Missouri Law Review

Volume 63
Issue 1 *Winter 1998*

Article 13

Winter 1998

Seizures of Containers Using the Plain Feel Doctrine: Did Missouri Go Too Far--or When Is a Pill Bottle Just a Pill Bottle

Daniel E. Blegen

Seizures of Containers Using the Plain Feel Doctrine: Did Missouri Go Too Far? or When Is a Pill Bottle Just a Pill Bottle?

State v. Rushing[1]

I. INTRODUCTION

The United States Supreme Court first recognized "plain feel" contraband searches in 1993 as an expansion of the "Terry search"[2] doctrine which allowed a quick pat-down search of a suspect for weapons.[3] Many states have addressed the application of the plain feel doctrine since it was articulated by the United States Supreme Court in *Minnesota v. Dickerson*.[4] Missouri's adoption of the doctrine, however, may have overly broadened the intended scope of such a search.

The contraband typically found during a plain feel search either is in a form which can be detected by the police officer's tactile perception, or is in a container that is known to the officer to commonly contain contraband.[5] Courts have had little trouble upholding the seizure of contraband itself using the "plain feel" doctrine.[6] The seizure of containers using the "plain feel" exception, however, leads to questionable results.[7]

II. FACTS AND HOLDING

Shaun Alexander Rushing (Rushing) was arrested on October 12, 1994, for possession with intent to distribute crack cocaine.[8] Randall Rhodes (Rhodes), the chief juvenile officer for the 32d Judicial Circuit of Missouri, while driving in Cape Girardeau, Missouri, saw Rushing standing by the driver's side door of a car in an area "known for drug trafficking and gang activity."[9] Rhodes witnessed Rushing reach into his pants and then apparently hand something to

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1. 935 S.W.2d 30 (Mo. 1996), *cert. denied*, 117 S. Ct. 1713 (1997).

2. Terry v. Ohio, 392 U.S. 1 (1968).

3. Minnesota v. Dickerson, 508 U.S. 366 (1993). This doctrine allows the officer conducting the "*Terry* search" to seize contraband that is detected using the officer's sense of touch, and is "immediately apparent" as contraband. *Id.* at 375-76.

4. *See infra* notes 58-103 and accompanying text.

5. *See infra* Section III.B.

6. *See infra* notes 60-64 and accompanying text.

7. *See infra* note 65-103 and accompanying text.

8. State v. Rushing, 935 S.W.2d 30, 31 (Mo. 1996), *cert. denied*, 117 S. Ct. 1713 (1997).

9. *Id.*

the driver of the car.[10] Rhodes then witnessed the driver handing something to Rushing, who placed it in his pants pocket.[11]

"[B]ased on his training and experience as a juvenile officer," Rhodes believed that he had witnessed a drug transaction.[12] As a result, Rhodes reported what he had witnessed to narcotics officer Rick Price (Price).[13] Both men returned to the location where Rhodes had witnessed the drug transaction, whereupon Rhodes identified Rushing, who was standing on the porch of 216 South Lorimier Street.[14] Price testified that he had executed a search warrant for drugs on a prior occasion at 216 South Lorimier Street.[15]

Rhodes and Price approached Rushing and questioned him about the drug transaction.[16] Rushing denied that he had sold drugs.[17] Testifying that he was concerned for his safety because of the presence of gang graffiti in the area, Price conducted a protective pat-down search of Rushing for weapons and contraband.[18]

While running a hand down Rushing's front pants pocket, Price felt a tubular item that he immediately thought was a "Life Saver Hole candy container, which is a common container used by crack dealers to carry their crack cocaine in."[19] Price based his belief that it was a container of crack cocaine on the information provided by Rhodes, the surrounding area, and his previous training and experience.[20] Price explained at trial that, in his experience, containers of this type are commonly used to carry crack cocaine because they are easily concealed and easily opened.[21]

Price removed the container from Rushing's pocket and discovered that it was a cylindrical medicine bottle.[22] He opened the bottle and discovered ten rocks of crack cocaine and some rice.[23] Price arrested Rushing and took him to the police station where more crack cocaine was found in a wadded dollar bill.[24]

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10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Rushing*, 935 S.W.2d at 31.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* Such a search is permissible under *Terry v. Ohio*, 392 U.S. 1 (1968), discussed *infra* notes 36-41 and accompanying text.
19. *Rushing*, 935 S.W.2d at 31.
20. *Id.*
21. *Id.* at 32.
22. *Id.*
23. *Id.*
24. *Id.*

At trial, Rushing moved to suppress the evidence.[25] The trial court denied the motion to suppress, and convicted Rushing on the charge of possession with intent to distribute.[26] Rushing appealed to the Missouri Court of Appeals, Eastern District,[27] which transferred the case to the Missouri Supreme Court pursuant to Article V, section 10, of the Missouri Constitution.[28] The Missouri Supreme Court affirmed the conviction.[29]

III. LEGAL HISTORY

A. Adopting "Plain Feel"

The protection of the right of all individuals to be free from unreasonable searches and seizures is the purpose of the Fourth Amendment to the United States Constitution.[30] The United States Supreme Court has, however, created several exceptions to the bar on searches without a proper warrant.[31] The United States Supreme Court's 1993 decision in *Minnesota v. Dickerson*,[32] in which the

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25. *Id.* The supreme court did not elaborate on the basis for the motion in its opinion.

26. *Id.*

27. *Rushing*, 935 S.W.2d at 31.

28. *Id.* Cases may be transferred to the Missouri Supreme Court by a majority of the judges in a particular district of the court of appeals or by the supreme court. MO. CONST. art. 5 § 10.

29. *Id.* at 34

30. The Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probably cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

31. *See, e.g.*, Minnesota v. Dickerson, 508 U.S. 366 (1993) (exception for plain feel search); Horton v. California, 496 U.S. 128 (1990) (exception for contraband in plain view); Minnesota v. Olson, 495 U.S. 91 (1990) (exception for "exigent circumstances" such as imminent destruction); United States v. Robinson, 414 U.S. 218 (1973) (exception for search incident to arrest); Terry v. Ohio, 392 U.S. 1 (1968) (exception for protective search for weapons); Maryland Penitentiary v. Hayden, 387 U.S. 294 (1967) (exception for searches following "hot pursuit" by officers); Carroll v. United States, 267 U.S. 132 (1925) (exception for search of automobile because of mobility). For a further discussion of exceptions to the warrant requirement see JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE §§ 62-108 (1991).

32. 508 U.S. 366 (1993).

Court combined the "stop-and-frisk"[33] and the "plain view"[34] exceptions to create a new "plain feel"[35] exception, represents one such instance.

