 649 (CA 7 1971); *People v. Waits*, 580 P. 2d 391 (Colo. 1978); *Redd v. State*, 243 S.E. 2d 16 (Ga. 1978); *State v. Chattley*, 390 A. 2d 472 (Me. 1978); *State v. Vohnoutka*, 292 N. W.2d 756 (Minn. 1980); *Dick v. State*, 596 P. 2d 1265 (Okla. Cr. 1979); *State v. Miller*, 608 P. 2d 595 (Ore. 1980); *Albo v. State*, 379 So. 2d 648 (Fla. 1980).

is no reason Maples should be precluded from observing as an officer what would be entirely visible to him as a private citizen. There is no legitimate expectation of privacy, *Katz v. United States*, *supra*, 389 U. S., at 361 (1967) (Harlan, J., concurring); *Smith v. Maryland*, 442 U. S. 735, 739-745 (1979), shielding that portion of the interior of an automobile which may be viewed from outside the vehicle by either inquisitive passersby or diligent police officers. In short, the conduct that enabled Maples to observe the interior of Brown's car and of his open glove compartment was not a search within the meaning of the Fourth Amendment.

Thus there can be no dispute here as to the presence of the first of the three requirements held necessary by the *Coolidge* plurality to invoke the "plain view" doctrine.⁶ But the Court of Criminal Appeals, as we have noted, felt the state's case ran aground on the requirement that the incriminating nature of the items be "immediately apparent" to the police officer. To the Court of Appeals, this apparently meant that the officer must be possessed of near certainty as to the seizable nature of the items. Decisions by this Court since *Coolidge* indicate that the use of the phrase "immediately apparent" was very likely an unhappy choice of words, since it can be taken to imply that an unduly high degree of certainty as to the incriminatory character of evidence is necessary for an application of the "plain view" doctrine.

In *Colorado v. Bannister*, *supra*, 449 U. S., at 3-4, we applied what was in substance the plain view doctrine to an offi-

⁶ While seizure of the balloon required a warrantless, physical intrusion into Brown's automobile, this was proper, assuming that the remaining requirements of the plain view doctrine were satisfied. The "Fourth Amendment protects people not places." *Katz v. United States*, *supra*, 389 U. S., at 351. Officer Maples' action was a limited intrusion, see *Adams v. Williams*, 407 U. S. 143 (1972), directed only to retrieving an object in plain view and not offering the officer an opportunity to engage in the type of "general exploratory search" condemned in *Coolidge*. As such, it was entirely reasonable.

And no one does dispute it.

would this authorize seizure from house?

Court made deliberate decision not to go with plain view doctrine

of course

cer's seizure of evidence from an automobile. *Id.*, at n. 4. The officer noticed that the occupants of the automobile matched a description of persons suspected of a theft and that auto parts in the open glove compartment of the car similarly resembled ones reported stolen. The Court held that these facts supplied the officer with "probable cause," *id.*, at 4, and therefore, that he could seize the incriminating items from the car without a warrant. Plainly, the Court did not view the "immediately apparent" language of *Coolidge* as establishing any requirement that a police officer "know" that certain items are contraband or evidence of a crime. Indeed, *Colorado v. Bannister*, *supra*, was merely an application of the rule, set forth in *Payton v. New York*, 445 U. S. 573 (1980), that "[t]he seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity." *Id.*, at 587 (emphasis added). We think this statement of the rule from *Payton*, *supra*, requiring probable cause for seizure in the ordinary case,⁶ is consistent with the Fourth Amendment and we reaffirm it here.

As the Court frequently has remarked, probable 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," *Carroll v. United States*, 267 U. S. 132, 162 (1925), 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 re-

⁶ We need not address in this case whether some degree of suspicion lower than probable cause would be sufficient basis for a seizure in certain cases. While such seizures would not fit within the "presumptively reasonable" rule of *Payton*, which requires the existence of probable cause, they nonetheless might be reasonable if police were acting in exigent circumstances or where some other important governmental interest is involved.

(dicta)

are

admissible?

This puts prob
cause at less
than 50-50 chance

dicta

exigent circumstances
excuse lack of warrant
not lack of probable
cause; this seems
to be place allusion.

quired. *Brinegar v. United States*, 338 U. S. 160, 176 (1949). Moreover, our observation in *United States v. Cortez*, 449 U. S. 411, 418 (1981), regarding "particularized suspicion," is equally applicable to the probable cause requirement:

"The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement."

With these considerations in mind it is plain that Officer Maples possessed probable cause to believe that the balloon in Brown's hand contained an illicit substance. Maples testified that he was aware, both from his participation in previous narcotics arrests and from discussions with other officers, that balloons tied in the manner of the one possessed by Brown were frequently used to carry narcotics. This testimony was corroborated by that of a police department chemist who noted that it was "common" for balloons to be used in packaging narcotics. In addition, Maples was able to observe the contents of the glove compartment of Brown's car, which revealed further suggestions that Brown was engaged in activities that might involve possession of illicit substances. The fact that Maples could not see through the opaque fabric of the balloon is all but irrelevant: the distinctive character of the balloon itself spoke volumes as to its contents—particularly to the trained eye of the officer.

In addition to its statement that for seizure of objects in plain view to be justified the basis upon which they might be seized had to be "immediately apparent," and the requirement that the initial intrusion be lawful, both of which re-

quirements we hold were satisfied here, the *Coolidge* plurality also stated that the police must discover incriminating evidence "inadvertently," which is to say, they may not "know in advance the location of [certain] evidence and intend to seize it," relying on the plain view doctrine only as a pretense. *Id.*, at 470. Whatever may be the final disposition of the "inadvertence" element of "plain view,"⁷ it clearly was no bar to the seizure here. As in the related case of warrantless searches based on an exception to the warrant requirement of the Fourth Amendment, the circumstances of this meeting between Maples and Brown give no suggestion that the roadblock was a pretext whereby evidence of narcotics violation might be uncovered in "plain view" in the course of a check for driver's licenses. Here, although the officers no doubt had an expectation that some of the cars they halted on East Allen Street—which was part of a "medium" area of narcotics traffic, *J. App.*, at 33—would contain narcotics or paraphernalia, there is no indication in the record that they had anything beyond this generalized expectation. Likewise, there is no indication that Maples had any reason to believe that any particular object would be in Brown's glove compartment or elsewhere in his automobile. The "inadvertence" requirement of "plain view," properly understood, was no bar to the seizure here.

Maples lawfully viewed the green balloon in the interior of Brown's car, and had probable cause to believe that it was subject to seizure under the Fourth Amendment. The judgment of the Texas Court of Criminal Appeals is accordingly reversed, and the case remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

⁷ See *State v. King*, 191 N. W. 2d 650, 655 (Iowa 1971); *United States v. Santana*, 485 F. 2d 365, 369-370 (CA 2 1973), cert. denied, 415 U. S. 931 (1974); *United States v. Bradshaw*, 490 F. 2d 1097, 1101, n. 3 (CA 4 1974), cert. denied, 419 U. S. 895 (1974); *North v. Superior Court*, 502 P. 2d 1305, 1308 (Calif. 1972).

rejects

suggests no — suggesting
LFP will be vote to
can requirement

attempt to use
one side of the
debate with
approval

Why not a
"compare ... with ..."
citation

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

February 21, 1983



Re: 81-419 - Texas v. Brown

Dear Bill:

I join.

Regards,

A handwritten signature in black ink, appearing to be 'WRB', located below the word 'Regards,'.

Justice Rehnquist

Copies to the Conference

*Mike - OK to print
on a 12 draft*

JUSTICE POWELL, concurring.

In Coolidge v. New Hampshire, 403 U.S. 443 (1971), a plurality of this Court recognized three requirements for a "plain view" search and seizure. A police officer without a warrant may seize evidence in plain view when (i) the officer's initial intrusion is lawful,¹ id., at 465-466; (ii) the officer's discovery of the evidence is inadvertent, id., at 469-471; and (iii) it is "immediately apparent" to the officer that he has evidence before him, id., at 466. More recently, we explained in dicta that the "immediately apparent" requirement means that the officer must have "probable cause to associate the property [to be seized] with criminal activity." Payton v. New York, 445 U.S. 573, 587 (1980). Cf. Colorado v. Bannister, 449 U.S. 1 (1980) (per curiam).

Though it is unnecessary to rely on
 I accept the Coolidge plurality's statement of the plain view requirements, and I accept ~~the Payton Court's statement of the probable cause standard.~~ *maintained in Payton* In the present case, Respondent does not dispute that Officer Maples' initial intrusion was lawful. Respondent also concedes that the discovery of the tied-off balloon was inadvertent. *Accordingly,* the only issue before the Court is whether Officer Maples had probable cause to associate

¹The initial intrusion may be lawful for any of several reasons. It may be supported by a warrant unrelated to the seizure at issue. Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971) (plurality opinion). It may fall within one of the recognized exceptions to the warrant requirement. Id., at 465-466. Or it may be justified because the officer has "some other legitimate reason for being present unconnected with a search directed against the accused." Id., at 466.

the uninflated tied-off balloon with criminal activity.²

Mike!
relocate this note
also
had
It is clear to me that Officer Maples ~~did have the req-~~
uisite probable cause. He testified that he previously had made

an arrest in a case where narcotics were carried in tied-off balloons similar to the one at issue here. Other officers ~~also~~ had told him of such cases. Even if it were not generally known that a balloon is a common container for carrying illegal narcotics,³ we have recognized that a law enforcement officer may rely on his training and experience to draw inferences and make deductions that might well elude an untrained person. United States v. Cortez, 449 U.S. 411, 418 (1981). Moreover, ~~there does not seem to~~ *we are not advised of*

B ~~be~~ any innocent item that is commonly carried in an uninflated, tied-off balloon such as the one Officer Maples seized.

All of the requirements for a plain view search and seizure having been satisfied here, I agree that the decision below must be reversed.

²I do not accept respondent's argument that the decision below was based on state law, and thus is not reviewable here. The Texas Court of Criminal Appeals relied directly on Coolidge, supra, and on several state cases, each of which relied, either directly or indirectly, on Coolidge. Neither the decision below nor the cases it cites indicates any reliance on relevant state law grounds.

³The Texas Court of Criminal Appeals, despite its decision here, recognized this common use of balloons in DeLao v. State, 550 S.W.2d 289, 291 (1977). Cf. id., at 292 (Douglas, J., dissenting) ("[I]t is common knowledge that users and sellers of narcotics carry the substance on their person in rubber balloons, often called fingerstalls.").

1#0419G

Mike Sturley
23073

RECEIVED
SUPREME COURT, U.S.
PUBLICATIONS UNIT

first draft: Texas v. Brown, No. 81-419

First draft
30 copies

'83 FEB 23 P6:55

JUSTICE POWELL, concurring in the judgment.

In Coolidge v. New Hampshire, 403 U.S. 443 (1971), a plurality of this Court recognized three requirements for a "plain view" search and seizure. A police officer without a warrant may seize evidence in plain view when (i) the officer's initial intrusion is lawful,¹ id., at 465-466; (ii) the officer's discovery of the evidence is inadvertent, id., at 469-471; and (iii) it is "immediately apparent" to the officer that he has evidence before him, id., at 466. More recently, we explained in dicta that the "immediately apparent" requirement means that the officer must have "probable cause to associate the property [to be seized] with criminal activity." Payton v. New York, 445 U.S. 573, 587 (1980). Cf. Colorado v. Bannister, 449 U.S. 1 (1980) (per curiam).

The plain view requirements of Coolidge are satisfactorily met in this case.² Respondent does not dispute that Offi-

¹The initial intrusion may be lawful for any of several reasons. It may be supported by a warrant unrelated to the seizure at issue. Coolidge, 403 U.S., at 465. It may fall within one of the recognized exceptions to the warrant requirement. Id., at 465-466. Or it may be justified because the officer has "some other legitimate reason for being present unconnected with a search directed against the accused." Id., at 466.

²I do not accept respondent's argument that the decision below was based on state law, and thus is not reviewable here. The Texas Court of Criminal Appeals relied directly on Coolidge, supra, and on several state cases, each of which relied, either directly or indirectly, on Coolidge. Neither the decision below nor the cases it cites indicate any reliance on relevant state

Footnote continued on next page.

cer Maples' initial intrusion was lawful. Respondent concedes that the discovery of the tied-off balloon was inadvertent. If probable cause must be shown, as the Payton dicta suggests, I think it is clear that it existed here. Officer Maples testified that he previously had made an arrest in a case where narcotics were carried in tied-off balloons similar to the one at issue here. Other officers had told him of such cases. Even if it were not generally known that a balloon is a common container for carrying illegal narcotics,³ we have recognized that a law enforcement officer may rely on his training and experience to draw inferences and make deductions that might well elude an untrained person. United States v. Cortez, 449 U.S. 411, 418 (1981). Moreover, we are are not advised of any innocent item that is commonly carried in an uninflated, tied-off balloon such as the one Officer Maples seized.

All of the requirements for a plain view search and seizure having been satisfied here, I agree that the decision below must be reversed.

law grounds.

³The Texas Court of Criminal Appeals, despite its decision here, recognized this common use of balloons in DeLao v. State, 550 S.W.2d 289, 291 (1977). Cf. id., at 292 (Douglas, J., dissenting) ("[I]t is common knowledge that users and sellers of narcotics carry the substance on their person in rubber balloons, often called fingerstalls.").

1 # 0419 Gx

and 1 # 0419 GFx

Michael Sturley

23073

1st DRAFT

30 copies

JUSTICE POWELL, concurring in the judgment.

I concur in the judgment, and also agree with much of the Court's opinion relating to the application in this case of the plain view exception to the Warrant Clause. But I do not join the Court's opinion because it goes well beyond the application of the plain view exception. As I read the opinion, it appears to accord less significance to the Warrant Clause of the Fourth Amendment than is justified by the language and purpose of that Amendment. In dissent in United States v. Rabinowitz, 339 U.S. 56 (1950), Justice Frankfurter wrote eloquently:

"One cannot wrench 'unreasonable searches' from the text and context and historic content of the Fourth Amendment.... When [that] Amendment outlawed 'unreasonable searches' and then went on to define the very restricted authority that even a search warrant issued by a magistrate could give, the framers said with all the clarity of the gloss of history that a search is 'unreasonable' unless a warrant authorizes it, barring only exceptions justified by absolute necessity." Id., at 70.

To be sure, the opinions of this Court in Warrant Clause cases have not always been consistent. They have reflected disagreement among Justices as to the extent to which the Clause defines the reasonableness standard of the Amendment. In one of my earliest opinions, United States v. United States District Court, 407 U.S. 297 (1972), I cited Justice Frankfurter's Rabinowitz dissent in emphasizing the importance of the Warrant Clause. Id., at 316. Although I would not say that exceptions can be justified only by "absolute necessity,"¹ I stated that they were

¹I have considered the automobile exception, for example, as one clearly justified because of the nature of the vehicle. See, Footnote continued on next page.

"few in number and carefully delineated." Id., at 318. This has continued to be my view, as expressed recently in Arkansas v. Sanders, 442 U.S. 753, 759 (1979). It is a view frequently repeated by this Court. See, e.g., United States v. Ross, 456 U.S. 798, ____ (1982); Mincey v. Arizona, 437 U.S. 385, 390 (1978) (unanimous decision); Vale v. Louisiana, 399 U.S. 30, 34 (1970); Katz v. United States, 389 U.S. 347, 357 (1967); Camara v. Municipal Court, 387 U.S. 523, 528-529 (1967); Jones v. United States, 357 U.S. 493, 499 (1958).

