THE PLAIN TOUCH DOCTRINE:

POLITICAL AFFILIATION AND

JUDICIAL DECISION-MAKING

By

MICHAEL SHANE KLEIN

A dissertation submitted in partial fulfillment of
the requirements for the degree of

DOCTOR OF PHILOSOPHY

WASHINGTON STATE UNIVERSITY
Department of Criminal Justice and Criminology

MAY 2016

© Copyright by MICHAEL SHANE KLEIN, 2016
All Rights Reserved
To the Faculty of Washington State University:

The members of the Committee appointed to examine the dissertation of MICHAEL SHANE KLEIN find it satisfactory and recommend that it be accepted.

______________________________
Craig Hemmens, Ph.D., Chair

______________________________
Mary Stohr, Ph.D.

______________________________
Faith Lutze, Ph.D.
ACKNOWLEDGMENT

I would like to thank Dr. Craig Hemmens, Dr. Faith Lutze, and Dr. Mary Stohr for putting up with me and making this happen. Dr. Craig Hemmens was an especially able mentor, and he helped me more than I can ever put into words. My office mate Brandon Bang also helped me keep my sanity. Without the push of Dr. David Polizzi at Indiana State University I would have never even thought of applying, and eventually completing, a Ph.D. Finally, I would like to thank my dad for making me what I am, and for my wife for supporting me when I would have otherwise faltered. My accomplishments are their accomplishments.
THE PLAIN TOUCH DOCTRINE:
POLITICAL AFFILIATION AND
JUDICIAL DECISION-MAKING

Abstract

by Michael Shane Klein, Ph.D.
Washington State University
May 2016

Chair: Craig Hemmens

The Plain Touch exception to the Fourth Amendment allows police officers to seize contraband that is found during a Terry frisk. The exception, as outlined in the case of Minnesota v. Dickerson, extends the doctrine of Terry v. Ohio and further bolsters the abilities of police officers to seize evidence without a warrant. Critics of the Dickerson decision believed that the plain touch exception was a “conservative” decision that would destroy essential civil liberties. This study tested whether or not “conservative” politics have influenced the development of the plain touch doctrine. A doctrinal analysis of the appellate court cases in both federal circuit courts and state supreme courts revealed that the plain touch doctrine has developed in a manner that still safeguards civil liberties. However, a binary logistic regression analysis did reveal that the political affiliation of state supreme court judges had influenced the development of the plain touch doctrine.
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACKNOWLEDGMENT</td>
<td>ii</td>
</tr>
<tr>
<td>ABSTRACT</td>
<td>iv</td>
</tr>
<tr>
<td>LIST OF TABLES</td>
<td>ix</td>
</tr>
<tr>
<td>LIST OF FIGURES</td>
<td>xi</td>
</tr>
<tr>
<td>DEDICATION</td>
<td>xii</td>
</tr>
</tbody>
</table>

## CHAPTER

1. INTRODUCTION ................................................................. 1

2. THE APPELLATE SYSTEM ...................................................... 7
   - Courts of Appeal in America ........................................ 7
   - The Law ........................................................................... 10
   - Judicial Selection Methodologies .................................. 14

3. LITERATURE REVIEW ............................................................. 21
   - The Fourth Amendment ................................................ 21
   - A Confusing Doctrine ................................................. 28
   - *Minnesota v. Dickerson* ............................................ 33
   - *Dickerson*: Review of Literature ................................ 36
   - Judicial Decision-Making ............................................. 45
   - Conclusion ...................................................................... 53

4. METHODOLOGY ......................................................................... 55
   - Sampling .......................................................................... 55
   - Analytical Plan: Doctrinal Analysis ................................ 58
   - Analytical Plan: Binary Logistic Regression ................... 61
5. RESULTS: DOCTRINAL ANALYSIS ................................................................. 73

Jurisdictional Specifics .............................................................................. 73
Year of Decision .......................................................................................... 76
Lower Court Decision ................................................................................ 77
Outcome ...................................................................................................... 80
Descriptive Statistics .................................................................................. 81
Focal Concerns ............................................................................................ 82
#1: Immediately Apparent Standard ......................................................... 82
#2: Unreliability of Touch ......................................................................... 88
#3: "Pre-Textual Stops .............................................................................. 88
#4: Over-Reliance on Officer Testimony .................................................. 89
#5: Lack of Direction ............................................................................... 91
Conclusion .................................................................................................. 94

6. DISCUSSION: DOCTRINAL ANALYSIS ............................................... 96

Descriptive Statistics ................................................................................ 96
Jurisdictional Specifics ............................................................................... 96
Historical Development .............................................................................. 99
Rates of Reversal ....................................................................................... 100
Rates of Suppression ................................................................................ 102
Jurisdictional Differences ....................................................................... 103
Focal Concerns .......................................................................................... 104
#1: Immediately Apparent Standard1 ....................................................... 104
#2: Unreliability of Touch ....................................................................... 115
LIST OF TABLES