The United States Supreme Court established the stop-and-frisk exception in its landmark 1968 decision, *Terry v. Ohio*.[36] In *Terry*, a police officer approached two individuals that he felt were preparing to commit a robbery.[37] Fearing for his safety and the safety of others, the officer conducted a quick "pat-down" search of the two individuals, which led to the discovery of a weapon.[38] The officer seized the weapon without a warrant and it was eventually used to convict Terry of carrying a concealed weapon.[39]

The Supreme Court held this pat-down search to be constitutional, provided that it is performed only when the officer has a "reasonable fear" that the officer or others might be in danger.[40] Under such circumstances, the officer may conduct a limited search of the suspect's outer clothing to discover any weapons that could be used against the officer.[41]

The United States Supreme Court established the plain view search exception in *Coolidge v. New Hampshire*.[42] The exception was recently clarified in *Horton v. California*.[43] This exception allows police to seize contraband if they can view it from a lawful position and its nature is "immediately apparent."[44]

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33. *See infra* notes 36-41 and accompanying text.
34. *See infra* notes 42-44 and accompanying text.
35. *Dickerson*, 508 U.S. at 375.
36. 392 U.S. 1 (1968).
37. *Id.* at 5-7.
38. *Id.* at 7-8.
39. *Id.* at 8.
40. *Id.* at 30.
41. The *Terry* Court wrote:

> We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

Id. at 30.

For a more thorough discussion of the *Terry* search exception, see DRESSLER, *supra* note 31, at §§ 93-102.

42. 403 U.S. 443 (1971).
43. 496 U.S. 128 (1990).
44. *Id.* at 136-37. For a thorough discussion of the "plain view" exception see DRESSLER, *supra* note 31 at §§ 80-83.

In *Dickerson*, the United States Supreme Court combined these two exceptions to establish the plain feel exception. *Dickerson* involved two police officers on patrol near a building considered by police to be a "crack house."[45] The officers observed Dickerson as he exited the building and began walking toward the patrol car.[46] When Dickerson saw the patrol car and made eye contact with one of the officers, he stopped, turned, and began walking in the opposite direction.[47] Based upon Dickerson's actions and the officers' knowledge of the building from which Dickerson had just exited, the officers stopped Dickerson to investigate.[48] One officer conducted a pat-down search.[49] The officer felt no weapons, but did feel a lump in Dickerson's jacket pocket.[50] The officer testified that he manipulated the lump with his fingers and that it "felt to be a lump of crack cocaine in cellophane."[51] The trial court allowed the seizure using the plain view doctrine as an analogy.[52]

On appeal, the United States Supreme Court held that if a police officer is conducting a lawful search under the *Terry* exception to the warrant requirement and discovers "an object whose contour or mass makes its identity immediately apparent . . . its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context."[53] The *Dickerson* court did not allow admission of the evidence, however, because the police did not discover the contraband until after "'squeezing, sliding and otherwise manipulating the contents of the defendant's pocket'—a pocket which the officer already knew contained no weapon."[54]

Thus far, although the Court has laid out a new exception to the warrant requirement, it has done little to guide lower courts regarding its application as evidenced by inconsistent results in lower courts.[55] Additionally, while

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45. Minnesota v. Dickerson, 508 U.S. 366, 368 (1993).

46. *Id.*

47. *Id.* at 368-69.

48. *Id.*

49. *Id.*

50. *Dickerson*, 508 U.S. at 368-69.

51. *Id.*

52. *Id.* The Minnesota Court of Appeals reversed, "'declin[ing] to adopt the plain feel exception' to the warrant requirement." *Id.* at 370 (citing State v. Dickerson, 469 N.W.2d 462, 466 (Minn. Ct. App. 1991), *aff'd*, 481 N.W.2d 840 (Minn. 1992), *aff'd*, 508 U.S. 366 (1993)). The Minnesota Supreme Court affirmed the holding of the court of appeals, specifically holding that "'the sense of touch is inherently less immediate and less reliable than the sense of sight' and that 'the sense of touch is far more intrusive into the core of personal privacy that is at the core of the [F]ourth [A]mendment.'" *Id.* at 370 (citing State v. Dickerson, 481 N.W.2d 840, 845 (Minn. 1992), *aff'd*, 508 U.S. 366 (1993)).

53. *Dickerson*, 508 U.S. at 375-76.

54. *Id.* at 378 (quoting State v. Dickerson, 481 N.W.2d 840, 844 (Minn. 1992)).

55. *See infra* Section III.B.

commentators have viewed this new exception to the warrant requirement as simply an acknowledgement of the realities of law enforcement,[56] it has been criticized for being too vague.[57]

B. Adoption by the States

Since *Dickerson*, thirty-seven states have addressed its holding. Of the thirty-seven, only nineteen actually have upheld a seizure based upon the plain feel search doctrine,[58] while an additional five have adopted the holding but denied the seizure because it exceeded the scope allowed.[59]

These courts have addressed the plain feel issue in one of two general factual situations. The more common, and arguably easier, of the two situations involves contraband that is loose or in a bag that indicates the texture or nature of its contents. The more difficult situation involves a container that does not conform to the shape of the contraband.

In "bag" situations, the state generally argues that based on the officer's experience, the nature of the encounter with the suspect, and the officer's tactile

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56. Andrew Agati, Note, *The Plain Feel Doctrine of* Minnesota v. Dickerson*: Creating an Illusion*, 45 CASE W. RES. L. REV. 927, 955 (1995). The author notes that *Dickerson* strikes a balance between recognizing the ability of police officers to detect contraband through their sense of touch and the privacy interests of the individual being searched. *Id.* This balance is struck by limiting the doctrine to situations involving immediate recognition of the object as contraband. *Id. See also* Steven T. Atneosen & Beverly J. Wolfe, *The "Plain Feel" Exception: Is the Standard Sufficiently Plain?*, 20 WM. MITCHELL L. REV. 81, 110 (1994).

57. Atneosen, *supra* note 56, at 98-110. The authors stress that the Supreme Court correctly decided the case, but that the "immediately apparent" standard is not sufficiently clear for police officers in the line of duty. The authors recommend a "bright line" standard based upon objective facts. *Id.* at 102. The authors also recommend a standard developed using three principles: the standard should be easily applied by police officers, the standard should be reasonable, and the standard should be objective. *Id.* at 103-10. It is also interesting to note that the authors of this article were attorneys with the Hennepin County Attorney's Office in Minnesota, and were involved in the prosecution of the *Dickerson* case. *Id.* at 81.

Additionally, the standard has been criticized because the sense of touch is not as acute as the sense of sight in the "plain view" exception, and therefore this extension of the "plain view" doctrine goes too far. Eric B. Liebman, Note, *The Future of the Fourth Amendment after* Minnesota v. Dickerson*—A "Reasonable" Proposal*, 44 DEPAUL L. REV. 167, 203-06 (1994).