This case involves an application of the plain view exception, first addressed at some length by the plurality opinion in Coolidge v. New Hampshire, 403 U.S. 443 (1971). The Court today states that this opinion "has never been expressly adopted by a majority of this Court." Ante, at 6. Whatever my view may have been when Coolidge was decided, I see no reason at this late date to imply criticism of its articulation of this exception. It has been accepted generally for over a decade.² Moreover, it seems

e.g., Arkansas v. Sanders, 442 U.S. 753, 760-761 (1979); United States v. Martinez-Fuerte, 428 U.S. 543, 561-562 (1976); Almeida-Sanchez v. United States, 413 U.S. 266, 279 (1973) (POWELL, J., concurring).

²See, e.g., United States v. Chesher, 678 F.2d 1353, 1356-1357 (CA9 1982); United States v. Irizarry, 673 F.2d 554, 558-560 (CA1 1982); United States v. Tolerton, 669 F.2d 652, 653-655 (CA10), cert. denied, ____ U.S. ____ (1982); United States v. Antill, 615 F.2d 648, 649 (CA5) (per curiam), cert. denied, 449 U.S. 866 (1980); United States v. Duckett, 583 F.2d 1309, 1313-1314 (CA5 1978); United States v. Williams, 523 F.2d 64, 66-67 (CA8 1975), cert. denied, 423 U.S. 1090 (1976); United States v. Truitt, 521 F.2d 1174, 1175-1178 (CA6 1975); United States v. Pacelli, 470 F.2d 67, 70-72 (CA2 1972), cert. denied, 410 U.S. 983 (1973); United States v. Drew, 451 F.2d 230, 232-234 (CA5

Footnote continued on next page.

unnecessary to cast doubt on Coolidge in this case. Its plurality formulation is dispositive of the question before us.

Respondent does not dispute that Officer Maples' initial intrusion was lawful. Respondent also concedes that the discovery of the tied-off balloon was inadvertent in that it was observed in the course of a lawful inspection of the front seat area of the automobile. If probable cause must be shown, as the Payton dicta suggests,³ I think it is clear that it existed here. Officer Maples testified that he previously had made an arrest in a case where narcotics were carried in tied-off balloons similar to the one at issue here. Other officers had told him of such cases. Even if it were not generally known that a balloon is a common container for carrying illegal narcotics, we have recognized that a law enforcement officer may rely on his training and experience to draw inferences and make deductions that might well elude an untrained person. United States v. Cortez, 449 U.S. 411, 418 (1981). We are not advised of any innocent item that is commonly carried in uninflated, tied-off balloon such as the one Officer Maples seized.

Accordingly, I join the Court's judgment as it is consistent with principles established by our prior decisions.

1971).

³See Payton v. New York, 445 U.S. 573, 587 (1980). Although probable cause was present in this case, I note with approval that the Court recognizes--without deciding--that reasonable suspicion of illegal activity may be sufficient to justify a seizure in some cases. See ante, at 7, n. 4, and 11, n. 7.

1 #0419 Gx

RECEIVED
SUPREME COURT
PUBLICATIONS UNIT

Michael Sturley

23073

'83 MAR 22 A9:01

still first draft

30 copies

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Powell

Circulated: _____

Recirculated: _____

MAR 20 1983

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-419

TEXAS, PETITIONER v. CLIFFORD JAMES BROWN

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL
APPEALS OF TEXAS

[March —, 1983]

JUSTICE POWELL, concurring in the judgment.

the I concur in the judgment, and also agree with much of the Court's opinion relating to the application in this case of the plain view exception to the Warrant Clause. But I do not join the Court's opinion because it goes well beyond the application of ~~the plain view~~ exception. As I read the opinion, it appears to accord less significance to the Warrant Clause of the Fourth Amendment than is justified by the language and purpose of that Amendment. In dissent in *United States v. Rabinowitz*, 339 U. S. 56 (1950), Justice Frankfurter wrote eloquently:

"One cannot wrench 'unreasonable searches' from the text and context and historic content of the Fourth Amendment. . . . When [that] Amendment outlawed 'unreasonable searches' and then went on to define the very restricted authority that even a search warrant issued by a magistrate could give, the framers said with all the clarity of the gloss of history that a search is 'unreasonable' unless a warrant authorizes it, barring only exceptions justified by absolute necessity." *Id.*, at 70.

To be sure, the opinions of this Court in Warrant Clause cases have not always been consistent. They have reflected disagreement among Justices as to the extent to which the Clause defines the reasonableness standard of the Amend-

ment. In one of my earliest opinions, *United States v. United States District Court*, 407 U. S. 297 (1972), I cited Justice Frankfurter's *Rabinowitz* dissent in emphasizing the importance of the Warrant Clause. *Id.*, at 316. Although I would not say that exceptions can be justified only by "absolute necessity,"¹ I stated that they were "few in number and carefully delineated." *Id.*, at 318. This has continued to be my view, as expressed recently in *Arkansas v. Sanders*, 442 U. S. 753, 759 (1979). It is a view frequently repeated by this Court. See, e. g., *United States v. Ross*, 456 U. S. 798, — (1982); *Mincey v. Arizona*, 437 U. S. 385, 390 (1978) (unanimous decision); *Vale v. Louisiana*, 399 U. S. 30, 34 (1970); *Katz v. United States*, 389 U. S. 347, 357 (1967); *Camara v. Municipal Court*, 387 U. S. 523, 528–529 (1967); *Jones v. United States*, 357 U. S. 493, 499 (1958).

This case involves an application of the plain view exception, first addressed at some length by the plurality opinion in *Coolidge v. New Hampshire*, 403 U. S. 443 (1971). The Court today states that this opinion "has never been expressly adopted by a majority of this Court." *Ante*, at 6. might Whatever my view ~~may~~ have been when *Coolidge* was decided, I see no reason at this late date to imply criticism of its articulation of this exception. It has been accepted generally for over a decade.² Moreover, it seems unnecessary to

¹ I have considered the automobile exception, for example, as one clearly justified because of the nature of the vehicle. See, e. g., *Arkansas v. Sanders*, 442 U. S. 753, 760–761 (1979); *United States v. Martinez-Fuerte*, 428 U. S. 543, 561–562 (1976); *Almeida-Sanchez v. United States*, 413 U. S. 266, 279 (1973) (POWELL, J., concurring).

² See, e. g., *United States v. Chesher*, 678 F. 2d 1353, 1356–1357 (CA9 1982); *United States v. Irizarry*, 673 F. 2d 554, 558–560 (CA1 1982); *United States v. Tolerton*, 669 F. 2d 652, 653–655 (CA10), cert. denied, — U. S. — (1982); *United States v. Antill*, 615 F. 2d 648, 649 (CA5) (*per curiam*), cert. denied, 449 U. S. 866 (1980); *United States v. Duckett*, 583 F. 2d 1309, 1313–1314 (CA5 1978); *United States v. Williams*, 523 F. 2d 64, 66–67 (CA8 1975), cert. denied, 423 U. S. 1090 (1976); *United States v. Truitt*,

cast doubt on *Coolidge* in this case. Its plurality formulation is dispositive of the question before us.

Respondent does not dispute that Officer Maples' initial intrusion was lawful. Respondent also concedes that the discovery of the tied-off balloon was inadvertent in that it was observed in the course of a lawful inspection of the front seat area of the automobile. If probable cause must be shown, as the *Payton* dicta suggests,¹ I think it is clear that it existed here. Officer Maples testified that he previously had made an arrest in a case where narcotics were carried in tied-off balloons similar to the one at issue here. Other officers had told him of such cases. Even if it were not generally known that a balloon is a common container for carrying illegal narcotics, we have recognized that a law enforcement officer may rely on his training and experience to draw inferences and make deductions that might well elude an untrained person. *United States v. Cortez*, 449 U. S. 411, 418 (1981). We are not advised of any innocent item that is commonly carried in uninflated, tied-off balloon such as the one Officer Maples seized.

Accordingly, I concur in the Court's judgment as it is consistent with principles established by our prior decisions.

Concur
in

521 F. 2d 1174, 1175-1178 (CA6 1975); *United States v. Pacelli*, 470 F. 2d 67, 70-72 (CA2 1972), cert. denied, 410 U. S. 983 (1973); *United States v. Drew*, 451 F. 2d 230, 232-234 (CA5 1971).

¹See *Payton v. New York*, 445 U. S. 573, 587 (1980). Although probable cause was present in this case, I note with approval that the Court recognizes—without deciding—that reasonable suspicion of illegal activity may be sufficient to justify a seizure in some cases. See *ante*, at 7, n. 4, and 11, n. 7.

³JUSTICE STEVENS, in his dissent, addresses the legality of the State's search of the balloon as well as of its seizure. See post, at 5-6. As Brown's counsel stated at oral argument that his client "did not object to the opening of the balloon", Tr. of Oral Arg. 47, I think it unnecessary to reach the search question -- although I am inclined to agree with the implicit concession of counsel that if the seizure was lawful there was little or no remaining expectation of privacy in the balloon.

*B**File*

JUSTICE POWELL, concurring.

*Makes draft as
revised by me.*

In Coolidge v. New Hampshire, 403 U.S. 443 (1971), a plurality of this Court recognized three requirements for a "plain view" search and seizure. A police officer without a warrant may seize evidence in plain view when (i) the officer's initial intrusion is lawful,¹ id., at 465-466; (ii) the officer's discovery of the evidence is inadvertent, id., at 469-471; and (iii) it is "immediately apparent" to the officer that he has evidence before him, id., at 466. More recently, we explained in dicta that the "immediately apparent" requirement means that the officer must have "probable cause to associate the property [to be seized] with criminal activity." Payton v. New York, 445 U.S. 573, 587 (1980). Cf. Colorado v. Bannister, 449 U.S. 1 (1980) (per curiam).

The plain view requirements of Coolidge are satisfactorily met in this case.² Respondent does not dispute that Officer Maples' initial intrusion was lawful. Respondent concedes

¹The initial intrusion may be lawful for any of several reasons. It may be supported by a warrant unrelated to the seizure at issue. Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971) (plurality opinion). It may fall within one of the recognized exceptions to the warrant requirement. Id., at 465-466. Or it may be justified because the officer has "some other legitimate reason for being present unconnected with a search directed against the accused." Id., at 466.

²I do not accept respondent's argument that the decision below was based on state law, and thus is not reviewable here. The Texas Court of Criminal Appeals relied directly on Coolidge, supra, and on several state cases, each of which relied, either directly or indirectly, on Coolidge. Neither the decision below nor the cases it cites indicates any reliance on relevant state law grounds.

that the discovery of the tied-off balloon was inadvertent. If probable cause must be shown, as the Payton dicta suggests, I think it is clear that it existed here. Officer Maples testified that he previously had made an arrest in a case where narcotics were carried in tied-off balloons similar to the one at issue here. Other officers had told him of such cases. Even if it were not generally known that a balloon is a common container for carrying illegal narcotics,³ we have recognized that a law enforcement officer may rely on his training and experience to draw inferences and make deductions that might well elude an untrained person. United States v. Cortez, 449 U.S. 411, 418 (1981). Moreover, we are not advised of any innocent item that is commonly carried in an uninflated, tied-off balloon such as the one Officer Maples seized.

All of the requirements for a plain view search and seizure having been satisfied here, I agree that the decision below must be reversed.

³The Texas Court of Criminal Appeals, despite its decision here, recognized this common use of balloons in DeLao v. State, 550 S.W.2d 289, 291 (1977). Cf. id., at 292 (Douglas, J., dissenting) ("[I]t is common knowledge that users and sellers of narcotics carry the substance on their person in rubber balloons, often called fingerstalls.").

4 + 10

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell ✓
Justice Stevens
Justice O'Connor

L.F.P.

Rehearsal principles of 4th Amend - 4
from: Justice Rehnquist

"Wide range" of exception
to warrant clause - 4

Circulated: _____

Recirculated: FEB 24 1983

Accepts Coolidge only as "point of
reference" - 6
2nd DRAFT

SUPREME COURT OF THE UNITED STATES

"Plain view" not an exception to warrant
clause - 7
No. 81-419

Any object
in plain
view may be
seized - 7

TEXAS, PETITIONER v. CLIFFORD JAMES BROWN

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL
APPEALS OF TEXAS

[February —, 1983]

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Clifford James Brown was convicted in the District Court of Tarrant County, Texas, for possession of heroin in violation of state law. The Texas Court of Criminal Appeals reversed his conviction, holding that evidence introduced at his trial should have been suppressed because it was obtained in violation of the Fourth Amendment to the United States Constitution.¹ That court rejected the state's con-

¹ Brown argues that the decision below rested on an independent and adequate state ground, and therefore that this Court lacks jurisdiction. *Fox Film Corp. v. Muller*, 296 U. S. 207, 210 (1935). The position is untenable. The opinion of the Texas Court of Criminal Appeals rests squarely on the interpretation of the Fourth Amendment to the United States Constitution in *Coolidge v. New Hampshire*, 403 U. S. 443 (1971), and on Texas cases interpreting that decision, e. g., *Howard v. State*, 599 S. W. 2d 597 (Tex. Cr. App. 1979); *DeLao v. State*, 550 S. W. 2d 289 (Tex. Cr. App. 1977); *Duncan v. State*, 549 S. W. 2d 730 (Tex. Cr. App. 1977); and *Nicholas v. State*, 502 S. W. 2d 169 (Tex. Cr. App. 1973). The only mention of the Texas Constitution occurs in a summary of Brown's contentions at the outset of the lower court's opinion. In a field like the Fourth Amendment, where the federal courts have been so active in imposing standards on state and local activities, a more affirmative indication in the opinion of the state court of reliance on state law is necessary before we will reject the likely explanation that "the [state] court felt compelled by what it understood to be federal constitutional considerations" to reach the result it did. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U. S. 562, 568 (1977).

Brown relies principally on *Howard v. State*, *supra*, and *Duncan v.*

Stay with your opinion. WHR changes
two of the problem areas, but only
slightly. Make

New Rule
different
from
Coolidge - 7

(Mike - check case cited)

"Central
requirement
is 'reasonable'
- 8

Accepts
Payton -
'probable
cause' - 10

tention that the so-called "plain view" doctrine justified the police seizure. Because of apparent uncertainty concerning the scope and applicability of this doctrine, we granted certiorari, — U. S. —, and now reverse the judgment of the Court of Criminal Appeals.

On a summer evening in June, 1979, Harold Maples, an officer of the Fort Worth police force, assisted in setting up a routine driver's license checkpoint on East Allen Street in that city. Shortly before midnight Maples stopped an automobile driven by respondent Brown, who was alone. Standing alongside the driver's window of Brown's car, Maples asked him for his driver's license. At roughly the same time, Maples shined his flashlight into the car and saw Brown withdraw his right hand from his right pants pocket. Caught between the two middle fingers of the hand was an opaque, green party balloon, knotted about one half inch from the tip. Brown let the balloon fall to the seat beside his leg, and then reached across the passenger seat and opened the glove compartment.