4.1. List of Cases...........................................................................................................56
4.2. Focal Concerns.......................................................................................................58
4.3. Focal Concerns Operations.....................................................................................61
4.4. Variables ..................................................................................................................68
5.1. Distribution by Circuit ..............................................................................................74
5.2. Distribution by State ................................................................................................76
5.3. Decisions by Year .....................................................................................................77
5.4. Affirmation of Lower Court.......................................................................................78
5.5. Affirmation of Trial Court in State Supreme Courts ...............................................80
5.6. Outcome by Jurisdiction ..........................................................................................81
5.7. Outcome by Trial Court Affirmation ........................................................................82
5.8. Type of Offense by Jurisdiction ..............................................................................83
5.9. Type of Evidence by Jurisdiction ............................................................................84
5.10. Evidence Allowed at Trial ......................................................................................85
5.11. “Pure Drug” Evidence ..........................................................................................86
5.12. Evidence in Rigid Container ..................................................................................87
5.13. Suppression Due to Unjustified Terry Stop ............................................................89
5.14. Officer Testimony by Jurisdiction .........................................................................90
5.15. Method of Decision by Jurisdiction ......................................................................92
5.16. Method of Decision by Outcome ..........................................................................93
5.17. Method of Decision in Cases with Complete Decision-Making ............................94
7.1. Descriptive Statistics...............................................................................................148
7.2. Descriptive Statistics for Federal Cases ................................................................. 149
7.3. Descriptive Statistics for State Supreme Court Cases ........................................... 150
7.4. Binary Logistic Regression: Political Affiliation and Outcome (N=108) ................. 152
7.5. Binary Logistic Regression: Political Affiliation with “Pure Drug” (N=108) .......... 154
7.6. Binary Logistic Regression: Political Affiliation and Reversed Outcome (N=108) .... 155
7.7. Binary Logistic Regression: Political Affiliation, Reversed, with Pure Drug (N=108) .... 156
7.8. Binary Logistic Regression: Political Affiliation and Outcome (n=45) ................. 157
7.9. Binary Logistic Regression: Political Affiliation and Reversed Outcome (n=45) ....... 158
7.10. Binary Logistic Regression: Political Affiliation and Outcome (n=63) ............... 159
7.11. Binary Logistic Regression: Political Affiliation and Reversed Outcome (n=63) .... 160
7.12. Binary Logistic Regression: Political Affiliation of Author and Outcome (N=108) .... 162
7.13. Binary Logistic Regression: Political Affiliation of Author and Outcome (n=45) ...... 163
7.14. Binary Logistic Regression: Political Affiliation of Author and Outcome (n=63) .... 165
A.4.1. Binary Logistic Regression: Political Affiliation and Outcome (N=108) ......... 270
A.4.2. Binary Logistic Regression: Political Affiliation and Outcome (N=108) ............. 271
A.4.3. Binary Logistic Regression: Political Affiliation and Outcome (N=108) ............ 272
LIST OF FIGURES

5.1. Distribution by Circuit ........................................................................................................75

5.2. Year of Decision ..................................................................................................................77
DEDICATION

To my wife,

The rutest girlfriend a guy could ask for.

To my dad,

For teaching me to stand on my own two feet.

To Craig Hemmens,

For turning me into a bonafide, grown-up academic.
CHAPTER 1

INTRODUCTION

The American Revolution resulted from the perceived slights of the British monarchy, and this revolutionary sentiment birthed the Fourth Amendment. Pre-revolution colonials aimed a variety of grievances at the distant English crown, amongst these, the monarchy’s use of general warrants caused particular outrage for the colonials (Newman, 2007). General warrants granted the British authorities the power to search any location without specificity, and the soon-to-be independent Americans cried foul at the British government’s ability to enter any home and conduct any search based upon whim and fancy rather than particularized evidence of wrongdoing. The Fourth Amendment was designed to protect against these sort of unreasonable search and seizures. As with all Constitutional amendments there remained a vast amount of unexplored territory in the wording of this Amendment. Questions concerning the nature of reasonableness and probable cause soon manifested in the legal discourse, and these questions continue to be addressed by the United States Supreme Court to this day. The criminal justice system and its various actors remain particularly attentive to these questions due to the ramifications of the continued uncertainty surrounding this amendment.

The intent of the authors of the Fourth Amendment is unclear, and different scholars interpret the Amendment in disparate ways (Amar, 1997; McInnis, 2009; Newman, 2007; Waite, 1944). Some legal scholars and judicial professionals believe that the Fourth Amendment requires a warrant for virtually every search, but others contend that searches must merely be reasonable (McInnis, 2009). These diametric perspectives are also aligned with different societal interests. Those that favor the warrant requirement often give primacy to individual rights (McInnis, 2009; Maclin, 2013). Alternatively, those that favor the reasonableness perspective
give a primacy to social control and police effectiveness (Amar, 1997; Newman, 2007). While this black-and-white separation is something of a simplification of the circumstances it can safely be said that a blanket warrant requirement would hamper law enforcement effectiveness. To prevent the hamstringing of law enforcement the Supreme Court has allowed several exceptions to the search warrant requirement, and each new exception is often seen as extending the power of the state and the police.