58. These states are: Alabama, Arkansas, California, Connecticut, Florida, Georgia, Illinois, Indiana, Louisiana, Maryland, Michigan, Montana, Missouri, North Carolina, Ohio, Pennsylvania, Texas, Wisconsin, and the District of Columbia.

59. These states are: Kentucky, New Jersey, New York, South Carolina, and Washington. The remaining thirteen states have discussed the holding in *Dickerson*, but did not apply the standard to the case in which it was discussed.

perception of the contraband, the contents of the bag are immediately apparent to the officer. Courts have tended to uphold these searches,[60] provided the officer did not go beyond the scope of a lawful *Terry* stop and frisk prior to determining the nature of the contraband.[61] As in *Dickerson*, the officer also must be able to determine the incriminating nature of the contraband without further manipulation of the object.[62]

Moreover, several courts have determined that a lump in a bag alone is not immediately apparent as contraband.[63] The vast majority, however, has held

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60. *See generally* Huffman v. State, 651 So. 2d 78 (Ala. Crim. App. 1994) (lump with configuration of crack cocaine); Dickerson v. State, 909 S.W.2d 656 (Ark. Ct. App. 1995) (bulge immediately apparent as bag of cocaine); State v. Trine, 673 A.2d 1098 (Conn. 1996) (lump of rock cocaine immediately apparent); Dickerson v. United States, 677 A.2d 509 (D.C. 1996) (package in crotch area immediately apparent); Harris v. State, 641 So. 2d 126 (Fla. Dist. Ct. App. 1994) (knew baggie was cocaine); Andrews v. State, 471 S.E.2d 567 (Ga. Ct. App. 1996) (large "cookie" of crack was immediately apparent); Howard v. State, 469 S.E.2d 749 (Ga. Ct. App. 1996) (bulge in groin was suspicious and possibly dangerous); Seaman v. State, 449 S.E.2d 526 (Ga. Ct. App. 1994) (baggie of marijuana in pocket); People v. Mitchell, 650 N.E.2d 1014 (Ill. 1995) (baggie in pocket); Bratcher v. State, 661 N.E.2d 828 (Ind. Ct. App. 1996) (baggie of marijuana immediately apparent); Parker v. State, 662 N.E.2d 994 (Ind. Ct. App. 1996) (baggie of cocaine immediately apparent); Walker v. State, 661 N.E.2d 869 (Ind. Ct. App. 1996) (baggie of marijuana immediately apparent); State v. Jackson, 684 So. 2d 1046 (La. Ct. App. 1996) ("golf ball" size bulge immediately apparent); State v. Lavigne, 675 So. 2d 771 (La. Ct. App. 1996) (crack pipe immediately apparent); State v. Mangrum, 675 So. 2d 1150 (La. Ct. App. 1996) (bulge immediately apparent); State v. Johnson, 660 So. 2d 942 (La. Ct. App. 1995) (rock of cocaine in pocket immediately apparent); State v. Wilson, 437 S.E.2d 387 (N.C. Ct. App. 1993) (lump in pocket immediately apparent as crack cocaine); *In re* Whitley, 468 S.E.2d 610 (N.C. Ct. App. 1996) (package that fell on hands during pat-down of legs immediately apparent as contraband); State v. Hunter, 649 N.E.2d 289 (Ohio Ct. App. 1994) (wadded plastic bag immediately apparent as contraband); *In re* B.C., 683 A.2d 919 (Pa. Super. Ct. 1996) (baggie in waistband immediately apparent as contraband); Commonwealth v. Dorsey, 654 A.2d 1086 (Pa. Super. Ct. 1995) (baggie of marijuana immediately apparent); Commonwealth v. Johnson, 631 A.2d 1335 (Pa. Super. Ct. 1993) ("crunchy" substance in crotch area immediately apparent as cocaine); Strickland v. State, 923 S.W.2d 617 (Tex. Ct. App. 1995) (crack pipe immediately apparent); State v. Buchanan, 504 N.W.2d 400 (Wis. Ct. App. 1993) (baggie of cocaine immediately apparent).

61. *See, e.g.*, State v. Thornton, 621 So. 2d 173 (La. Ct. App. 1993) (went beyond lawful search when officer determined contraband was not weapon).

62. Howard v. State, 623 So. 2d 1240 (Fla. Dist. Ct. App. 1993) (seizure not allowed because officer rolled baggie between fingers); State v. Jackson, 648 A.2d 738 (N.J. Super. Ct. App. Div. 1994) (seizure not allowed because officer continued manipulating lump).

63. People v. Dickey, 27 Cal. Rptr. 2d 44 (Ct. App. 1994) (bag of cocaine not immediately apparent); State v. Williams, 469 S.E.2d 261 (Ga. Ct. App. 1996) (bag that is possibly contraband held not enough); People v. Blackly, 645 N.E.2d 580 (Ill. App. Ct. 1995) (tightly rolled mass not immediately apparent); Community v. Crowder, 884

that a seizure of contraband is lawful when the officer finds a bag of contraband during the *Terry* search.[64]

Determining the validity of the seizure is decidedly more difficult, however, when the container does not conform to the shape of the contraband and is not, in itself, contraband. The courts are split in these cases,[65] with three courts allowing the seizure of the container,[66] and seven courts determining that the containers were not properly seized.[67]

The common thread among the "container" cases is that courts uphold the seizure of a container when they determine that the contents of the container are "immediately apparent."[68] A Connecticut appellate court determined that crack

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S.W.2d 649 (Ky. 1994) ("bindle" of drugs not immediately apparent); People v. Massey, 546 N.W.2d 711 (Mich. Ct. App. 1996) (bulge in pocket only gave officer "some idea" of nature of contraband); State v. Berveridge, 436 S.E.2d 912 (N.C. Ct. App. 1993) (cylindrical bulge not immediately apparent); Comm. v. Lateef, 667 A.2d 1158 (Pa. Super. Ct. 1995) (cocaine in bag not immediately apparent); Comm v. Mesa, 683 A.2d 643 (Pa. Super Ct. 1996) (baggie of marijuana not immediately apparent); Comm v. Smith, 685 A.2d 1030 (Pa. Super. Ct. 1996) (envelope not immediately apparent); State v. Tzintzun-Jimenez, 866 P.2d 667 (Wash. Ct. App. 1994) (slippery material not immediately apparent as cocaine).

64. *See supra* note 60.

65. While not all ten cases were decided using *Dickerson*, they all discussed the applicability of the *Dickerson* standard. These cases contain the only discussions of containers by state courts prior to *Rushing*.