Because of his previous experience in arrests for drug offenses, Maples testified that he was aware that narcotics fre-

State, supra. Neither decision supports the proposition that the Texas Court of Criminal Appeals based its decision upon state law. In *Howard*, the State argued that the plain view doctrine justified the seizure of a closed translucent medicine jar from an automobile. The Court of Criminal Appeals rejected the claim, relying on *Coolidge v. New Hampshire, supra*, and stating that the State's arguments "cannot be squared with the Supreme Court's interpretation of the plain view doctrine." 599 S. W. 2d, at 602. The court also relied on *Thomas v. State, supra*, which it characterized as "[f]ollowing the teachings of *Coolidge v. New Hampshire.*" *Ibid.* An additional opinion of the court on the State's Motion for Rehearing merely elaborated upon the application of the plain view doctrine set forth in the court's original opinion. Similarly, in *Duncan*, the Court of Criminal Appeals rejected the State's reliance on the plain view theory, citing to *Coolidge* for a statement of the applicable law, as well as to *Nicholas v. State*, 502 S. W. 2d 169 (Tex. Cr. App. 1973). Like the court's other decisions in the area, *Nicholas* relied only on *Coolidge*.

quently were packaged in balloons like the one in Brown's hand. When he saw the balloon, Maples shifted his position in order to obtain a better view of the interior of the glove compartment. He noticed that it contained several small plastic vials, quantities of loose white powder, and an open bag of party balloons. After rummaging briefly through the glove compartment, Brown told Maples that he had no driver's license in his possession. Maples then instructed him to get out of the car and stand at its rear. Brown complied, and, before following him to the rear of the car, Maples reached into the car and picked up the green balloon; there seemed to be a sort of powdery substance within the tied-off portion of the balloon.

Maples then displayed the balloon to a fellow officer who indicated that he "understood the situation." The two officers then advised Brown that he was under arrest.² They

² It is not clear on the record before us when Brown was arrested. The Court of Criminal Appeals stated, at one point in its opinion, that it did not question "the propriety of the arrest since appellant failed to produce a driver's license." This statement might be read to suggest that Brown was arrested upon his failure to produce a license, instead of at some point following seizure of the balloon from the car. The transcript of the suppression hearing, however, indicates rather clearly that Brown was not formally arrested until after seizure of the balloon. J. App. 28-31. In the face of such indications, we decline to interpret the above-quoted clause from the Court of Criminal Appeals' opinion as evidencing a belief that an arrest occurred prior to seizure of the balloon. Rather, we think it likely that the court was simply reasoning that Brown's arrest, whenever it may have taken place, was justified because of his failure to produce a driver's license.

We do not address the argument that seizure of the balloon would have been justified under *New York v. Belton*, 453 U. S. 454 (1982), which permits warrantless searches of the passenger compartment of an automobile incident to an arrest, because of the absence of clear factual findings regarding the time at which, and the reason for which, Brown was arrested and because the lower court was not able to consider that decision. Likewise, we do not rest our decision on *United States v. Ross*, — U. S. — (1982).

also conducted an on-the-scene inventory of Brown's car, discovering several plastic bags containing a green leafy substance and a large bottle of milk sugar. These items, like the balloon, were seized by the officers. At the suppression hearing conducted by the District Court, a police department chemist testified that he had examined the substance in the balloon seized by Maples and determined that it was heroin. He also testified that narcotics frequently were packaged in ordinary party balloons.

The Court of Criminal Appeals, discussing the Fourth Amendment issue, observed that "plain view *alone* is never enough to justify the warrantless seizure of evidence." Pet. A-10, quoting *Coolidge v. New Hampshire*, 403 U. S. 443, 468 (1971) (opinion of Stewart, Douglas, BRENNAN and MARSHALL, JJ.) It further concluded that "Officer Maples had to know that 'incriminatory evidence was before him when he seized the balloon.'" Pet. A-11 (emphasis supplied), quoting *DeLao v. State*, 550 S. W. 2d 289, 291 (Tex. Cr. App. 1977). On the state's petition for rehearing, three judges dissented, stating their view that "[t]he issue turns on whether an officer, relying on years of practical experience and knowledge commonly accepted, has probable cause to seize the balloon in plain view." Pet. A-15, 16.

Because the "plain view" doctrine generally is invoked in conjunction with other Fourth Amendment principles, such as those relating to warrants, probable cause, and search incident to arrest, we rehearse briefly these better understood principles of Fourth Amendment law. That amendment secures the persons, houses, papers and effects of the people against unreasonable searches and seizures, and requires the existence of probable cause before a warrant shall issue. Our cases hold that procedure by way of a warrant is preferred, although in a wide range of diverse situations we have recognized flexible, common-sense exceptions to this requirement. See, e. g., *Warden v. Hayden*, 387 U. S. 294 (1967) (hot pursuit); *United States v. Jeffers*, 342 U. S. 48, 51-52

we have
not
said
"wide
range"
of flexible
exceptions

Rehearsal
of other
principles
of 4th
amend
law

(1951) (exigent circumstances); *United States v. Ross*, — U. S. — (1982) (automobile search); *Chimel v. California*, 395 U. S. 752 (1969); *United States v. Robinson*, 414 U. S. 218 (1973); and *New York v. Belton*, 453 U. S. 454 (1982) (search of person and surrounding area incident to arrest); *Almeida-Sanchez v. United States*, 413 U. S. 266 (1973) (search at border or "functional equivalent"); *Zap v. United States*, 328 U. S. 624, 630 (1946) (consent). We have also held to be permissible intrusions less severe than full-scale searches or seizures without the necessity of a warrant. See, e. g., *Terry v. Ohio*, *supra*, (stop and frisk); *United States v. Brignoni-Ponce*, *supra*, (seizure for questioning); *Delaware v. Prouse*, *supra*, (roadblock). One frequently mentioned "exception to the warrant requirement," *Coolidge v. New Hampshire*, *supra*, 403 U. S., at 443, is the so-called "plain view" doctrine, relied upon by the state in this case.

While conceding that the green balloon seized by Officer Maples was clearly visible to him, the Court of Criminal Appeals held that the state might not avail itself of the "plain view" doctrine. That court said:

"For the plain view doctrine to apply, not only must the officer be legitimately in a position to view the object, but it must be immediately apparent to the police that they have evidence before them. This 'immediately apparent' aspect is central to the plain view exception and is here relied upon by appellant. (Citation omitted). In this case then, Officer Maples had to know that 'incriminatory evidence was before him when he seized the balloon.'" Petn. A-10, A-11.

The Court of Criminal Appeals based its conclusion primarily on the plurality opinion of this Court in *Coolidge v. New Hampshire*, *supra*. In the *Coolidge* plurality's view, the "plain view" doctrine permits the warrantless seizure by po-

Texas
relied on
Coolidge

lice of private possessions where three requirements are satisfied.³ First, the police officer must lawfully make an "initial intrusion" or otherwise properly be in a position from which he can view a particular area. *Id.*, at 465-468. Second, the officer must discover incriminating evidence "inadvertently," which is to say, he may not "know in advance the location of [certain] evidence and intend to seize it," relying on the plain view doctrine only as a pretext. *Id.*, at 470. Finally, it must be "immediately apparent" to the police that the items they observe may be evidence of a crime, contraband, or otherwise subject to seizure. *Id.*, at 469-470. While the lower courts generally have applied the *Coolidge* plurality's discussion of "plain view," it has never been expressly adopted by a majority of this Court. On the contrary, the plurality's formulation was sharply criticized at the time, see, *Coolidge v. New Hampshire*, *supra*, 403 U. S., at 506 (Black, J., dissenting); *id.*, at 516-521 (WHITE, J., dissenting). While not a binding precedent, as the considered opinion of four Members of this Court it should obviously be the point of reference for further discussion of the issue.

The *Coolidge* plurality observed, "It is important to keep in mind that, in the vast majority of cases, *any* evidence seized by the police will be in plain view, at least at the moment of seizure," simply as "the normal concomitant of any search, legal or illegal." 403 U. S., at 465. The question whether property in plain view of the police may be seized therefore must turn on the legality of the intrusion that en-

³The plurality also remarked that "plain view *alone* is never enough to justify the warrantless seizure of evidence." *Coolidge v. New Hampshire*, *supra*, 403 U. S., at 468. The court below appeared to understand this phrase to impose an independent limitation upon the scope of the plain view doctrine articulated in *Coolidge*. The context in which the plurality used the phrase, however, indicates that it was merely a rephrasing of its conclusion, discussed below, that in order for the plain view doctrine to apply, a police officer must be engaged in a lawful intrusion or must otherwise legitimately occupy the position affording him a "plain view."

*Don't
accept
Coolidge*

ables them to perceive and physically seize the property in question. The *Coolidge* plurality, while following this view of the "plain view" doctrine, characterized the doctrine as an exception to the warrant requirement. We think this may be somewhat inaccurate. That characterization, for example, describes application of the doctrine to seizures of property found in public areas very poorly. If police encountered contraband or evidence of a crime concealed in a public park few would suggest that the warrant clause had any applicability at all, and reliance upon some "exception" would be completely unnecessary.

"Plain view" can probably be better understood simply as an application of the reasonableness requirement of the Fourth Amendment to seizures of property. It is grounded on the recognition that when a police officer has observed an object in "plain view," the owner's remaining interests in the object are merely those of possession and ownership, see *Coolidge v. New Hampshire*, *supra*, 403 U. S., at 515 (WHITE, J., dissenting). Likewise, it reflects the fact that requiring police to obtain a warrant once they have obtained a first-hand perception of contraband, stolen property or incriminating evidence generally would be a "needless inconvenience," 403 U. S., at 468, that might involve danger to the police and public. *Ibid.* We have said previously that "the permissibility of a particular law enforcement practice is judged by balancing its intrusion on . . . Fourth Amendment interests against its promotion of legitimate governmental interests." *Delaware v. Prouse*, *supra*, 440 U. S., at 654. In light of the private and governmental interests just outlined, our decisions have come to reflect the rule that if, while lawfully engaged in an activity in a particular place, police officers perceive a suspicious object, they may seize it immediately. See *Marron v. United States*, 275 U. S. 192 (1927); *Go-Bart Importing Co. v. United States*, 282 U. S. 344, 358 (1931); *United States v. Lefkowitz*, 285 U. S. 452, 465 (1932); *Harris v. United States*, 390 U. S. 234, 236 (1968); *Frazier v.*

Inaccurate

- I irrelevant

Any object
in plain
view
may be
seized!
What about
if I left
my
wallet
on my
desk

New
Rule

Cupp, 394 U. S. 731 (1969). This rule merely reflects an application of the Fourth Amendment's central requirement of reasonableness to the law governing seizures of property.

Applying these principles, we conclude that Officer Maples properly seized the green balloon from Brown's automobile. The Court of Criminal Appeals stated that it did not "question . . . the validity of the officer's initial stop of appellant's vehicle as a part of a license check," Pet. A-10, and we agree. *Delaware v. Prouse*, 440 U. S. 648, 654-655 (1979). It is likewise beyond dispute that Maples' action in shining his flashlight to illuminate the interior of Brown's car trenchd upon no right secured to the latter by the Fourth Amendment. The Court said in *United States v. Lee*, 274 U. S. 559, 563 (1927), that "[The] use of a searchlight is comparable to the use of a marine glass or a field glass. It is not prohibited by the Constitution." Numerous other courts have agreed that the use of artificial means to illuminate a darkened area simply does not constitute a search, and thus triggers no Fourth Amendment protection.⁴

Likewise, the fact that Maples "changed [his] position" and "bent down at an angle so [he] could see what was inside" Brown's car, J. App., at 16, is irrelevant to Fourth Amendment analysis. The general public could peer into the interior of Brown's automobile from any number of angles; there

⁴*E. g.*, *United States v. Chesher*, 678 F. 2d 1352, 1356-1357, n. 2 (CA9 1982); *United States v. Ocampo*, 650 F. 2d 421, 427 (CA2 1981); *United States v. Pugh*, 566 F. 2d 626, 627, n. 2 (CA8 1977), cert. denied, 435 U. S. 1010 (1978); *United States v. Coplen*, 541 F. 2d 211 (CA9 1976), cert. denied, 429 U. S. 1073 (1977); *United States v. Lara*, 517 F. 2d 209 (CA5 1975); *United States v. Johnson*, 506 F. 2d 674 (CA8 1974), cert. denied, 421 U. S. 917 (1975); *United States v. Booker*, 461 F. 2d 990, 992 (CA6 1972); *United States v. Hanahan*, 442 F. 2d 649 (CA7 1971); *People v. Waits*, 580 P. 2d 391 (Colo. 1978); *Redd v. State*, 243 S. E. 2d 16 (Ga. 1978); *State v. Chattley*, 390 A. 2d 472 (Me. 1978); *State v. Vohnouthka*, 292 N. W. 2d 756 (Minn. 1980); *Dick v. State*, 596 P. 2d 1265 (Okla. Cr. 1979); *State v. Miller*, 608 P. 2d 595 (Ore. 1980); *Albo v. State*, 379 So. 2d 648 (Fla. 1980).

is no reason Maples should be precluded from observing as an officer what would be entirely visible to him as a private citizen. There is no legitimate expectation of privacy, *Katz v. United States*, *supra*, 389 U. S., at 361 (1967) (Harlan, J., concurring); *Smith v. Maryland*, 442 U. S. 735, 739-745 (1979), shielding that portion of the interior of an automobile which may be viewed from outside the vehicle by either inquisitive passersby or diligent police officers. In short, the conduct that enabled Maples to observe the interior of Brown's car and of his open glove compartment was not a search within the meaning of the Fourth Amendment.

Thus there can be no dispute here as to the presence of the first of the three requirements held necessary by the *Coolidge* plurality to invoke the "plain view" doctrine.⁵ But the Court of Criminal Appeals, as we have noted, felt the state's case ran aground on the requirement that the incriminating nature of the items be "immediately apparent" to the police officer. To the Court of Appeals, this apparently meant that the officer must be possessed of near certainty as to the seizable nature of the items. Decisions by this Court since *Coolidge* indicate that the use of the phrase "immediately apparent" was very likely an unhappy choice of words, since it can be taken to imply that an unduly high degree of certainty as to the incriminatory character of evidence is necessary for an application of the "plain view" doctrine.

In *Colorado v. Bannister*, *supra*, 449 U. S., at 3-4, we applied what was in substance the plain view doctrine to an offi-

⁵ While seizure of the balloon required a warrantless, physical intrusion into Brown's automobile, this was proper, assuming that the remaining requirements of the plain view doctrine were satisfied. The "Fourth Amendment protects people not places." *Katz v. United States*, *supra*, 389 U. S., at 351. Officer Maples' action was a limited intrusion, see *Adams v. Williams*, 407 U. S. 143 (1972), directed only to retrieving an object in plain view and not offering the officer an opportunity to engage in the type of "general exploratory search" condemned in *Coolidge*. As such, it was entirely reasonable.

cer's seizure of evidence from an automobile. *Id.*, at n. 4. The officer noticed that the occupants of the automobile matched a description of persons suspected of a theft and that auto parts in the open glove compartment of the car similarly resembled ones reported stolen. The Court held that these facts supplied the officer with "probable cause," *id.*, at 4, and therefore, that he could seize the incriminating items from the car without a warrant. Plainly, the Court did not view the "immediately apparent" language of *Coolidge* as establishing any requirement that a police officer "know" that certain items are contraband or evidence of a crime. Indeed, *Colorado v. Bannister*, *supra*, was merely an application of the rule, set forth in *Payton v. New York*, 445 U. S. 573 (1980), that "[t]he seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity." *Id.*, at 587 (emphasis added). We think this statement of the rule from *Payton*, *supra*, requiring probable cause for seizure in the ordinary case,⁸ is consistent with the Fourth Amendment and we reaffirm it here.

As the Court frequently has remarked, probable 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," *Carroll v. United States*, 267 U. S. 132, 162 (1925), 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. *Brinegar v. United States*, 338 U. S. 160, 176 (1949). Moreover, our observation in *United States v. Cortez*, 449 U. S. 411, 418 (1981), regarding "particularized

⁸ We need not address whether, in some circumstances, a degree of suspicion lower than probable cause would be sufficient basis for a seizure in certain cases.

Payton

need not
be more
likely
"true than
false"

omission

suspicion," is equally applicable to the probable cause requirement:

"The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement."

With these considerations in mind it is plain that Officer Maples possessed probable cause to believe that the balloon in Brown's hand contained an illicit substance. Maples testified that he was aware, both from his participation in previous narcotics arrests and from discussions with other officers, that balloons tied in the manner of the one possessed by Brown were frequently used to carry narcotics. This testimony was corroborated by that of a police department chemist who noted that it was "common" for balloons to be used in packaging narcotics. In addition, Maples was able to observe the contents of the glove compartment of Brown's car, which revealed further suggestions that Brown was engaged in activities that might involve possession of illicit substances. The fact that Maples could not see through the opaque fabric of the balloon is all but irrelevant: the distinctive character of the balloon itself spoke volumes as to its contents—particularly to the trained eye of the officer.

In addition to its statement that for seizure of objects in plain view to be justified the basis upon which they might be seized had to be "immediately apparent," and the requirement that the initial intrusion be lawful, both of which requirements we hold were satisfied here, the *Coolidge* plurality also stated that the police must discover incriminating evidence "inadvertently," which is to say, they may not

"know in advance the location of [certain] evidence and intend to seize it," relying on the plain view doctrine only as a pretense. *Id.*, at 470. Whatever may be the final disposition of the "inadvertence" element of "plain view,"¹ it clearly was no bar to the seizure here. As in the related case of warrantless searches based on an exception to the warrant requirement of the Fourth Amendment, the circumstances of this meeting between Maples and Brown give no suggestion that the roadblock was a pretext whereby evidence of narcotics violation might be uncovered in "plain view" in the course of a check for driver's licenses. Here, although the officers no doubt had an expectation that some of the cars they halted on East Allen Street—which was part of a "medium" area of narcotics traffic, J. App., at 33—would contain narcotics or paraphernalia, there is no indication in the record that they had anything beyond this generalized expectation. Likewise, there is no indication that Maples had any reason to believe that any particular object would be in Brown's glove compartment or elsewhere in his automobile. The "inadvertence" requirement of "plain view," properly understood, was no bar to the seizure here.

Maples lawfully viewed the green balloon in the interior of Brown's car, and had probable cause to believe that it was subject to seizure under the Fourth Amendment. The judgment of the Texas Court of Criminal Appeals is accordingly reversed, and the case remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

¹ See *State v. King*, 191 N. W. 2d 650, 655 (Iowa 1971); *United States v. Santana*, 485 F. 2d 365, 369-370 (CA2 1973), cert. denied, 415 U. S. 931 (1974); *United States v. Bradshaw*, 490 F. 2d 1097, 1101, n. 3 (CA4 1974), cert. denied, 419 U. S. 895 (1974); *North v. Superior Court*, 502 P. 2d 1305, 1308 (Calif. 1972).

FEB 24 1983

Not circulated

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

*File
copy*

From: Justice Powell

Circulated: _____

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-419

TEXAS, PETITIONER v. CLIFFORD JAMES BROWN

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL
APPEALS OF TEXAS

[February —, 1983]

JUSTICE POWELL, concurring in the judgment.

In *Coolidge v. New Hampshire*, 403 U. S. 443 (1971), a plurality of this Court recognized three requirements for a "plain view" search and seizure. A police officer without a warrant may seize evidence in plain view when (i) the officer's initial intrusion is lawful,¹ *id.*, at 465-466; (ii) the officer's discovery of the evidence is inadvertent, *id.*, at 469-471; and (iii) it is "immediately apparent" to the officer that he has evidence before him, *id.*, at 466. More recently, we explained in dicta that the "immediately apparent" requirement means that the officer must have "probable cause to associate the property [to be seized] with criminal activity." *Payton v. New York*, 445 U. S. 573, 587 (1980). Cf. *Colorado v. Bannister*, 449 U. S. 1 (1980) (*per curiam*).

Bryant The plain view requirements of *Coolidge* are satisfactorily met in this case.² Respondent does not dispute that Officer

¹ The initial intrusion may be lawful for any of several reasons. It may be supported by a warrant unrelated to the seizure at issue. *Coolidge*, 403 U. S., at 465. It may fall within one of the recognized exceptions to the warrant requirement. *Id.*, at 465-466. Or it may be justified because the officer has "some other legitimate reason for being present unconnected with a search directed against the accused." *Id.*, at 466.

² I do not accept respondent's argument that the decision below was based on state law, and thus is not reviewable here. The Texas Court of Criminal Appeals relied directly on *Coolidge*, *supra*, and on several state

*Before I
circulated
this, WHR
circulated
a 3rd
draft
that is
a substantial
improvement
over his
first
draft*

Maples' initial intrusion was lawful. Respondent concedes that the discovery of the tied-off balloon was inadvertent. If probable cause must be shown, as the *Payton* dicta suggests, I think it is clear that it existed here. Officer Maples testified that he previously had made an arrest in a case where narcotics were carried in tied-off balloons similar to the one at issue here. Other officers had told him of such cases. Even if it were not generally known that a balloon is a common container for carrying illegal narcotics,³ we have recognized that a law enforcement officer may rely on his training and experience to draw inferences and make deductions that might well elude an untrained person. *United States v. Cortez*, 449 U. S. 411, 418 (1981). Moreover, we are not advised of any innocent item that is commonly carried in an uninflated, tied-off balloon such as the one Officer Maples seized.

All of the requirements for a plain view search and seizure having been satisfied here, I agree that the decision below must be reversed. *End*

was satisfied. / End

cases, each of which relied, either directly or indirectly, on *Coolidge*. Neither the decision below nor the cases it cites indicate any reliance on relevant state law grounds.

³The Texas Court of Criminal Appeals, despite its decision here, recognized this common use of balloons in *DeLao v. State*, 560 S.W. 2d 289, 291 (1977). Cf. *id.*, at 292 (Douglas, J., dissenting) ("[I]t is common knowledge that users and sellers of narcotics carry the substance on their person in rubber balloons, often called fingerstalls.").

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

February 24, 1983



No. 81-419 Texas v. Brown

Dear Bill,

Please join me in your opinion. I may write a short separate concurrence explaining my understanding of the warrant requirement and the exceptions to it.

Sincerely,

A handwritten signature in cursive script, reading "Sandra", in dark ink.

Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 24, 1983 ✓

Re: 81-419 - Texas v. Brown

Dear Bill,

I join your opinion and shall file a
line or two.

Sincerely,



Justice Rehnquist

Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 25, 1983

81-419 Texas v. Brown

Dear Bill:

I will join your judgment, but am afraid I cannot join your opinion.

It contains a good many statements that I find difficult to reconcile with what I have said in Fourth Amendment cases - and indeed what the Court has said. I mention a few of my concerns.

I thought we took the case because the Texas court misapplied the "plain view" rule. Although Coolidge was only a plurality decision, federal courts have been following it for a decade and I have considered it established law. As I read your opinion you accept Coolidge initially as only a "point of reference" (p. 6), state that it is not an exception to the warrant clause (p. 7), but you embrace the dicta in Payton to the effect that the third inquiry under the plain view exception is whether there was probable cause. (p. 10) As we are not bound by this dicta, I would not foreclose the possibility that reasonable suspicion satisfies the third requirement of the rule. I agree there was probable cause here.

In any event, it seems to me that your opinion will create uncertainty as to the force of the rule and its specific content.

Although you and I have been together on most Fourth Amendment cases, we have differed as to the importance of the warrant clause. I do not think it is subordinate to the reasonableness component. In Sanders v. Arkansas, in accord with a number of our decisions (including some of mine), I emphasized the importance of the warrant clause and spoke of exceptions to it as few and "carefully drawn". In your opinion in this case you refer to a "wide range of diverse situations" in which we have recognized "flexible, common-sense exceptions to this requirement".

*This letter
was not sent.*

*WHR planned
to revise his
first draft. A
3rd draft circulated*

*on
3/9*

*is much
more in
line with*

*my
views,
though
I still
do not
like*

*the
way it
is written.*

In most situations, there may be little substantive difference in our views. Yet, the language and tone of your opinion in this case is different from what I have written in several opinions.

Other statements that puzzle me include the first couple of sentences in the first full paragraph on page 7. Would an officer be entitled to take a look inside my wallet if he happened to find it lying on my desk? On the same page (p. 7) the opinion states that our decisions reflect the rule that a "police officer [who] perceives a suspicious object", may "seize it immediately". You cite several cases, only two of which (Harris and Frazier) tend to support your position. Maron and Lefkowitz can be read to the contrary.

Omitted
in
3rd
draft

In sum, while we normally try to work out language in an opinion where there is considerable agreement, I have no right to expect you to make the substantial changes in language that would relieve my concerns. Accordingly, I am circulating a concurring opinion based on the plain view rule that says substantially all that I think is necessary to be said on the merits of this case.

Sincerely,

Lewis

Justice Rehnquist

lfp/ss

To: JUSTICE POWELL
 From: Michael
 Re: Texas v. Brown, No. 81-419

File
 memo
 & requested.

You asked me to look at the five cases WHR cites on the bottom of page 7 of his opinion in this case. None of the cases support a rule allowing seizure of any "suspicious" object, but Harris and Frazier are at least relevant to this case. (Harris, in particular, may be worth adding to the next draft of our opinion.) In brief, the five cases hold as follows:

During prohibition - op. by Butler emphasized
Marron v. United States, 275 U.S. 192 (1927): Prohibition agents had a warrant to search for liquor. While executing this warrant, they also arrested the bartender and seized ledgers relating to liquor sales, etc. HELD: Agents could not seize ledgers as incident to search for liquor, but could seize them as incident to bartender's arrest.

Go-Bart Importing Co. v. United States, 282 U.S. 344, 358 (1931): Prohibition agents, acting under color of an invalid arrest warrant, arrested two company officers and conducted general search of premises. HELD: Search violated Fourth Amendment. At 358, Marron was distinguished.

Another prohibition case
United States v. Lefkowitz, 285 U.S. 452, 465 (1932): Prohibition agents arrested defendants in room used to solicit liquor orders. Upon making the arrest, agents searched the room for evidence. HELD: Search violated Fourth Amendment. Dicta at 465-466 draw a distinction between searches "merely to get evidence" and searches "to find stolen goods for return to the owner," to take forfeited property, and to seize the instrumental-

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: Justice Rehnquist

Circulated: _____

MAR 9 1983

Recirculated: _____

Pg 3, 7-10, 12

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-419

TEXAS, PETITIONER v. CLIFFORD JAMES BROWN

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL
APPEALS OF TEXAS

[March —, 1983]

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Clifford James Brown was convicted in the District Court of Tarrant County, Texas, for possession of heroin in violation of state law. The Texas Court of Criminal Appeals reversed his conviction, holding that evidence introduced at his trial should have been suppressed because it was obtained in violation of the Fourth Amendment to the United States Constitution.¹ That court rejected the state's con-

¹ Brown argues that the decision below rested on an independent and adequate state ground, and therefore that this Court lacks jurisdiction. *Fox Film Corp. v. Muller*, 296 U. S. 207, 210 (1935). The position is untenable. The opinion of the Texas Court of Criminal Appeals rests squarely on the interpretation of the Fourth Amendment to the United States Constitution in *Coolidge v. New Hampshire*, 403 U. S. 443 (1971), and on Texas cases interpreting that decision, e. g., *Howard v. State*, 599 S. W. 2d 597 (Tex. Cr. App. 1979); *DeLao v. State*, 550 S. W. 2d 289 (Tex. Cr. App. 1977); *Duncan v. State*, 549 S. W. 2d 780 (Tex. Cr. App. 1977); and *Nicholas v. State*, 502 S. W. 2d 169 (Tex. Cr. App. 1973). The only mention of the Texas Constitution occurs in a summary of Brown's contentions at the outset of the lower court's opinion. In a field like the Fourth Amendment, where the federal courts have been so active in imposing standards on state and local activities, a more affirmative indication in the opinion of the state court of reliance on state law is necessary before we will reject the likely explanation that "the [state] court felt compelled by what it understood to be federal constitutional considerations" to reach the result it did. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U. S. 562, 568 (1977).

Brown relies principally on *Howard v. State*, *supra*, and *Duncan v.*

Notes:
I don't think
so

Does this undercut
WJB/TM/LFP/IPS
position in Michigan
v. Long, No. 82-256?
It seems to shift burden
to resp to disprove the
Court's jurisdiction.

WHR has taken out a few more of the offending passages, but many more remain. More importantly, this opinion does nothing to offer any guidance →

tention that the so-called "plain view" doctrine justified the police seizure. Because of apparent uncertainty concerning the scope and applicability of this doctrine, we granted certiorari, — U. S. —, and now reverse the judgment of the Court of Criminal Appeals.

On a summer evening in June, 1979, Harold Maples, an officer of the Fort Worth police force, assisted in setting up a routine driver's license checkpoint on East Allen Street in that city. Shortly before midnight Maples stopped an automobile driven by respondent Brown, who was alone. Standing alongside the driver's window of Brown's car, Maples asked him for his driver's license. At roughly the same time, Maples shined his flashlight into the car and saw Brown withdraw his right hand from his right pants pocket. Caught between the two middle fingers of the hand was an opaque, green party balloon, knotted about one half inch from the tip. Brown let the balloon fall to the seat beside his leg, and then reached across the passenger seat and opened the glove compartment.

Because of his previous experience in arrests for drug offenses, Maples testified that he was aware that narcotics fre-

State, supra. Neither decision supports the proposition that the Texas Court of Criminal Appeals based its decision upon state law. In *Howard*, the State argued that the plain view doctrine justified the seizure of a closed translucent medicine jar from an automobile. The Court of Criminal Appeals rejected the claim, relying on *Coolidge v. New Hampshire, supra*, and stating that the State's arguments "cannot be squared with the Supreme Court's interpretation of the plain view doctrine." 599 S. W. 2d, at 602. The court also relied on *Thomas v. State, supra*, which it characterized as "[f]ollowing the teachings of *Coolidge v. New Hampshire.*" *Ibid.* An additional opinion of the court on the State's Motion for Rehearing merely elaborated upon the application of the plain view doctrine set forth in the court's original opinion. Similarly, in *Duncan*, the Court of Criminal Appeals rejected the State's reliance on the plain view theory, citing to *Coolidge* for a statement of the applicable law, as well as to *Nicholas v. State*, 502 S. W. 2d 169 (Tex. Cr. App. 1973). Like the court's other decisions in the area, *Nicholas* relied only on *Coolidge*.

quently were packaged in balloons like the one in Brown's hand. When he saw the balloon, Maples shifted his position in order to obtain a better view of the interior of the glove compartment. He noticed that it contained several small plastic vials, quantities of loose white powder, and an open bag of party balloons. After rummaging briefly through the glove compartment, Brown told Maples that he had no driver's license in his possession. Maples then instructed him to get out of the car and stand at its rear. Brown complied, and, before following him to the rear of the car, Maples reached into the car and picked up the green balloon; there seemed to be a sort of powdery substance within the tied-off portion of the balloon.