66. State v. Gubitosi, 683 A.2d 419 (Conn. Ct. App. 1996) (crack vials allowed under plain feel); State v. Stevens, 672 So. 2d 986 (La. Ct. App. 1996) (matchbox allowed under plain feel); People v. Champion, 549 N.W.2d 849 (Mich. 1996) (pill bottle allowed under plain feel).

67. Howard v. State, 645 So. 2d 156 (Fla. Ct. App. 1994) (film cannister not allowed because of further manipulation); Jackson v. State, 669 N.E.2d 744 (Ind. Ct. App. 1996) (container not allowed because not immediately apparent); State v. Parker, 622 So. 2d 791 (La. Ct. App. 1993) (matchbox never immediately apparent); State v. Osborne, 651 N.E.2d 453 (Ohio Ct. App. 1994) (film cannister not allowed because not immediately apparent); Commonwealth v. Stackfield, 651 A.2d 558 (Pa. Super. Ct. 1994) (Zip-lock baggies not allowed because not immediately apparent); State v. Abrams, 471 S.E.2d 716 (S.C. Ct. App. 1996) (medicine bottle not allowed because exceeded scope when no weapon found); Campbell v. State, 864 S.W.2d 223 (Tex. Ct. App. 1993) (film cannister not allowed because not "incriminating").

Two additional cases were decided using a different analysis, but the courts discussed the applicability of the "plain feel" analysis in dicta. People v. Limon, 21 Cal. Rptr. 2d 397 (Ct. App. 1993) (magnetic key box allowed as search incident to arrest, but applicability of *Dickerson* discussed); Commonwealth v. Graham, 685 A.2d 132 (Pa. Super. Ct. 1996) ("Lifesaver Holes" container allowed under "plain view," but dissent discusses "plain feel").

68. State v. Gubitosi, 683 A.2d 419 (Conn. Ct. App. 1996) (crack vials immediately apparent); State v. Stevens, 672 So. 2d 986 (La. Ct. App. 1996) (matchbox immediately apparent); People v. Champion, 549 N.W.2d 849 (Mich. 1996) (pill bottle immediately

vials were immediately apparent in *State v. Gubitosi*.[69] The Fifth Circuit of the Louisiana Court of Appeals held that a matchbox was immediately apparent in *State v. Stevens*.[70] Finally, a majority of the Michigan Supreme Court used the totality of the circumstances to determine that a pill bottle was immediately apparent in *People v. Champion*.[71]

Several other courts, however, have determined that containers themselves cannot be "immediately apparent" as contraband.[72] The Fourth Circuit of the Louisiana Court of Appeals determined that a matchbox cannot be contraband in *State v. Parker*.[73] The Superior Court of Pennsylvania held that packaging materials, specifically baggies, are not immediately apparent as contraband in

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apparent).

69. 683 A.2d 419 (Conn. Ct. App. 1996). While the officer was conducting a *Terry* frisk, he felt an object in the defendant's pocket that he immediately concluded contained crack vials. *Id.* at 420. The officer then reached into the pocket and found 111 crack vials. *Id.* The court determined that the crack vials were properly seized and did not violate the boundaries set forth by *Dickerson* because the identity of the objects were "immediately apparent." *Id.* at 421 n.3.

70. 672 So. 2d 986 (La. Ct. App. 1996). The court's holding is discussed at length *infra* notes 90-96 and accompanying text.

71. 549 N.W.2d 849 (Mich. 1996). After observing suspicious activities, the officers stopped the defendant and conducted a *Terry* search for weapons. *Id.* at 852. In the course of the pat-down search, the officer felt what he immediately identified as a pill bottle in the crotch of the defendant's sweat pants. *Id.* Knowing that pill bottles were commonly used to carry drugs, he seized the bottle and opened it, finding cocaine. *Id.*

The Supreme Court of Michigan expressly adopted the "plain feel" exception from *Dickerson* and upheld the seizure based upon the totality of the circumstances as they were known to the officer. *Id.* at 861-62. In support of its conclusion, the court specifically pointed to the fact that the defendant had his hands in his sweat pants and had refused to remove them as he fled from the officers. *Id.* at 859. This fact was one of five cited by the court as part of the totality of the circumstances that supported their conclusion. The other four were: the defendant leaving the scene upon seeing the patrol car; the officer's recognition of the defendant and knowledge of his previous drug convictions; the nature of the area; and the knowledge that contraband is often carried in pill bottles. *Id.* The court did state, however, that the holding was strictly fact-based and may not have led to the same result had the officer found the pill bottle in a jacket pocket. *Id.*

Interestingly, the court did not indicate that *opening* the pill bottle was authorized under *Dickerson*. *Id.* at 860. In fact, opening of the pill bottle was authorized only after satisfying the requirements for a search incident to arrest. *Id.* at 861, n.17. The court held that the officers had probable cause to arrest the defendant based upon the factors cited for justification of the seizure. *Id.* at 861. Therefore, the pill bottle was opened incident to arrest and was a valid exercise of police power. *Id.*

72. *See infra* notes 73-75 and accompanying text.

73. 622 So. 2d 791 (La. Ct. App. 1994). The court's holding is discussed at length *infra* notes 97-103 and accompanying text.

Commonwealth v. Stackfield.[74] A Texas appellate court held that the "incriminating character" of a film cannister was not immediately apparent in *Campbell v. State*.[75]

Three additional cases discuss in dicta that, even though the seizure of the container may be allowed for other reasons, the container itself probably should not be considered contraband under *Dickerson*. While the seizure was upheld as a search incident to arrest, a California appellate court stated in dicta that a magnetic key box is not immediately apparent as contraband in *People v. Limon*.[76] While a majority of the Superior Court of Pennsylvania upheld the

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74. 651 A.2d 558 (Pa. Super. Ct. 1994). During a lawful protective pat-down search, the officer felt what he "knew was packaging material or zip-lock baggies, what it felt like from [his] experience from working drugs." *Id.* The officer then pulled the baggies out of the defendant's pocket and found that they had marijuana and cocaine residue inside. *Id.*

The court held that the officer had violated *Dickerson* and that the baggies were illegally seized. *Id.* at 562. The court held that the record was not sufficient to support the lower court's conclusion that "the officer felt an item that he immediately recognized as contraband." *Id.* The court further noted that "[a] zip-lock baggie is not per se contraband, although material contained in a zip-lock baggie may well be . . . [s]ight unseen, the contents of the baggies . . . could as easily have contained the remains of appellant's lunch as contraband." *Id.*