Maples then displayed the balloon to a fellow officer who indicated that he "understood the situation." The two officers then advised Brown that he was under arrest.² They also conducted an on-the-scene inventory of Brown's car, discovering several plastic bags containing a green leafy sub-

² It is not clear on the record before us when Brown was arrested. The Court of Criminal Appeals stated, at one point in its opinion, that it did not question "the propriety of the arrest since appellant failed to produce a driver's license." This statement might be read to suggest that Brown was arrested upon his failure to produce a license, instead of at some point following seizure of the balloon from the car. The transcript of the suppression hearing, however, indicates rather clearly that Brown was not formally arrested until after seizure of the balloon. J. App. 28-31. In the face of such indications, we decline to interpret the above-quoted clause from the Court of Criminal Appeals' opinion as evidencing a belief that an arrest occurred prior to seizure of the balloon. Rather, we think it likely that the court was simply reasoning that Brown's arrest, whenever it may have taken place, was justified because of his failure to produce a driver's license.

We do not address the argument that seizure of the balloon would have been justified under *New York v. Belton*, 453 U. S. 454 (1982), which permits warrantless searches of the passenger compartment of an automobile incident to an arrest, because of the absence of clear factual findings regarding the time at which, and the reason for which, Brown was arrested and because the lower court was not able to consider that decision.

Omission

stance and a large bottle of milk sugar. These items, like the balloon, were seized by the officers. At the suppression hearing conducted by the District Court, a police department chemist testified that he had examined the substance in the balloon seized by Maples and determined that it was heroin. He also testified that narcotics frequently were packaged in ordinary party balloons.

The Court of Criminal Appeals, discussing the Fourth Amendment issue, observed that "plain view *alone* is never enough to justify the warrantless seizure of evidence." Pet. A-10, quoting *Coolidge v. New Hampshire*, 403 U. S. 443, 468 (1971) (opinion of Stewart, Douglas, BRENNAN and MARSHALL, JJ.) It further concluded that "Officer Maples had to *know* that 'incriminatory evidence was before him when he seized the balloon.'" Pet. A-11 (emphasis supplied), quoting *DeLao v. State*, 550 S. W. 2d 289, 291 (Tex. Cr. App. 1977). On the state's petition for rehearing, three judges dissented, stating their view that "[t]he issue turns on whether an officer, relying on years of practical experience and knowledge commonly accepted, has probable cause to seize the balloon in plain view." Pet. A-15, 16.

Because the "plain view" doctrine generally is invoked in conjunction with other Fourth Amendment principles, such as those relating to warrants, probable cause, and search incident to arrest, we rehearse briefly these better understood principles of Fourth Amendment law. That amendment secures the persons, houses, papers and effects of the people against unreasonable searches and seizures, and requires the existence of probable cause before a warrant shall issue. Our cases hold that procedure by way of a warrant is preferred, although in a wide range of diverse situations we have recognized flexible, common-sense exceptions to this requirement. See, *e. g.*, *Warden v. Hayden*, 387 U. S. 294 (1967) (hot pursuit); *United States v. Jeffers*, 342 U. S. 48, 51-52 (1951) (exigent circumstances); *United States v. Ross*, — U. S. — (1982) (automobile search); *Chimel v. California*,

Inconsistent with
Sanders
442 U.S. at 759

WHR claims
warrant is only
"preferred"

395 U. S. 752 (1969); *United States v. Robinson*, 414 U. S. 218 (1973); and *New York v. Belton*, 453 U. S. 454 (1982) (search of person and surrounding area incident to arrest); *Almeida-Sanchez v. United States*, 413 U. S. 266 (1973) (search at border or "functional equivalent"); *Zap v. United States*, 328 U. S. 624, 630 (1946) (consent). We have also held to be permissible intrusions less severe than full-scale searches or seizures without the necessity of a warrant. See, e. g., *Terry v. Ohio*, *supra*, (stop and frisk); *United States v. Brignoni-Ponce*, *supra*, (seizure for questioning); *Delaware v. Prouse*, *supra*, (roadblock). One frequently mentioned "exception to the warrant requirement," *Coolidge v. New Hampshire*, *supra*, 403 U. S., at 443, is the so-called "plain view" doctrine, relied upon by the state in this case.

While conceding that the green balloon seized by Officer Maples was clearly visible to him, the Court of Criminal Appeals held that the state might not avail itself of the "plain view" doctrine. That court said:

"For the plain view doctrine to apply, not only must the officer be legitimately in a position to view the object, but it must be immediately apparent to the police that they have evidence before them. This 'immediately apparent' aspect is central to the plain view exception and is here relied upon by appellant. (Citation omitted). In this case then, Officer Maples had to know that 'incriminatory evidence was before him when he seized the balloon.'" Petn. A-10, A-11.

The Court of Criminal Appeals based its conclusion primarily on the plurality opinion of this Court in *Coolidge v. New Hampshire*, *supra*. In the *Coolidge* plurality's view, the "plain view" doctrine permits the warrantless seizure by police of private possessions where three requirements are satisfied.³ First, the police officer must lawfully make an "ini-

³The plurality also remarked that "plain view alone is never enough to

tial intrusion" or otherwise properly be in a position from which he can view a particular area. *Id.*, at 465-468. Second, the officer must discover incriminating evidence "inadvertently," which is to say, he may not "know in advance the location of [certain] evidence and intend to seize it," relying on the plain view doctrine only as a pretext. *Id.*, at 470. Finally, it must be "immediately apparent" to the police that the items they observe may be evidence of a crime, contraband, or otherwise subject to seizure. *Id.*, at 469-470. While the lower courts generally have applied the *Coolidge* plurality's discussion of "plain view," it has never been expressly adopted by a majority of this Court. On the contrary, the plurality's formulation was sharply criticized at the time, see, *Coolidge v. New Hampshire*, *supra*, 403 U. S., at 506 (Black, J., dissenting); *id.*, at 516-521 (WHITE, J., dissenting). While not a binding precedent, as the considered opinion of four Members of this Court it should obviously be the point of reference for further discussion of the issue.

The *Coolidge* plurality observed, "It is important to keep in mind that, in the vast majority of cases, any evidence seized by the police will be in plain view, at least at the moment of seizure," simply as "the normal concomitant of any search, legal or illegal." 403 U. S., at 465. The question whether property in plain view of the police may be seized therefore must turn on the legality of the intrusion that enables them to perceive and physically seize the property in question. The *Coolidge* plurality, while following this ap-

justify the warrantless seizure of evidence." *Coolidge v. New Hampshire*, *supra*, 403 U. S., at 468. The court below appeared to understand this phrase to impose an independent limitation upon the scope of the plain view doctrine articulated in *Coolidge*. The context in which the plurality used the phrase, however, indicates that it was merely a rephrasing of its conclusion, discussed below, that in order for the plain view doctrine to apply, a police officer must be engaged in a lawful intrusion or must otherwise legitimately occupy the position affording him a "plain view."

Openly suggests that *Coolidge* requirements are not the law. WMR stresses "plurality" at least eight times in page and a quarter. Calls *Coolidge* a mere "point of reference"

proach to "plain view," characterized it as an independent exception to the warrant requirement. At least from an analytical perspective, this description may be somewhat inaccurate. We recognized in *Payton v. New York*, 445 U. S. 573, 586-587 (1980), the well-settled rule that "objects such as weapons or contraband found in a public place may be seized by the police without a warrant. The seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity." A different situation is presented, however, when the property in open view is "situated on private premises to which access is not otherwise available for the seizing officer." *Id.*, at 587, quoting, *G. M. Leasing Corp. v. United States*, 429 U. S. 338, 354 (1977). As these cases indicate, "plain view" provides grounds for seizure of an item when an officer's access to an object has some prior justification under the Fourth Amendment.⁴ "Plain view" is perhaps better understood,

⁴Thus, police may perceive an object while executing a search warrant, or they may come across an item while acting pursuant to some exception to the warrant clause, *e. g.*, *Warden v. Hayden*, 387 U. S. 294 (1967); *Terry v. Ohio*, 392 U.S. 1 (1968). Alternatively, police may need no justification under the Fourth Amendment for their access to an item, such as when property is left in a public place, see *Payton v. New York*, *supra*, 445 U.S., at 587.

It is important to distinguish "plain view," as used in *Coolidge* to justify seizure of an object, from an officer's mere observation of an item left in plain view. Whereas the latter generally involves no Fourth Amendment search, see pp. ———, *infra*; *Katz v. United States*, 389 U. S. 347 (1967), the former generally does implicate the Amendment's limitations upon seizures of personal property. The information obtained as a result of observation of an object in plain sight may be the basis for probable cause or reasonable suspicion of illegal activity. In turn, these levels of suspicion may, in some cases, see *e. g.*, *Terry v. Ohio*, *supra*; *United States v. Ross*, — U. S. — (1982), justify police conduct affording them access to a particular item.

therefore, not as an independent "exception" to the warrant clause, but simply as an extension of whatever the prior justification for an officer's "access to an object" may be.

The principle is grounded on the recognition that when a police officer has observed an object in "plain view," the owner's remaining interests in the object are merely those of possession and ownership, see *Coolidge v. New Hampshire*, *supra*, 403 U. S., at 515 (WHITE, J., dissenting). Likewise, it reflects the fact that requiring police to obtain a warrant once they have obtained a first-hand perception of contraband, stolen property or incriminating evidence generally would be a "needless inconvenience," 403 U. S., at 468, that might involve danger to the police and public. *Ibid.* We have said previously that "the permissibility of a particular law enforcement practice is judged by balancing its intrusion on . . . Fourth Amendment interests against its promotion of legitimate governmental interests." *Delaware v. Prouse*, *supra*, 440 U. S., at 654. In light of the private and governmental interests just outlined, our decisions have come to reflect the rule that if, while lawfully engaged in an activity in a particular place, police officers perceive a suspicious object, they may seize it immediately. See *Marron v. United States*, 275 U. S. 192 (1927); *Go-Bart Importing Co. v. United States*, 282 U. S. 344, 358 (1931); *United States v. Lefkowitz*, 285 U. S. 452, 465 (1932); *Harris v. United States*, 390 U. S. 234, 236 (1968); *Frazier v. Cupp*, 394 U. S. 731 (1969). This rule merely reflects an application of the Fourth Amendment's central requirement of reasonableness to the law governing seizures of property.

Applying these principles, we conclude that Officer Maples properly seized the green balloon from Brown's automobile. The Court of Criminal Appeals stated that it did not "question . . . the validity of the officer's initial stop of appellant's vehicle as a part of a license check," Pet. A-10, and we agree. *Delaware v. Prouse*, 440 U. S. 648, 654-655 (1979). It is

tone tending to
undercut warrant
clause

undercuts the
warrant requirement

Does this mean an
officer could search
a wallet if he sees
it in plain view?
WHR doesn't
say officer
may seize it

This would wipe out
Coolidge entirely.
It's far too broad.

These cases do not
support WHR

These support narrower
rule — as in *Coolidge*

?

likewise beyond dispute that Maples' action in shining his flashlight to illuminate the interior of Brown's car trenching upon no right secured to the latter by the Fourth Amendment. The Court said in *United States v. Lee*, 274 U. S. 559, 563 (1927), that "[The] use of a searchlight is comparable to the use of a marine glass or a field glass. It is not prohibited by the Constitution." Numerous other courts have agreed that the use of artificial means to illuminate a darkened area simply does not constitute a search, and thus triggers no Fourth Amendment protection.⁵

Likewise, the fact that Maples "changed [his] position" and "bent down at an angle so [he] could see what was inside" Brown's car, J. App., at 16, is irrelevant to Fourth Amendment analysis. The general public could peer into the interior of Brown's automobile from any number of angles; there is no reason Maples should be precluded from observing as an officer what would be entirely visible to him as a private citizen. There is no legitimate expectation of privacy, *Katz v. United States*, *supra*, 389 U. S., at 361 (1967) (Harlan, J., concurring); *Smith v. Maryland*, 442 U. S. 735, 739-745 (1979), shielding that portion of the interior of an automobile which may be viewed from outside the vehicle by either inquisitive passersby or diligent police officers. In short, the

⁵ *E. g.*, *United States v. Chesher*, 678 F. 2d 1352, 1356-1357, n. 2 (CA9 1982); *United States v. Ocampo*, 650 F. 2d 421, 427 (CA2 1981); *United States v. Pugh*, 566 F. 2d 626, 627, n. 2 (CA8 1977), cert. denied, 435 U. S. 1010 (1978); *United States v. Copen*, 541 F. 2d 211 (CA9 1976), cert. denied, 429 U. S. 1073 (1977); *United States v. Lara*, 517 F. 2d 209 (CA5 1975); *United States v. Johnson*, 506 F. 2d 674 (CA8 1974), cert. denied, 421 U. S. 917 (1975); *United States v. Booker*, 461 F. 2d 990, 992 (CA6 1972); *United States v. Hanahan*, 442 F. 2d 649 (CA7 1971); *People v. Waits*, 580 P. 2d 391 (Colo. 1978); *Redd v. State*, 243 S. E. 2d 16 (Ga. 1978); *State v. Chattley*, 390 A. 2d 472 (Me. 1978); *State v. Vohnoutka*, 292 N. W. 2d 756 (Minn. 1980); *Dick v. State*, 596 P. 2d 1265 (Okla. Cr. 1979); *State v. Miller*, 608 P. 2d 595 (Ore. 1980); *Albo v. State*, 379 So. 2d 648 (Fla. 1980).

All of this
is totally
unnecessary.

No one
challenges
the validity
of the
officer's
actions
other than
the seizure

conduct that enabled Maples to observe the interior of Brown's car and of his open glove compartment was not a search within the meaning of the Fourth Amendment.

there
isn't

Thus there can be no dispute here as to the presence of the first of the three requirements held necessary by the *Coolidge* plurality to invoke the "plain view" doctrine.* But the Court of Criminal Appeals, as we have noted, felt the state's case ran aground on the requirement that the incriminating nature of the items be "immediately apparent" to the police officer. To the Court of Appeals, this apparently meant that the officer must be possessed of near certainty as to the seizable nature of the items. Decisions by this Court since *Coolidge* indicate that the use of the phrase "immediately apparent" was very likely an unhappy choice of words, since it can be taken to imply that an unduly high degree of certainty as to the incriminatory character of evidence is necessary for an application of the "plain view" doctrine.

In *Colorado v. Bannister*, *supra*, 449 U. S., at 3-4, we applied what was in substance the plain view doctrine to an officer's seizure of evidence from an automobile. *Id.*, at n. 4. The officer noticed that the occupants of the automobile matched a description of persons suspected of a theft and that auto parts in the open glove compartment of the car similarly resembled ones reported stolen. The Court held that these facts supplied the officer with "probable cause," *id.*, at 4, and therefore, that he could seize the incriminating items from the car without a warrant. Plainly, the Court did not view the "immediately apparent" language of *Coolidge* as establishing any requirement that a police officer "know" that certain items are contraband or evidence of a crime. Indeed, *Colorado v. Bannister*, *supra*, was merely an application of the rule, set forth in *Payton v. New York*, 445 U. S. 573

* While seizure of the balloon required a warrantless, physical intrusion into Brown's automobile, this was proper, assuming that the remaining requirements of the plain view doctrine were satisfied. *United States v. Ross*, — U. S. — (1982).

1 per Justice

(1980), that "[t]he seizure of property in plain view involves no invasion of privacy and is *presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity.*" *Id.*, at 587 (emphasis added). We think this statement of the rule from *Payton, supra*, requiring probable cause for seizure in the ordinary case,⁷ is consistent with the Fourth Amendment and we reaffirm it here.

As the Court frequently has remarked, probable 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," *Carroll v. United States*, 267 U. S. 132, 162 (1925), 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. *Brinegar v. United States*, 338 U. S. 160, 176 (1949). Moreover, our observation in *United States v. Cortez*, 449 U. S. 411, 418 (1981), regarding "particularized suspicion," is equally applicable to the probable cause requirement:

"The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement."

With these considerations in mind it is plain that Officer Maples possessed probable cause to believe that the balloon

⁷ We need not address whether, in some circumstances, a degree of suspicion lower than probable cause would be sufficient basis for a seizure in certain cases.

Attempt to weaken
the probable
cause standard.
It's totally unnecessary
since the officer
could satisfy a
very high standard
in this case

should be "are"

puts probable cause
at less than 50-50

in Brown's hand contained an illicit substance. Maples testified that he was aware, both from his participation in previous narcotics arrests and from discussions with other officers, that balloons tied in the manner of the one possessed by Brown were frequently used to carry narcotics. This testimony was corroborated by that of a police department chemist who noted that it was "common" for balloons to be used in packaging narcotics. In addition, Maples was able to observe the contents of the glove compartment of Brown's car, which revealed further suggestions that Brown was engaged in activities that might involve possession of illicit substances. The fact that Maples could not see through the opaque fabric of the balloon is all but irrelevant: the distinctive character of the balloon itself spoke volumes as to its contents—particularly to the trained eye of the officer.

In addition to its statement that for seizure of objects in plain view to be justified the basis upon which they might be seized had to be "immediately apparent," and the requirement that the initial intrusion be lawful, both of which requirements we hold were satisfied here, the *Coolidge* plurality also stated that the police must discover incriminating evidence "inadvertently," which is to say, they may not "know in advance the location of [certain] evidence and intend to seize it," relying on the plain view doctrine only as a pretense. *Id.*, at 470. Whatever may be the final disposition of the "inadvertence" element of "plain view,"⁸ it clearly was no bar to the seizure here. The circumstances of this meeting between Maples and Brown give no suggestion that the roadblock was a pretext whereby evidence of narcotics violation might be uncovered in "plain view" in the course

invitation to
cut back on
Coolidge

cites only the cases
that suggest
Coolidge too
liberal

⁸ See *State v. King*, 191 N. W. 2d 650, 655 (Iowa 1971); *United States v. Santana*, 485 F. 2d 365, 369-370 (CA2 1973), cert. denied, 415 U. S. 981 (1974); *United States v. Bradshaw*, 490 F. 2d 1097, 1101, n. 3 (CA4 1974), cert. denied, 419 U. S. 895 (1974); *North v. Superior Court*, 502 P. 2d 1305, 1308 (Calif. 1972).

omission

of a check for driver's licenses. Here, although the officers no doubt had an expectation that some of the cars they halted on East Allen Street—which was part of a "medium" area of narcotics traffic, J. App., at 33—would contain narcotics or paraphernalia, there is no indication in the record that they had anything beyond this generalized expectation. Likewise, there is no indication that Maples had any reason to believe that any particular object would be in Brown's glove compartment or elsewhere in his automobile. The "inadvertence" requirement of "plain view," properly understood, was no bar to the seizure here.

Maples lawfully viewed the green balloon in the interior of Brown's car, and had probable cause to believe that it was subject to seizure under the Fourth Amendment. The judgment of the Texas Court of Criminal Appeals is accordingly reversed, and the case remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

March 9, 1983



No. 81-419 Texas v. Brown

Dear Bill,

I have reviewed your third draft in this case and I will not plan to circulate a separate concurrence. Please join me in the third draft.

Sincerely,

A handwritten signature in cursive script, appearing to read "Sandra", located below the word "Sincerely,".

Justice Rehnquist

Copies to the Conference

March 17, 1983

TEX13 GINA-POW

81-419 Texas v. Brown

Justice Powell, concurring.

I concur in the judgment, and also agree with much of the Court's opinion relating to the application of the plain view exception to the warrant clause to the facts of this case. I do not join the Court's opinion because it goes well beyond the application of the plain view exception. As I read the opinion, it appears to accord less significance to the warrant clause of the Fourth Amendment than I think is justified by the language and purpose of that Amendment.¹ Writing in dissent in U.S. v.

¹Mike: Draft a note that identifies some of the language in Rehnquist's opinion that seems to subordinate the warrant clause to the reasonableness requirement.

say that exceptions can be justified only by "absolute necessity"², I stated that they were "few in number and carefully delineated". United States District Court, supra, at 318. This has continued to be my view, as expressed recently in Arkansas v. Saunders, ____ U.S. ____, at ____ (19____). It is a view frequently repeated by this Court. (Mike: cite cases).

This case involves an application of the plain view exception, first addressed at some length by the plurality opinion in Coolidge v. New Hampshire, 403 U.S. 443 (1971). The Court today states that this opinion "has never been expressly adopted by a majority of this Court.

²I have considered the automobile exception, for example, as one clearly justified because of the nature of the vehicle. See, e.g. (Mike, cite several cases including Saunders and Martinez-Fuertes.)

Ante at _____. Whatever my view may have been when Coolidge was decided, I see no reason at this late date to imply criticism of its articulation of this exception. It has been accepted generally for over a decade.³ Moreover, it seems unnecessary to cast doubt on Coolidge in this case. Its plurality formulation is dispositive of the question before us.

Respondent does not dispute that Officer Maples' initial intrusion was lawful. Respondent also concedes that the discovery of the tied-off balloon was inadvertent in that it was observed in the course of a lawful inspection of the front seat area of the automobile. If probable cause must be shown, as the Payton dicta

³Mike: Add whatever authority from CA's you think supports this statement.

suggests, I think it is clear that it existed here.⁴

Officer Maples testified that he previously had made an arrest in a case where narcotics were carried in tied-off balloons similar to the one at issue here. Other officers had told him of such cases. Even if it were not generally known that a balloon is a common container for carrying illegal narcotics, we have recognized that a law enforcement officer may rely on his training and experience to draw inferences and make deductions that might well elude an untrained person. United States v. Cortez, 449 U.S. 411, 418 (1981). We are not advised of any innocent item that is commonly carried in uninflated,

⁴Although probable cause was present in this case, I note with approval that the Court recognizes - without deciding - that reasonable suspicion of illegal activity may be sufficient. See fns. 4 and 6.

second draft: 81-419, Texas v. Brown

JUSTICE POWELL, concurring in the judgment.

I concur in the judgment, and also agree with much of the Court's opinion relating to the application in this case of the plain view exception to the Warrant Clause. But I do not join the Court's opinion because it goes well beyond the application of the plain view exception. As I read the opinion, it appears to accord less significance to the Warrant Clause of the Fourth Amendment than is justified by the language and purpose of that Amendment. In dissent in United States v. Rabinowitz, 339 U.S. 56 (1950), Justice Frankfurter wrote eloquently:

"One cannot wrench 'unreasonable searches' from the text and context and historic content of the Fourth Amendment.... When [that] Amendment outlawed 'unreasonable searches' and then went on to define the very restricted authority that even a search warrant issued by a magistrate could give, the framers said with all the clarity of the gloss of history that a search is 'unreasonable' unless a warrant authorizes it, barring only exceptions justified by absolute necessity." Id., at 70.

To be sure, the opinions of this Court in Warrant Clause cases have not always been consistent. They have reflected disagreement among Justices as to the extent to which the Clause defines the reasonableness standard of the Amendment. In one of my earliest opinions, United States v. United States District Court, 407 U.S. 297 (1972), I cited Justice Frankfurter's Rabinowitz dissent in emphasizing the importance of the Warrant Clause. Id., at 316. Although I ^{would} ~~did~~ not say that exceptions can be justified only by "absolute necessity,"¹ I stated that they were

¹I have considered the automobile exception, for example, as one clearly justified because of the nature of the vehicle. See, Footnote continued on next page.

"few in number and carefully delineated." Id., at 318. This has continued to be my view, as expressed recently in Arkansas v. Sanders, 442 U.S. 753, 759 (1979). It is a view frequently repeated by this Court. See, e.g., United States v. Ross, 456 U.S. 798, ____ (1982); Mincey v. Arizona, 437 U.S. 385, 390 (1978) (unanimous decision); Vale v. Louisiana, 399 U.S. 30, 34 (1970); Katz v. United States, 389 U.S. 347, 357 (1967); Camara v. Municipal Court, 387 U.S. 523, 528-529 (1967); Jones v. United States, 357 U.S. 493, 499 (1958).

This case involves an application of the plain view exception, first addressed at some length by the plurality opinion in Coolidge v. New Hampshire, 403 U.S. 443 (1971). The Court today states that this opinion "has never been expressly adopted by a majority of this Court." Ante, at 6. Whatever my view may have been when Coolidge was decided, I see no reason at this late date to imply criticism of its articulation of this exception. It has been accepted generally for over a decade.² Moreover, it seems

e.g., Arkansas v. Sanders, 442 U.S. 753, 760-761 (1979); United States v. Martinez-Fuerte, 428 U.S. 543, 561-562 (1976); Almeida-Sanchez v. United States, 413 U.S. 266, 279 (1973) (POWELL, J., concurring).

²See, e.g., United States v. Chesher, 678 F.2d 1353, 1356-1357 (CA9 1982); United States v. Irizarry, 673 F.2d 554, 558-560 (CA1 1982); United States v. Tolerton, 669 F.2d 652, 653-655 (CA10), cert. denied, ____ U.S. ____ (1982); United States v. Antill, 615 F.2d 648, 649 (CA5) (per curiam), cert. denied, 449 U.S. 866 (1980); United States v. Duckett, 583 F.2d 1309, 1313-1314 (CA5 1978); United States v. Williams, 523 F.2d 64, 66-67 (CA8 1975), cert. denied, 423 U.S. 1090 (1976); United States v. Truitt, 521 F.2d 1174, 1175-1178 (CA6 1975); United States v. Pacelli, 470 F.2d 67, 70-72 (CA2 1972), cert. denied, 410 U.S. 983 (1973); United States v. Drew, 451 F.2d 230, 232-234 (CA5

Footnote continued on next page.

unnecessary to cast doubt on Coolidge in this case. Its plurality formulation is dispositive of the question before us.

Respondent does not dispute that Officer Maples' initial intrusion was lawful. Respondent also concedes that the discovery of the tied-off balloon was inadvertent in that it was observed in the course of a lawful inspection of the front seat area of the automobile. If probable cause must be shown, as the Payton dicta suggests,³ I think it is clear that it existed here. Officer Maples testified that he previously had made an arrest in a case where narcotics were carried in tied-off balloons similar to the one at issue here. Other officers had told him of such cases. Even if it were not generally known that a balloon is a common container for carrying illegal narcotics, we have recognized that a law enforcement officer may rely on his training and experience to draw inferences and make deductions that might well elude an untrained person. United States v. Cortez, 449 U.S. 411, 418 (1981). We are not advised of any innocent item that is commonly carried in uninflated, tied-off balloon such as the one Officer Maples seized.

Accordingly, I join the Court's judgment as it is consistent with principles established by our prior decisions.

1971).

³See Payton v. New York, 445 U.S. 573, 587 (1980). Although probable cause was present in this case, I note with approval that the Court recognizes--without deciding--that reasonable suspicion of illegal activity may be sufficient to justify a seizure in some cases. See ante, at 7, n. 4, and 11, n. 7.

MAR 22 1983

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

MAR 23 1983

Circulated: _____

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-419

TEXAS, PETITIONER *v.* CLIFFORD JAMES BROWN

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL
APPEALS OF TEXAS

[March —, 1983]

JUSTICE POWELL, concurring in the judgment.

I concur in the judgment, and also agree with much of the Court's opinion relating to the application in this case of the plain view exception to the Warrant Clause. But I do not join the Court's opinion because it goes well beyond the application of the exception. As I read the opinion, it appears to accord less significance to the Warrant Clause of the Fourth Amendment than is justified by the language and purpose of that Amendment. In dissent in *United States v. Rabinowitz*, 339 U. S. 56 (1950), Justice Frankfurter wrote eloquently:

"One cannot wrench 'unreasonable searches' from the text and context and historic content of the Fourth Amendment. . . . When [that] Amendment outlawed 'unreasonable searches' and then went on to define the very restricted authority that even a search warrant issued by a magistrate could give, the framers said with all the clarity of the gloss of history that a search is 'unreasonable' unless a warrant authorizes it, barring only exceptions justified by absolute necessity." *Id.*, at 70.

To be sure, the opinions of this Court in Warrant Clause cases have not always been consistent. They have reflected disagreement among Justices as to the extent to which the Clause defines the reasonableness standard of the Amend-

ment. In one of my earliest opinions, *United States v. United States District Court*, 407 U. S. 297 (1972), I cited Justice Frankfurter's *Rabinowitz* dissent in emphasizing the importance of the Warrant Clause. *Id.*, at 316. Although I would not say that exceptions can be justified only by "absolute necessity,"¹ I stated that they were "few in number and carefully delineated." *Id.*, at 318. This has continued to be my view, as expressed recently in *Arkansas v. Sanders*, 442 U. S. 753, 759 (1979). It is a view frequently repeated by this Court. See, e. g., *United States v. Ross*, 456 U. S. 798, — (1982); *Mincey v. Arizona*, 437 U. S. 385, 390 (1978) (unanimous decision); *Vale v. Louisiana*, 399 U. S. 30, 34 (1970); *Katz v. United States*, 389 U. S. 347, 357 (1967); *Camara v. Municipal Court*, 387 U. S. 523, 528-529 (1967); *Jones v. United States*, 357 U. S. 493, 499 (1958).

This case involves an application of the plain view exception, first addressed at some length by the plurality opinion in *Coolidge v. New Hampshire*, 403 U. S. 443 (1971). The Court today states that this opinion "has never been expressly adopted by a majority of this Court." *Ante*, at 6. Whatever my view might have been when *Coolidge* was decided, I see no reason at this late date to imply criticism of its articulation of this exception. It has been accepted generally for over a decade.² Moreover, it seems unnecessary to

¹ I have considered the automobile exception, for example, as one clearly justified because of the nature of the vehicle. See, e. g., *Arkansas v. Sanders*, 442 U. S. 753, 760-761 (1979); *United States v. Martinez-Fuerte*, 428 U. S. 543, 561-562 (1976); *Almeida-Sanchez v. United States*, 413 U. S. 266, 279 (1973) (POWELL, J., concurring).