75. 864 S.W.2d 223, 226 (Tex. Ct. App. 1993). The officer in *Campbell* seized a film cannister found in the defendant's front pocket based upon the officer's experience and the defendant's evasive actions. *Id.* at 224. The officer observed the defendant's Chevy Suburban "weaving" and "failing to maintain a single lane," and pulled him over. *Id.* When he approached the vehicle, he smelled alcohol and saw a cup in the car. *Id.* He asked the defendant to get out of the car and asked his permission to search him and the car. *Id.* The defendant gave permission, and the officer conducted a pat-down search. *Id.*

When the officer got to the defendant's front shirt pocket, the defendant made an "evasive action." *Id.* The officer continued to pat the defendant down and found a film cannister in the defendant's front pocket. *Id.* The officer testified that the cannister did not feel like a weapon, but that when he felt the cannister he "knew there was something he didn't want seen." *Id.*

The court held that the officer exceeded the scope of the *Terry* search when he determined the object contained no weapon. *Id.* at 226. The court pointed to the officer's testimony that the film cannister "did not feel like a weapon." *Id.* The court further found that the "plain feel" exception was not applicable because "[t]he 'incriminating character' of a 35-millimeter film cannister was not 'immediately apparent' under the facts before us to justify its seizure." *Id.* The officer did testify at trial that he had experience with film cannisters being used to carry drugs, and that the film cannister he has found actually contain film "probably 10 percent" of the time. *Id.* at 224-25.

76. 21 Cal. Rptr. 2d 397 (Ct. App. 1993). The officer, after observing what he thought was a drug transaction, discovered the magnetic key box during a valid *Terry* search. *Id.* at 399. After the officer had seen the object, he "had a pretty good suspicion" that it contained drugs. *Id.* The officer removed the box, asked the defendant if he could look inside, and the defendant consented. *Id.* at 399.

seizure based upon the plain view doctrine in *Commonwealth v. Graham*,[77] the dissent discussed the plain feel doctrine and argued that a "Lifesaver Holes" bottle cannot be immediately apparent as contraband.[78] Similarly, the dissent in *Champion* argued that the pill bottle allowed by a majority of the Michigan Supreme Court[79] could not be immediately apparent as contraband.[80]

The remaining cases fall into one of two categories. Either the officer required further manipulation to determine the incriminating nature of the

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The court determined that the presence of the key box, combined with the circumstances of the encounter and the nature of the surrounding area, gave the officer probable cause to arrest the defendant. *Id.* at 404. Because probable cause existed, the court determined that the search was valid as a search incident to arrest. *Id.* at 405.

The court acknowledged, however, that ordinary containers are not, by themselves, contraband. *Id.* at 404. In fact, the court explicitly stated that the officer's testimony that he had seen drugs concealed in a key box before may not be enough without some other corroborating facts. *Id.* The court held that the additional facts of the exchange gave the magnetic key box added significance in this situation. *Id.*

77. Commonwealth v. Graham, 685 A.2d 132, 138 (Pa. Super. Ct. 1996). The officer observed the defendant and two other individuals while on patrol and knew that there was an outstanding arrest warrant for one of the defendant's companions, Ronnie Beason. *Id.* at 134. After stopping the three men and ordering Beason to lie down, Officer Dawley saw a bulge in the defendant's pocket and conducted a *Terry* pat-down search. *Id.*

While patting down the defendant's back pockets, the officer shined his flashlight into one pocket and saw the Lifesaver Holes container "which appeared to contain crack cocaine." *Id.* at 135. The court upheld the seizure of this container under the "plain view" doctrine because the officer was justified in shining his flashlight into the defendant's pocket during a lawful *Terry* pat-down search, and the contraband was in plain view. *Id.* at 138. The legality of this "plain view" search is certainly questionable, but that determination is beyond the scope of this Note.

78. *Id.* at 141. The dissent argued that the seizure would still not be justified because a Lifesaver Hole container "is not an object that is immediately apparent as contraband." *Id.* Further, the dissent argued that "even if Officer Dawley had testified that his experience with drug law enforcement gave him the knowledge that such a container was commonly used to package drugs, that would still not be sufficient to justify any further search and seizure." *Id.* The court relied on Commonwealth v. Stackfield, 651 A.2d 558 (Pa. Super. Ct. 1994).

79. *See supra* note 71 and accompanying text.

80. State v. Champion, 549 N.W.2d 849, 866 (Mich. 1996). The dissent in *Champion* argued that the search was invalid for several reasons. *Id.* at 862-72. One particularly interesting argument was based upon the dissent's literal reading of the language in the *Dickerson* opinion. The dissent noted that the *Dickerson* holding only allows seizure when "*that particular object's* mass and contour make *its* incriminating character 'immediately apparent.'" *Id.* at 865-66 (emphasis in original). The dissent further argued that there is nothing illegal about a pill bottle, and that the officer could not believe that it was contraband. *Id.* at 866. The point made by the dissent was that the court was confusing the item with the contents of the item. *Id.*

contraband,[81] or the court held that the *Terry* search should have ceased as soon as the officer knew that the object was not a weapon.[82]

Additional manipulation caused the Florida Court of Appeals to conclude that an officer did not have probable cause to seize a film cannister in *Howard v. State*.[83] An Indiana appellate court held that the seizure of a container of cocaine, after determining it was not a weapon and opening the container, exceeded the scope of a *Terry* search in *Jackson v. State*.[84]

Continuing to search the suspect after determining that no weapons existed caused an Ohio appellate court to invalidate the seizure of a film cannister in *State v. Osborne*.[85] In *State v. Abrams*,[86] the Court of Appeals of South Carolina

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81. Howard v. State, 645 So. 2d 156, 159 (Fla Dist. Ct. App. 1994) (shaking of a film cannister is further manipulation); Jackson v. State, 669 N.E.2d 744 (Ind. Ct. App. 1996) (opening container is further manipulation exceeding the *Terry* doctrine).

82. State v. Osborne, 652 N.E.2d 453 (Ohio Ct. App. 1994) (search must stop when officer determines container is not a weapon); State v. Abrams, 471 S.E.2d 716 (S.C. Ct. App. 1996) (purpose of pat-down search satisfied when officer determines container is not weapon).