² See, e. g., *United States v. Chesher*, 678 F. 2d 1353, 1356-1357 (CA9 1982); *United States v. Irizarry*, 673 F. 2d 554, 558-560 (CA1 1982); *United States v. Tolerton*, 669 F. 2d 652, 653-655 (CA10), cert. denied, — U. S. — (1982); *United States v. Antill*, 615 F. 2d 648, 649 (CA5) (*per curiam*), cert. denied, 449 U. S. 866 (1980); *United States v. Duckett*, 583 F. 2d 1309, 1313-1314 (CA5 1978); *United States v. Williams*, 523 F. 2d 64, 66-67 (CA8 1975), cert. denied, 423 U. S. 1090 (1976); *United States v. Truitt*,

cast doubt on *Coolidge* in this case. Its plurality formulation is dispositive of the question before us.

Respondent does not dispute that Officer Maples' initial intrusion was lawful. Respondent also concedes that the discovery of the tied-off balloon was inadvertent in that it was observed in the course of a lawful inspection of the front seat area of the automobile. If probable cause must be shown, as the *Payton* dicta suggests,³ I think it is clear that it existed here. Officer Maples testified that he previously had made an arrest in a case where narcotics were carried in tied-off balloons similar to the one at issue here. Other officers had told him of such cases. Even if it were not generally known that a balloon is a common container for carrying illegal narcotics, we have recognized that a law enforcement officer may rely on his training and experience to draw inferences and make deductions that might well elude an untrained person. *United States v. Cortez*, 449 U. S. 411, 418 (1981). We are not advised of any innocent item that is commonly carried in uninflated, tied-off balloon such as the one Officer Maples seized.

Accordingly, I concur in the Court's judgment as it is consistent with principles established by our prior decisions.

521 F. 2d 1174, 1175-1178 (CA6 1975); *United States v. Pacelli*, 470 F. 2d 67, 70-72 (CA2 1972), cert. denied, 410 U. S. 983 (1973); *United States v. Drew*, 451 F. 2d 280, 282-284 (CA5 1971).

³See *Payton v. New York*, 445 U. S. 573, 587 (1980). Although probable cause was present in this case, I note with approval that the Court recognizes—without deciding—that reasonable suspicion of illegal activity may be sufficient to justify a seizure in some cases. See *ante*, at 7, n. 4, and 11, n. 7.

March 23, 1983

81-419 Texas v. Brown

Dear Bill:

As we usually agree in the criminal law area, I write to say why I have concluded that we are too far apart in this case to get together. My view of the relative importance of the warrant clause has differed from yours and the Chief's, and apparently now from Byron's and Sandra's. In view of what I have written about it in the past, I cannot join your opinion.

Also, I am troubled by the "cold water" that you toss on Potter's opinion in Coolidge. If we had come on the Court earlier, I am by no means sure I would have joined Potter the way he wrote it. But at least the substance of the plain view exception seems established, and I have not been aware that it has created any genuine problem. The rule clearly fits this case, and I would have thought that no purpose is served by not making a straightforward application of it here.

Sincerely,

Justice Rehnquist

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

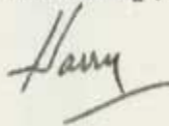
March 24, 1983

Re: No. 81-419 - Texas v. Brown

Dear Bill:

I have delayed my vote in this case because, like Lewis, I have been troubled about the breadth of your opinion. I share his feeling that the opinion "goes well beyond the application of the exception." Thus, as of now, I am joining Lewis' opinion on the assumption that he will eliminate its third footnote.

Sincerely,



Justice Rehnquist

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 24, 1983

Re: No. 81-419, Texas v. Brown

Dear Lewis:

If, as we discussed by telephone this afternoon, you would eliminate footnote 3 on page 3 of your opinion concurring in the judgment, I would be glad to join your opinion. I suggest this only because I would prefer to meet the situation described in that footnote when it arises.

Sincerely,



Justice Powell

cc: The Conference

RECEIVED
SUPREME COURT U.S.
PUBLICATIONS UNIT

'83 APR 12 P2:56

3rd draft

30 copies

changes
1, 2, 3

APR 25 1983

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Powell

Circulated: _____

Recirculated: _____

3rd

DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-419

TEXAS, PETITIONER v. CLIFFORD JAMES BROWN

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL
APPEALS OF TEXAS

[March —, 1983]

JUSTICE POWELL, with whom JUSTICE BLACKMUN joins,
concurring in the judgment.

plurality's

I concur in the judgment, and also agree with much of the ~~Court's~~ opinion relating to the application in this case of the plain view exception to the Warrant Clause. But I do not join the ~~Court's~~ opinion because it goes well beyond the application of the exception. As I read the opinion, it appears to accord less significance to the Warrant Clause of the Fourth Amendment than is justified by the language and purpose of that Amendment. In dissent in *United States v. Rabinowitz*, 339 U. S. 56 (1950), Justice Frankfurter wrote eloquently:

"One cannot wrench 'unreasonable searches' from the text and context and historic content of the Fourth Amendment. . . . When [that] Amendment outlawed 'unreasonable searches' and then went on to define the very restricted authority that even a search warrant issued by a magistrate could give, the framers said with all the clarity of the gloss of history that a search is 'unreasonable' unless a warrant authorizes it, barring only exceptions justified by absolute necessity." *Id.*, at 70.

To be sure, the opinions of this Court in Warrant Clause cases have not always been consistent. They have reflected disagreement among Justices as to the extent to which the

'83 APR 12 P6:06

RECEIVED
SUPREME COURT U.S.
PUBLICATIONS UNIT

April

825

Clause defines the reasonableness standard of the Amendment. In one of my earliest opinions, *United States v. United States District Court*, 407 U. S. 297 (1972), I cited Justice Frankfurter's *Rabinowitz* dissent in emphasizing the importance of the Warrant Clause. *Id.*, at 316. Although I would not say that exceptions can be justified only by "absolute necessity,"¹ I stated that they were "few in number and carefully delineated." *Id.*, at 318. This has continued to be my view, as expressed recently in *Arkansas v. Sanders*, 442 U. S. 753, 759 (1979). It is a view frequently repeated by this Court. See, e. g., *United States v. Ross*, 456 U. S. 798, — (1982); *Mincey v. Arizona*, 437 U. S. 385, 390 (1978) (unanimous decision); *Vale v. Louisiana*, 399 U. S. 30, 34 (1970); *Katz v. United States*, 389 U. S. 347, 357 (1967); *Camara v. Municipal Court*, 387 U. S. 523, 528-529 (1967); *Jones v. United States*, 357 U. S. 493, 499 (1958).

plurality

This case involves an application of the plain view exception, first addressed at some length by the plurality opinion in *Coolidge v. New Hampshire*, 403 U. S. 443 (1971). The Court today states that this opinion "has never been expressly adopted by a majority of this Court." *Ante*, at 6. Whatever my view might have been when *Coolidge* was decided, I see no reason at this late date to imply criticism of its articulation of this exception. It has been accepted generally for over a decade.² Moreover, it seems unnecessary to

¹ I have considered the automobile exception, for example, as one clearly justified because of the nature of the vehicle. See, e. g., *Arkansas v. Sanders*, 442 U. S. 753, 760-761 (1979); *United States v. Martinez-Fuerte*, 428 U. S. 543, 561-562 (1976); *Almeida-Sanchez v. United States*, 413 U. S. 266, 279 (1973) (POWELL, J., concurring).

² See, e. g., *United States v. Chesher*, 678 F. 2d 1353, 1356-1357 (CA9 1982); *United States v. Irizarry*, 673 F. 2d 554, 558-560 (CA1 1982); *United States v. Tolerton*, 669 F. 2d 652, 653-655 (CA10), cert. denied, — U. S. — (1982); *United States v. Antill*, 615 F. 2d 648, 649 (CA5) (*per curiam*), cert. denied, 449 U. S. 866 (1980); *United States v. Duckett*, 583 F. 2d 1309, 1313-1314 (CA5 1978); *United States v. Williams*, 523 F. 2d 64, 66-67

Brown

cast doubt on *Coolidge* in this case. Its plurality formulation is dispositive of the question before us.

Respondent does not dispute that Officer Maples' initial intrusion was lawful. ~~Respondent~~ also concedes that the discovery of the tied-off balloon was inadvertent in that it was observed in the course of a lawful inspection of the front seat area of the automobile. If probable cause must be shown, as the *Payton* dicta suggest, see *Payton v. New York*, 445 U. S. 573, 587 (1980), I think it is clear that it existed here. Officer Maples testified that he previously had made an arrest in a case where narcotics were carried in tied-off balloons similar to the one at issue here. Other officers had told him of such cases. Even if it were not generally known that a balloon is a common container for carrying illegal narcotics, we have recognized that a law enforcement officer may rely on his training and experience to draw inferences and make deductions that might well elude an untrained person. *United States v. Cortez*, 449 U. S. 411, 418 (1981). We are not advised of any innocent item that is commonly carried in uninflated, tied-off balloon such as the one Officer Maples seized.

Accordingly, I concur in the ~~majority~~ judgment as it is consistent with principles established by our prior decisions.

(CA8 1975), cert. denied, 423 U. S. 1090 (1975); *United States v. Truitt*, 521 F. 2d 1174, 1175-1178 (CA6 1975); *United States v. Pacelli*, 470 F. 2d 67, 70-72 (CA2 1972), cert. denied, 410 U. S. 983 (1973); *United States v. Drew*, 451 F. 2d 230, 232-234 (CA5 1971).

pp. 1, 3

MAR 25 1983

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Powell

Circulated: _____

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-419

TEXAS, PETITIONER *v.* CLIFFORD JAMES BROWN

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL
APPEALS OF TEXAS

[March —, 1983]

JUSTICE POWELL, with whom JUSTICE BLACKMUN joins, concurring in the judgment.

I concur in the judgment, and also agree with much of the Court's opinion relating to the application in this case of the plain view exception to the Warrant Clause. But I do not join the Court's opinion because it goes well beyond the application of the exception. As I read the opinion, it appears to accord less significance to the Warrant Clause of the Fourth Amendment than is justified by the language and purpose of that Amendment. In dissent in *United States v. Rabinowitz*, 339 U. S. 56 (1950), Justice Frankfurter wrote eloquently:

"One cannot wrench 'unreasonable searches' from the text and context and historic content of the Fourth Amendment. . . . When [that] Amendment outlawed 'unreasonable searches' and then went on to define the very restricted authority that even a search warrant issued by a magistrate could give, the framers said with all the clarity of the gloss of history that a search is 'unreasonable' unless a warrant authorizes it, barring only exceptions justified by absolute necessity." *Id.*, at 70.

To be sure, the opinions of this Court in Warrant Clause cases have not always been consistent. They have reflected disagreement among Justices as to the extent to which the

Clause defines the reasonableness standard of the Amendment. In one of my earliest opinions, *United States v. United States District Court*, 407 U. S. 297 (1972), I cited Justice Frankfurter's *Rabinowitz* dissent in emphasizing the importance of the Warrant Clause. *Id.*, at 316. Although I would not say that exceptions can be justified only by "absolute necessity,"¹ I stated that they were "few in number and carefully delineated." *Id.*, at 318. This has continued to be my view, as expressed recently in *Arkansas v. Sanders*, 442 U. S. 753, 759 (1979). It is a view frequently repeated by this Court. See, e. g., *United States v. Ross*, 456 U. S. 798, — (1982); *Mincey v. Arizona*, 437 U. S. 385, 390 (1978) (unanimous decision); *Vale v. Louisiana*, 399 U. S. 30, 34 (1970); *Katz v. United States*, 389 U. S. 347, 357 (1967); *Camara v. Municipal Court*, 387 U. S. 523, 528-529 (1967); *Jones v. United States*, 357 U. S. 493, 499 (1958).

This case involves an application of the plain view exception, first addressed at some length by the plurality opinion in *Coolidge v. New Hampshire*, 403 U. S. 443 (1971). The Court today states that this opinion "has never been expressly adopted by a majority of this Court." *Ante*, at 6. Whatever my view might have been when *Coolidge* was decided, I see no reason at this late date to imply criticism of its articulation of this exception. It has been accepted generally for over a decade.² Moreover, it seems unnecessary to

¹ I have considered the automobile exception, for example, as one clearly justified because of the nature of the vehicle. See, e. g., *Arkansas v. Sanders*, 442 U. S. 753, 760-761 (1979); *United States v. Martinez-Fuerte*, 428 U. S. 543, 561-562 (1976); *Almeida-Sanchez v. United States*, 413 U. S. 266, 279 (1973) (POWELL, J., concurring).

² See, e. g., *United States v. Chesher*, 678 F. 2d 1353, 1356-1357 (CA9 1982); *United States v. Irizarry*, 673 F. 2d 554, 558-560 (CA1 1982); *United States v. Tolerton*, 669 F. 2d 652, 653-655 (CA10), cert. denied, — U. S. — (1982); *United States v. Antill*, 615 F. 2d 648, 649 (CA5) (*per curiam*), cert. denied, 449 U. S. 866 (1980); *United States v. Duckett*, 583 F. 2d 1309, 1313-1314 (CA5 1978); *United States v. Williams*, 523 F. 2d 64, 66-67

cast doubt on *Coolidge* in this case. Its plurality formulation is dispositive of the question before us.

Respondent does not dispute that Officer Maples' initial intrusion was lawful. Respondent also concedes that the discovery of the tied-off balloon was inadvertent in that it was observed in the course of a lawful inspection of the front seat area of the automobile. If probable cause must be shown, as the *Payton* dicta suggests, see *Payton v. New York*, 445 U. S. 573, 587 (1980), I think it is clear that it existed here. Officer Maples testified that he previously had made an arrest in a case where narcotics were carried in tied-off balloons similar to the one at issue here. Other officers had told him of such cases. Even if it were not generally known that a balloon is a common container for carrying illegal narcotics, we have recognized that a law enforcement officer may rely on his training and experience to draw inferences and make deductions that might well elude an untrained person. *United States v. Cortez*, 449 U. S. 411, 418 (1981). We are not advised of any innocent item that is commonly carried in uninflated, tied-off balloon such as the one Officer Maples seized.

Accordingly, I concur in the Court's judgment as it is consistent with principles established by our prior decisions.

(CA8 1975), cert. denied, 423 U. S. 1090 (1976); *United States v. Truitt*, 621 F. 2d 1174, 1175-1178 (CA6 1975); *United States v. Pacelli*, 470 F. 2d 67, 70-72 (CA2 1972), cert. denied, 410 U. S. 983 (1973); *United States v. Drew*, 451 F. 2d 230, 232-234 (CA5 1971).

OMISSION

Supreme Court of the
District of Columbia

ALL parties
are to present
written
statements
by the
attorneys
for each
party.

There are two things
one to avoid take
commitment to
"probably cause" as
within the meaning
of Cookridge. I think
it probably is, but
possibly reasonable
suspicion - in light
of recent case -
might suffice.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

April 6, 1983

Re: No. 81-419 -- Texas v. Brown

Dear John,

Please join me.

Sincerely,

Bill

Justice Stevens

Copies to the Conference

April 8, 1983

81-419 Texas v. Brown

Dear John:

I note in your opinion that you address the "search" of the balloon, in addition to its seizure.

My impression is that the search question is not before us, as was conceded at oral argument.

I called this morning to raise this point. I understand you are out of the city, but suspect that you are not in Chicago for the vote on Tuesday. What an unsavory situation!

Sincerely,

Justice Stevens

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

April 11, 1983

Re: 81-419 - Texas v. Brown

Dear Lewis:

Thanks for your note. I recognize that the search point was not argued and may not have been preserved. That, of course, is the reason for my footnote 1 (which I am expanding) on page 3.

I saw both Chris Whitman and Dallin Oaks at a moot court in Ann Arbor, and both made a special point of asking me to send their best regards to you.

Sincerely,



Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 12, 1983

Re: No. 81-419 - Texas v. Brown

Dear John:

Please join me in your opinion concurring in
the judgment.

Sincerely,

T.M.
T.M.

Justice Stevens

cc: The Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

File

*John - in light
of my letter
dropped his
reference on
the "search"
as basis of
a dissent
LJP*

From: Justice Stevens

Circulated: _____
Recirculated: _____

APR 12 '83

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-419

TEXAS, PETITIONER v. CLIFFORD JAMES BROWN

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL
APPEALS OF TEXAS

[April —, 1983]

JUSTICE STEVENS, with whom JUSTICE BRENNAN joins,
concurring in the judgment.

The Texas Court of Criminal Appeals held that the warrantless seizure of respondent's balloon could not be justified under the plain view doctrine because incriminating evidence was not immediately apparent. This Court reverses, holding that even though the contents of the balloon were not visible to the officer, incriminating evidence was immediately apparent because he had probable cause to believe the balloon contained an illicit substance. I agree with the Court that contraband need not be visible in order for a plain view seizure to be justified. I therefore concur in the conclusion that the Texas Court interpreted the Fourth Amendment more strictly than is required.

The plurality's explanation of our disposition of this case is, however, incomplete. It gives adequate consideration to our cases holding that a closed container may not be opened without a warrant, even when the container is in plain view and the officer has probable cause to believe contraband is concealed within. *United States v. Chadwick*, 433 U. S. 1 (1977); *Arkansas v. Sanders*, 442 U. S. 753 (1979); *United States v. Ross*, — U. S. —, — (1982). Final determination of whether the trial court properly denied the suppression motion requires a more complete understanding of the plain view doctrine, as well as the answer to a factual in-

quiry that remains open to the state court on remand.

Although our Fourth Amendment cases sometimes refer indiscriminately to searches and seizures, there are important differences between the two that are relevant to the plain view doctrine. The Amendment protects two different interests of the citizen—the interest in retaining possession of property and the interest in maintaining personal privacy. A seizure threatens the former, a search the latter. As a matter of timing, a seizure is usually preceded by a search, but when a container is involved the converse is often true. Significantly, the two protected interests are not always present to the same extent; for example, the seizure of a locked suitcase does not necessarily compromise the secrecy of its contents, and the search of a stopped vehicle does not necessarily deprive its owner of possession.

An object may be considered to be “in plain view” if it can be seized without compromising any interest in privacy. Since seizure of such an object threatens only the interest in possession, circumstances diminishing that interest may justify exceptions to the Fourth Amendment’s usual requirements. Thus, if an item has been abandoned, neither Fourth Amendment interest is implicated, and neither probable cause nor a warrant is necessary to justify seizure. See *e. g.*, *Abel v. United States*, 362 U. S. 217, 241 (1960); *cf. United States v. Lisk*, 522 F. 2d 228, 230 (7th Cir. 1975). And if an officer has probable cause to believe that a publicly situated item is associated with criminal activity, the interest in possession is outweighed by the risk that such an item might disappear or be put to its intended use before a warrant could be obtained. The officer may therefore seize it without a warrant. See *G.M. Leasing Corp. v. United States*, 429 U. S. 338, 354 (1975); *Payton v. New York*, 445 U. S. 573, 587 (1980). The “plain view” exception to the warrant requirement is easy to understand and to apply in cases in which no search is made and no intrusion on privacy occurs.

The Court's more difficult plain view cases, however, have regularly arisen in two contexts that link the seizure with a prior or subsequent search. The first is the situation in which an officer who is executing a valid search for one item seizes a different item. The Court has been sensitive to the danger inherent in such a situation that officers will enlarge a specific authorization, furnished by a warrant or an exigency, into the equivalent of a general warrant to rummage and seize at will. That danger is averted by strict attention to two of the core requirements of plain view: seizing the item must entail no significant additional invasion of privacy, and at the time of seizure the officer must have probable cause to connect the item with criminal behavior. See *United States v. Lefkowitz*, 285 U. S. 452, 465 (1932); cf. *Coolidge v. New Hampshire*, 403 U. S. 443, 465-466 (1971).

The second familiar context is the situation in which an officer comes upon a container in plain view and wants both to seize it and to examine its contents. In recent years, the Court has spoken at some length about the latter act, *e. g.*, *Ross, supra*; *Chadwick, supra*; *Sanders, supra*, emphasizing the Fourth Amendment privacy values implicated whenever a container is opened. In this case, however, both the search of a container (the balloon) and the antecedent seizure are open to challenge.¹ In that regard, it more closely resembles *Coolidge, supra*.² All of these cases, however,

¹In defending the Texas Court of Criminal Appeals' judgment before this Court, the respondent did not rely upon a challenge to the search of the balloon. I nevertheless believe it is necessary to elaborate upon the distinction between the balloon's search and its seizure in this case in order to clarify what the Court does and does not hold today. Moreover, it is not clear to me whether, as a matter of Texas law, the respondent would still be permitted to present an argument that the evidence should be suppressed because it was obtained after a search of the balloon. See *infra*, n. 3.

²Although *Coolidge* is not always thought of as a container case, the Court was required to confront New Hampshire's separate attempts to jus-

demonstrate that the constitutionality of a container search is not automatically determined by the constitutionality of the prior seizure. See *Chadwick, supra*, at 13-14, n. 8; *Sanders, supra*, at 761-762. Separate inquiries are necessary, taking into account the separate interests at stake.

If a movable container is in plain view, seizure does not implicate any privacy interests. Therefore, if there is probable cause to believe it contains contraband, the owner's possessory interest in the container must yield to society's interest in making sure that the contraband does not vanish during the time it would take to obtain a warrant. The item may be seized temporarily. It does not follow, however, that the container may be opened on the spot. Once the container is in custody, there is no risk that evidence will be destroyed. Some inconvenience to the officer is entailed by requiring him to obtain a warrant before opening the container, but that alone does not excuse the duty to go before a neutral magistrate. *Johnson v. United States*, 333 U. S. 10, 15 (1948); *McDonald v. United States*, 335 U. S. 451, 455 (1948). As JUSTICE POWELL emphasizes, *ante*, at 1-2, the Warrant Clause embodies our government's historical commitment to bear the burden of inconvenience. Exigent circumstances must be shown before the Constitution will entrust an individual's privacy to the judgment of a single police officer.

In this case, I have no doubt concerning the propriety of the officer's warrantless seizure of the balloon. For the reasons stated by JUSTICES POWELL and REHNQUIST, I agree that the police officer invaded no privacy interest in order to see the balloon, and that when he saw it he had probable cause to believe it contained drugs. But before the balloon's

tify both its warrantless seizure of a container, an immobilized automobile, see *id.*, at 464-473, and its subsequent warrantless searches of the container's interior, see *id.*, at 458-464.

contents could be used as evidence against the respondent, the state also had to justify opening it without a warrant.³ I can perceive two potential justifications. First, it is entirely possible that what the officer saw in the car's glove compartment, coupled with his observation of respondent and the contents of his pockets, provided probable cause to believe that contraband was located somewhere in the car—and not merely in the one balloon at issue. If so, then under *Ross, supra*, which was not decided until after the Texas Court of Civil Appeals reviewed this case, it was permissible to examine the contents of any container in the car, including this balloon.

Alternatively, the balloon could be one of those rare single-purpose containers which "by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance." *Sanders, supra*, at 764-765, n. 13. Whereas a suitcase or a paper bag may contain an almost infinite variety of items, a balloon of this kind might be used only to transport drugs. Viewing it where he did could have given the officer a degree of certainty that is equivalent to the plain view of the heroin itself. If that be true, I would conclude that the plain view doctrine supports the search as well as the seizure even though the contents of the balloon were not actually visible to the officer.⁴

This reasoning leads me to the conclusion that the Fourth

³ Arguably, as a matter of Texas law the respondent has waived his right to demand such a justification. That is, of course, an issue for the Texas courts.

⁴ Conversely, the fact that an object is visible does not automatically mean that it is in plain view in the sense that no invasion of privacy is required to seize it. This case does not require elaboration of what the Fourth Amendment demands before an officer may seize a visible item that he could not reach without, for example, entering a private home or destroying a valuable container. See *Taylor v. United States*, 286 U. S. 1, 5 (1932).

Amendment would not require exclusion of the balloon's contents in this case if, but only if, there was probable cause to search the entire vehicle or there was virtual certainty that the balloon contained a controlled substance.⁵ Neither of these fact-bound inquiries was made by the Texas courts, and neither should be made by this Court in the first instance. Moreover, it may be that on remand the Texas Court of Criminal Appeals will find those inquiries unnecessary because the respondent may have waived his right to demand them. See *supra*, n. 3. I therefore concur in the judgment.

⁵ Sometimes there can be greater certainty about the identity of a substance within a container than about the identity of a substance that is actually visible. One might actually see a white powder without realizing that it is heroin, but be virtually certain a balloon contains such a substance in a particular context. It seems to me that in evaluating whether a person's privacy interests are infringed, "virtual certainty" is a more meaningful indicator than visibility.

P. 1, 2, 3

APR 13 1983

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Powell

Circulated: _____

Recirculated: _____

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 81-419

TEXAS, PETITIONER *v.* CLIFFORD JAMES BROWN

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL
APPEALS OF TEXAS

[April —, 1983]

JUSTICE POWELL, with whom JUSTICE BLACKMUN joins,
concurring in the judgment.

I concur in the judgment, and also agree with much of the plurality's opinion relating to the application in this case of the plain view exception to the Warrant Clause. But I do not join the plurality's opinion because it goes well beyond the application of the exception. As I read the opinion, it appears

to accord less significance to the Warrant Clause of the Fourth Amendment than is justified by the language and purpose of that Amendment. In dissent in *United States v. Rabinowitz*, 339 U. S. 56 (1950), Justice Frankfurter wrote eloquently:

"One cannot wrench 'unreasonable searches' from the text and context and historic content of the Fourth Amendment. . . . When [that] Amendment outlawed 'unreasonable searches' and then went on to define the very restricted authority that even a search warrant issued by a magistrate could give, the framers said with all the clarity of the gloss of history that a search is 'unreasonable' unless a warrant authorizes it, barring only exceptions justified by absolute necessity." *Id.*, at 70.

To be sure, the opinions of this Court in Warrant Clause cases have not always been consistent. They have reflected

disagreement among Justices as to the extent to which the Clause defines the reasonableness standard of the Amendment. In one of my earliest opinions, *United States v. United States District Court*, 407 U. S. 297 (1972), I cited Justice Frankfurter's *Rabinowitz* dissent in emphasizing the importance of the Warrant Clause. *Id.*, at 316. Although I would not say that exceptions can be justified only by "absolute necessity,"¹ I stated that they were "few in number and carefully delineated." *Id.*, at 318. This has continued to be my view, as expressed recently in *Arkansas v. Sanders*, 442 U. S. 753, 759 (1979). It is a view frequently repeated by this Court. See, e. g., *United States v. Ross*, 456 U. S. 798, 825 (1982); *Mincey v. Arizona*, 437 U. S. 385, 390 (1978) (unanimous decision); *Vale v. Louisiana*, 399 U. S. 30, 34 (1970); *Katz v. United States*, 389 U. S. 347, 357 (1967); *Camara v. Municipal Court*, 387 U. S. 523, 528-529 (1967); *Jones v. United States*, 357 U. S. 493, 499 (1958).

This case involves an application of the plain view exception, first addressed at some length by the plurality opinion in *Coolidge v. New Hampshire*, 403 U. S. 443 (1971). The plurality today states that this opinion "has never been expressly adopted by a majority of this Court." *Ante*, at 6. Whatever my view might have been when *Coolidge* was decided, I see no reason at this late date to imply criticism of its articulation of this exception. It has been accepted generally for over a decade.² Moreover, it seems unnecessary to

¹ I have considered the automobile exception, for example, as one clearly justified because of the nature of the vehicle. See, e. g., *Arkansas v. Sanders*, 442 U. S. 753, 760-761 (1979); *United States v. Martinez-Fuerte*, 428 U. S. 543, 561-562 (1975); *Almeida-Sanchez v. United States*, 413 U. S. 266, 279 (1973) (POWELL, J., concurring).

² See, e. g., *United States v. Chesher*, 678 F. 2d 1353, 1356-1357 (CA9 1982); *United States v. Irizarry*, 673 F. 2d 554, 558-560 (CA1 1982); *United States v. Tolerton*, 669 F. 2d 652, 653-655 (CA10), cert. denied, — U. S. — (1982); *United States v. Antill*, 615 F. 2d 648, 649 (CA5) (*per curiam*), cert. denied, 449 U. S. 866 (1980); *United States v. Duckett*, 583 F. 2d

cast doubt on *Coolidge* in this case. Its plurality formulation is dispositive of the question before us.

Respondent Brown does not dispute that Officer Maples' initial intrusion was lawful. Brown also concedes that the discovery of the tied-off balloon was inadvertent in that it was observed in the course of a lawful inspection of the front seat area of the automobile. If probable cause must be shown, as the *Payton* dicta suggest, see *Payton v. New York*, 445 U. S. 573, 587 (1980), I think it is clear that it existed here. Officer Maples testified that he previously had made an arrest in a case where narcotics were carried in tied-off balloons similar to the one at issue here. Other officers had told him of such cases. Even if it were not generally known that a balloon is a common container for carrying illegal narcotics, we have recognized that a law enforcement officer may rely on his training and experience to draw inferences and make deductions that might well elude an untrained person. *United States v. Cortez*, 449 U. S. 411, 418 (1981). We are not advised of any innocent item that is commonly carried in uninflated, tied-off balloon such as the one Officer Maples seized.

Accordingly, I concur in the judgment as it is consistent with principles established by our prior decisions.

1309, 1313-1314 (CA5 1978); *United States v. Williams*, 523 F. 2d 64, 66-67 (CA8 1975), cert. denied, 423 U. S. 1090 (1976); *United States v. Truitt*, 521 F. 2d 1174, 1175-1178 (CA6 1975); *United States v. Pacelli*, 470 F. 2d 67, 70-72 (CA2 1972), cert. denied, 410 U. S. 983 (1973); *United States v. Drew*, 451 F. 2d 230, 232-234 (CA5 1971).

REC. J.	W. J. B.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P. S.	S. D. OC.
UHL 4/21/83	Join DOS 4/6/83	Join UHL 2/24/83	Join DOS 4/12/83		1st Draft con in Judgment 3/23/83 2nd draft 3/25/83	1st draft 2/9/83 2nd draft	1st draft con in part & dismissing 4/5/83	Join UHL 2/24/83
		1st draft concurring opinion 2/25/83			3rd draft 4/14/83	2/24/83 3rd draft	in part 4/5/83	Join 3rd draft 3/9/83
						2/9/83 4th draft 4/6/83	4/7/83 3rd draft 4/12/83	
						5th draft 4/15/83	4th draft 4/13/83	