83. 645 So. 2d 156 (Fla. Dist. Ct. App. 1994). During the course of a pat-down search for weapons, the officer discovered a film cannister in the defendant's waistband. *Id.* at 157. One officer testified that the defendant was not suspected of anything at the time, but the defendant consented to the search. *Id.* The court conceded that absent this consent, the officer would not have had probable cause to conduct a *Terry* search of the defendant. *Id* at 157. It was during the course of this search that the film cannister was discovered. *Id.* The officer shook the cannister and heard what he characterized as "pebbles falling in it." *Id.* After consulting with another officer, the officer seized the film cannister and arrested the defendant. *Id.*

The court held that the search went beyond the scope allowed by *Dickerson* because the officer did not recognize the illegal character of the object from its texture or feel. *Id.* at 159. The court determined that the officers exceeded the permissible scope "after they knew the film cannister was not a weapon and when they did not otherwise have probable cause to believe the object was illegal contraband." *Id.*

84. 669 N.E.2d 744 (Ind. Ct. App. 1996). In the course of a *Terry* search for weapons, the officer felt a container that he believed might contain razor blades and removed it from the defendant's pocket. *Id.* at 746. The officer observed that it was a partially transparent container that contained a "white chunky substance." *Id.* The officer testified that he did not know what the substance was, other than that it was not a prescription drug. *Id.* The court upheld the *Terry* search and the removal of the container from the pocket because Thompson believed that the container could have contained a weapon. *Id.* at 748.

The court held, however, that the opening of the container and the resulting seizure of the cocaine were not within the bounds of the "plain view" doctrine because the incriminating nature of the contraband was not "immediately apparent." *Id.* Thompson only testified that the container contained "a white chunky substance." *Id.* at 749. Because the further manipulation exceeded the scope allowed under *Dickerson*, the court held that the evidence should not have been allowed. *Id.*

85. 651 N.E.2d 453 (Ohio Ct. App. 1994). The officers in *Osborne* were called to a parking lot to respond to a report that shots had been fired. *Id.* at 454. During a *Terry*

also held that the seizure of a medicine bottle exceeded the scope allowed under *Dickerson* when the officer continued searching after determining that it was not a weapon.[87]

The state courts have not only reached inconsistent results, but have used inconsistent analyses as well.[88] For example, the seizure of a matchbox was faced by two different circuits of the Louisiana Court of Appeals.[89] The Fifth Circuit determined that a matchbox was immediately apparent as a container for contraband in *State v. Stevens*.[90] The officer in *Stevens* observed the defendant "acting suspiciously and flagging down a vehicle in a known drug area. . . ."[91] After stopping the defendant, the officer conducted a *Terry* search and felt a matchbox in the defendant's front pocket.[92]

The court held that the seizure of the matchbox was justified under *Dickerson* because of the circumstances at the time, and the knowledge of the

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search for weapons, the officer felt a hard object that he believed was possibly contraband. *Id.* The officer testified that he did not observe a weapon as he approached the defendant, and that he conducted the search to discover "possible weapons or *any possible contraband*." *Id.* (emphasis in original). The officer removed the object and discovered that it was a translucent film cannister. *Id.* The officer opened the cannister knowing that it was not a weapon, found cocaine, and arrested the defendant. *Id.* at 455. The officer testified that he did not think the cannister held a weapon and that "he had no idea what was inside the cannister before he opened it." *Id.* The court held that the contents of the film cannister were inadmissible because the officer knew that it was not a weapon, and any other search to determine the contents exceeded the search allowed by *Terry* because the incriminating nature of the cannister was not apparent to Officer Textra. *Id.* at 457. The court did leave open the possibility that additional evidence could justify the search, for example, testimony by the officer that the contents were immediately apparent upon seeing the container. *Id.*

86. 471 S.E.2d 716 (S.C. Ct. App. 1996).

87. *Id.* at 718. During the *Terry* pat-down search, the officer felt a "tube like" object in the defendant's front pocket and, based upon his experience, he "immediately realized that it was something frequently used to transport drugs." *Id.* at 717. The court held that the limited purpose of the pat-down search for weapons was satisfied when the officers determined that the container was not a weapon, and any additional search was not allowed. *Id.*

88. *See infra* notes 89-103 and accompanying text.

89. The seizures were analyzed by the Fifth Circuit in *State v. Stevens*, 672 So. 2d 986 (La. Ct. App. 1996), and the Fourth Circuit in *State v. Parker*, 622 So. 2d 791 (La. Ct. App. 1993).

90. 672 So. 2d 986 (La. Ct. App. 1996).

91. *Id.* at 987.

92. *Id.* After the officer removed the matchbox, the defendant fled. *Id.* The defendant then turned himself in to police later that evening. *Id.*

officer that drug dealers often carry crack cocaine in matchboxes.[93] To further stress the importance of context, the court stated:

> Is a small matchbox capable of being immediately recognized as something containing illegal contraband? Not in the hands of the Marlboro man or Humphrey Bogart lighting a cigarette; however, in the pocket of a drug-selling suspect flagging down cars at night in an area known for illegal drug trafficking, a small matchbox *can* be immediately recognized, by feel, for what it almost surely is, a depository for crack cocaine.[94]

The dissent, however, argued that a seizure is only justified if the object "feels like contraband."[95] The dissent further stated that "[a] matchbox is not contraband. . . [and] the feel of a matchbox is not immediately identifiable as contraband in a patdown search."[96]

The Fourth Circuit held that the seizure of a matchbox exceeded the scope allowed under the plain feel exception in *State v. Parker*.[97] In *Parker*, a deputy sheriff was given information about possible drug dealing, and he proceeded to the location specified.[98] When he arrived at the scene with several deputies, he saw one suspect throw a container of cocaine out of a car window and he seized it.[99]

The defendant was standing next to the car and a deputy conducted a valid *Terry* stop-and-frisk on the defendant.[100] During this search, the deputy seized a matchbox from the defendant's pocket.[101]

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93. *Id.* at 988. The court noted, "Police officers neither live nor work in a vacuum. They immediately know, from common sense and experience, that certain areas are known for drug activity . . . and that drug sellers often place crack cocaine in matchboxes." *Id.* at 987.

94. *Id.* at 988 (emphasis in original).

95. *Id.*

96. *Id.*

97. 622 So. 2d 791 (La. Ct. App. 1993).

98. *Id.* at 792. The information was about a father and son team that was reportedly selling drugs out of a car.

99. *Id.* The father and son were both arrested and searched following the discovery of the discarded contraband. *Id.*

100. *Id.* The defendant was attempting to leave the scene when stopped by another deputy. *Id.* The court held that the *Terry* search for weapons was justified based upon the known nature of the surrounding area and the discovery of drugs on the father and son in the car. *Id.*

101. *Id.*

The court held that while the search for weapons was authorized, the seizure of the matchbox was not.[102] In reaching this conclusion, the court noted:

> [T]he officer did not feel drugs in defendant's pocket, but rather only felt a matchbox. A matchbox in and of itself is not contraband . . . . In order to determine if the matchbox held drugs, it was necessary for the officer to remove it from inside the defendant's pocket and open it. This is the type of further manipulation outlawed by *Dickerson*.[103]

Against this backdrop of confusion and inconsistency, the Missouri Supreme Court decided the fate of the seized medicine bottle of crack cocaine in *Rushing*.

IV. INSTANT DECISION

A. Majority

In *State v. Rushing*, Chief Judge Holstein, writing for the majority, determined that the seizure of the medicine bottle from the defendant was valid under the standard for plain feel searches outlined by the United States Supreme Court in *Dickerson*.[104] The court determined that the incriminating nature of the container was immediately apparent to Officer Price because of the surrounding circumstances and Officer Price's experience as a police officer.[105]

The majority held that the "immediately apparent" standard is the same as the probable cause standard.[106] The majority determined that probable cause exists when the "facts and circumstances within the knowledge of the seizing officer are sufficient to warrant a person of reasonable caution to believe that the item may be contraband . . . ."[107] The majority further determined that the officer's factual knowledge, based on his law enforcement experience, is a relevant factor in the determination of probable cause.[108]

In support of its holding, the majority cited the following factors as pointing to a determination that the container Price felt was contraband: "1) the officer's feel of the object, 2) his knowledge of the suspicious transaction observed by Rhodes, 3) the reputation of the neighborhood as a drug trafficking area, and 4) his knowledge of commonly used drug containers."[109] The majority held that

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102. *Id.* at 795.

103. *Id.* There was no mention in the opinion as to what the deputy believed was in the container.

104. 935 S.W.2d 30, 33 (Mo. 1996), *cert. denied*, 117 S. Ct. 1713 (1997).

105. *Id.*

106. *Id.*

107. *Id.*

108. *Rushing*, 935 S.W.2d at 33.

109. *Id.*

sufficient evidence existed "even though Officer Price felt the container rather than the cocaine itself."[110]

The majority further determined that the adoption of the plain feel exception did not violate Article I, section 15 of the Missouri Constitution,[111] stating that while the Missouri Constitution may be construed to provide more protection than the United States Constitution, "the construction given to the Fourth Amendment of the federal constitution by the Supreme Court of the United States is strongly persuasive in construing the like section of our state constitution."[112] The majority further stated that the plain feel doctrine merely is a logical extension of the plain-view exception because it "neither expands the scope of *Terry* nor blurs its limits," and no justification exists for refusing to allow it in Missouri.[113]

Therefore, the court concluded that the plain feel exception allows the seizure of a container of contraband discovered during the course of a valid *Terry* stop-and-frisk, provided it is "immediately apparent as contraband."[114]

B. Dissent

In writing for the dissent, Judge Covington found that the seizure in *Rushing* exceeded the scope of the seizure authorized under the "plain feel" exception because it is impossible to determine that a container contains contraband based upon tactile perception.[115] Judge Covington noted that probable cause rather than reasonable suspicion was the standard required for seizure of objects detected during a pat-down search.[116] Covington further

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110. *Id.*

111. *Id.* at 34. Article I, section 15 of the Missouri Constitution states: "the people shall be secure in their person, papers, homes and effects, from unreasonable searches and seizures . . . ."

112. *Rushing*, 935 S.W.2d at 34 (citing Star Square Auto Supply v. Gerk, 30 S.W.2d 447, 456 (Mo. 1930)).

113. *Id.*

114. *Id.*

115. *Id.* at 36 (Covington, J., dissenting). In support, Judge Covington cited other state courts which have held that similar searches exceeded the authority of *Dickerson*. *Id.* at 35. In particular, Judge Covington cited *Commonwealth v. Crowder*, 884 S.W.2d 649 (Ky. 1994), in which the Kentucky Supreme Court held that a search was invalid because the officer did not immediately recognize the incriminating nature of a "bindle" of drugs. *Id.* The dissent also cited *Commonwealth v. Stackfield*, 651 A.2d 558, 562 (Pa. Super. Ct. 1994), in which the Pennsylvania Superior Court invalidated the seizure of zip-lock baggies because "[a] zip-lock baggie is not per se contraband." *Id.* *See supra* note 74 and accompanying text. Finally, the dissent cited *Campbell v. State*, 864 S.W.2d 223 (Tex. Ct. App. 1996), in which the Texas Court of Appeals held that "'[t]he incriminating character' of a 35-millimeter film cannister was not 'immediately apparent'. . . ." *Id.* *See supra* note 75 and accompanying text.

116. *Rushing*, 935 S.W.2d at 35 (Covington, J., dissenting). The dissent pointed

argued that nothing about a candy container makes it distinguishable from any other candy container,[117] and that "[t]he nature of the bottle as contraband was not apparent to the officer until after he removed the bottle from the defendant's pocket."[118]

The dissent acknowledged that factors such as Officer Price's knowledge supported the state's theory in the case,[119] but argued that the suspicions of Officer Price were not enough to reach the probable cause necessary for a valid search under *Dickerson*.[120] Therefore, the dissent concluded that reasonable suspicion is not enough to satisfy the probable cause requirement for a plain feel search under *Dickerson*.[121]

V. COMMENT

The standard adopted in *Minnesota v. Dickerson* is sound,[122] but the facts upon which Missouri adopted the standard go beyond what is authorized by *Dickerson* and further blur the line which the police must tread in conducting protective searches on suspects.

The standard articulated by the United States Supreme Court in *Minnesota v. Dickerson*[123] must be read narrowly to protect against abuse by over-eager law enforcement officers inclined to stretch their testimony to conform to the requirements of *Dickerson*.[124] The standard is not sufficiently clear to guide courts as they decide cases involving plain feel seizures,[125] particularly seizures involving containers; a fact that is made clear by the resulting inconsistencies in the state court decisions applying *Dickerson* to varying factual situations.[126]

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to the United States Supreme Court decision in *Arizona v. Hicks*, 480 U.S. 321, 326 (1987), where the Court overturned the seizure of stolen stereo components because the state had only a "reasonable suspicion" that the stereo was stolen prior to moving it and checking the serial numbers. The dissent in *Rushing* analogized this holding to the present case, arguing that Officer Price had only reasonable suspicion until he opened the container and determined its contents. *Rushing*, 935 S.W.2d at 35 (Covington, J., dissenting).

117. *Rushing*, 935 S.W.2d at 35 (Covington, J., dissenting).

118. *Id.* at 35-36.

119. *Id.*

120. *Id.*

121. *Id.*

122. The ability of a law enforcement officer to detect contraband through the officer's tactile sense during an otherwise lawful *Terry* search for weapons is a relatively minor application of the plain view doctrine, provided that the officer must be able to immediately recognize the object as contraband. Agati, *supra* note56, at 942.

123. 508 U.S. 366 (1993).

124. The possibility of perjury is discussed in Agati, *supra* note 56, at 948-50.

125. *See generally* Agati, *supra* note 56; Atneosen & Wolfe, *supra* note 57; Liebman, *supra* note 57.

126. *See supra* Section III.B.

State courts have consistently upheld the seizure when the contraband itself can be felt through the clothing during a *Terry* stop-and-frisk,[127] provided the officer has probable cause for the *Terry* stop[128] and does not exceed the scope of the search allowed.[129] State courts are much less consistent when cases involve containers that are not themselves contraband.[130] The application of the *Dickerson* rule to containers must be further defined or the states will continue to apply the rule inconsistently.[131]

More importantly, the fact that the opinion in *Dickerson* is vague regarding the application of the plain feel exception to containers allows law enforcement officers to abuse what certainly was intended as a recognition of the realities of their job.[132] The rule almost encourages officers to make *Terry* stops on a pretext of a dangerous situation in order to make an illegal search for contraband.[133] If a pill bottle,[134] matchbox,[135] and magnetic key box[136] could be immediately identified as contraband, certainly many other containers commonly used by law-abiding citizens could be immediately apparent as contraband and subject individuals to what would otherwise be a constitutionally impermissible search.

Dickerson's standard must be further defined; the question of what direction the court should take, however, still remains. As it has been interpreted to date, the rule appears to favor a holding that containers cannot be immediately apparent as contraband.[137] The specific language of the *Dickerson* holding,[138] combined with the protection that the Fourth Amendment is intended to give

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127. *See supra* note 60 and accompanying text.

128. *See supra* notes 36-41 and accompanying text.

129. *See supra* note 61 and accompanying text.

130. *See supra* notes 65-103 and accompanying text.

131. *See supra* notes 65-103 and accompanying text. As an example, the Court of Appeals of Louisiana, Fifth Circuit, determined that a matchbox was immediately apparent as contraband in *State v. Stevens*, 672 So. 2d 986, 988 (La. Ct. App. 1996), while the Court of Appeals of Louisiana, Fourth Circuit, held that a matchbox could *never* be "in and of itself . . . contraband" in *State v. Parker*, 622 So. 2d 791, 795 (La. Ct. App. 1994).

132. *See generally supra* note 56.

133. For a discussion of the dangers of pretext searched under *Dickerson*, *see* Agati, *supra* note 56, at 950-52.

134. *See* People v. Champion, 549 N.W.2d 849 (Mich. 1996); State v. Rushing, 935 S.W.2d 30 (Mo. 1996), *cert. denied*, 117 S. Ct. 1713 (1997).

135. *See* State v. Stevens, 672 So. 2d 986 (La. Ct. App. 1996).

136. *See* People v. Limon, 21 Cal. Rptr. 2d 397 (Ct. App. 1993).

137. *See* State v. Parker, 622 So. 2d 791 (La. Ct. App. 1994); Commonwealth v. Stackfield, 651 A.2d 558 (Pa. Super. Ct. 1994); Campbell v. State, 864 S.W.2d 223 (Tex. Ct. App. 1993). *But cf.* State v. Gubitosi, 683 A.2d 419 (Conn. Ct. App. 1996); State v. Stevens, 672 So. 2d 986 (La. Ct. App. 1996).

138. *See supra* note 53 and accompanying text.

citizens,[139] supports the conclusion that the plain feel standard should be narrowly construed.

The *Dickerson* opinion specifically stated that the police may seize contraband only if the object's "contour or mass makes its identity immediately apparent . . . ."[140] The court further held that the drugs in *Dickerson* were not immediately apparent as contraband even though the officer "formed the opinion that the object . . . was crack . . . cocaine."[141] Because it was not until the officer further manipulated the object that he was certain that it was contraband, and since the justification for the *Terry* search ended when the officer determined the object was not a weapon, the Supreme Court refused to allow the object under the plain feel exception.[142]

Similarly, as in *Dickerson*, a law enforcement officer can easily dispel any suspicion as to whether a container felt during a pat-down search is a weapon. Further, in the course of this determination, a container is simply a container and takes on no other characteristics, despite the suspicions of the law enforcement officer. In fact, a container takes on no new meaning prior to further manipulation by the officer.[143] For this reason, the language of *Dickerson*,[144] combined with state courts' application of the standard to varying factual situations,[145] points to the conclusion that the Court intended a narrow reading of the new plain feel search.

In addition, the very nature of the Fourth Amendment[146] leads to the conclusion that the search should be read narrowly.[147] While the right to be free

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139. The Fourth Amendment was traditionally seen as a protection against violations of the right to private property. DRESSLER, *supra* note 31, § 17. The modern approach, however, views the Fourth Amendment as a protection of individual's "legitimate expectations of privacy." *Id.* (citing Katz v. United States, 389 U.S. 347 (1967)).

140. Minnesota v. Dickerson, 508 U.S. 366, 375 (1993).

141. *Id.* at 377.

142. *Id.* at 378.

143. Such manipulation involves opening, *Jackson v. State*, 669 N.E.2d 744 (Ind. Ct. App. 1996), *State v. Parker*, 622 So. 2d 791 (La. Ct. App. 1994), *State v. Osborne*, 651 N.E.2d 453 (Ohio Ct. App. 1994), and shaking, *Howard v. State*, 645 So. 2d 156 (Fla. Dist. Ct. App. 1994).

144. *See supra* note 53 and accompanying text.

145. *See, e.g.*, State v. Parker, 622 So. 2d 791 (La. Ct. App. 1994) (matchbox cannot be immediately apparent as contraband); Commonwealth v. Stackfield, 651 A.2d 558 (Pa. Super. Ct. 1994) (Zip-lock baggies not immediately apparent as contraband). For more discussion of this issue, see *supra* notes 65-103 and accompanying text.

146. *See supra* note 30.

147. *See supra* note 30.

from warrantless seizures may not be absolute,[148] it has been recognized as an important right that should not be abrogated without great consideration.[149]

VI. CONCLUSION

In adopting the plain feel standard, the Missouri Supreme Court certainly went beyond what should be the boundaries of the United States Supreme Court's holding in *Dickerson*. The idea that an otherwise innocent container takes on sinister meaning based solely upon who is in possession of the container is overly broad and should not be followed.

The confusion and inconsistency over application of the plain feel standard, combined with the potential for abuse by law enforcement officers, makes it clear that the Supreme Court must articulate a clearer rule for cases involving the seizure of containers. In articulating a new rule, the Court should be guided by the language of its original holding in *Dickerson* and the intent of the Fourth Amendment. The new rule should not allow the seizure of innocuous containers based on the questionable "knowledge" of the seizing officer.

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148. The Supreme Court has articulated many exceptions to an absolute requirement. *See supra* note 31 and accompanying text.

149. The warrant requirement is generally seen as protecting against searches by the police without probable cause. *See* DRESSLER, *supra* note 31, § 50.