This study examines the development of one of these exceptions, the “plain feel” or “plain touch” exception that was instituted in *Minnesota v. Dickerson* (1993). To begin, I will provide a brief summary of the exceptions that unite to form the plain feel exception. *Terry v. Ohio* (1968) instituted an exception where police officers could “stop and frisk” an individual based upon reasonable suspicion. A *Terry* stop is warrantless by nature, and the frisk sets the physical location for a plain touch situation. Under the original conception of *Terry* an officer could only initiate a frisk for the express purpose of finding a weapon on a potentially dangerous individual. However, the *Terry* doctrine created the possibility of a police officer discovering non-weapon contraband during a frisk. If an officer made this type of discovery during a frisk could the officer seize this evidence under *Terry*? Questions like this are analogous to another exception, and a discussion of “plain view” will set the stage for *Dickerson*.

The Court defined the plain view exception in a series of several cases, but *Arizona v. Hicks* (1987) is the current leading case. Plain view refers to evidence that is essentially left out in the open for an officer to observe during the course of his lawful duty. If the officer has a legal right to be in a particular place he is free to seize any contraband he sees in the open. *Hicks* refined this exception by stating that the incriminating nature of any item in plain view must be immediately apparent. An officer cannot manipulate an item to determine if it is seizable.
Instead, the item’s appearance must furnish probable cause to justify a seizure. If we apply this to the *Terry* doctrine it may serve as an answer to the above question. Plain view hinges upon the sense of sight, but if we replace sight with the sense of touch an officer could theoretically seize any evidence that tactile sensation would immediately mark as seizable in nature.

The Court defined this “plain touch” exception in *Minnesota v. Dickerson* (1993). The plain touch exception allows an officer to seize any non-weapon contraband that he discovers during a frisk if his tactile analysis, or touch, indicates the item is contraband. However, as in the plain view exception the officer must not manipulate the evidence to determine its illegal nature. Critics immediately decried the *Dickerson* decision as a pro-police erosion of Fourth Amendment rights, and most cited the ambiguous nature of the exception (Poulin, 1997). Critics asked, “How can we determine if an officer could recognize an object’s illegal nature without manipulation? What’s to keep an officer from lying and seizing anything they desire?” (Doty, 1994).

It is has been just over two decades since *Dickerson* was decided, and no analysis of the current state of the *Dickerson* doctrine has been performed. It is unclear if *Dickerson* has led to an erosion of Fourth Amendment rights, and the decisions of the appellate courts will allow us to determine if *Dickerson* led to a pro-police or pro-rights jurisprudence. An analysis of the state and federal appellate cases concerning plain touch and *Dickerson* will allow us to see how *Dickerson* is functioning in both the federal and state court systems, and a social science methodology may reveal which judicial attributes influence these decisions. Presidents and governors have long been accused, and informally convicted, of the practice of court packing, which refers to nominating judges with a certain political affiliation or philosophy to the judiciary. Theoretically, Democratic judges will decide in a manner that can be conceptualized as
“pro-rights,” and Republican judges will institute pro-police decisions (Cross, 2003; Goldman, 1975). By inputting the political orientation of the deciding justices into a basic statistical analysis it may be possible to determine how political orientation has affected the development of the *Dickerson* doctrine. This proposed analysis will not only reveal the current state of the *Dickerson* doctrine, but it may also reveal the political forces at play behind the current functioning of the Fourth Amendment.

Further, prior research has revealed that several demographic characteristics influence appellate decision-making. The gender, age, and educational background of a judge sometimes influence the decisions of appellate judges (Collins & Miller, 2008; Cross & Tiller, 1998; Goldman, 1976), and the specifics of local legal contexts and geography also sometimes influence how appellate courts institute their decisions (Cross, 2003). Although this study seeks mainly to determine the effects of politics on judicial decision-making the current methodology will also illuminate which of these demographic factors shape and influence decision-making within the appellate court system.

**Politics and the Police: Why is This Study Important?**

The Fourth Amendment defines a large portion of the criminal procedure law that surrounds policing, and police procedure is further wrapped up in the larger discourse concerning expectations of individual freedom and rights. Perhaps Packer (1968) conceptualizes this discourse best with his antithetical concepts of “due process” and “crime control.” The question essentially boils down to expectations of freedom versus expectations of police efficiency. The history of criminal justice shows these two antithetical concepts displaying at different levels in evolving, or quite possibly devolving, social structures. These two concepts influence Fourth Amendment jurisprudence, and we must rely on our judiciary to determine what level of police
efficiency is permitted in terms of search and seizures. After all if we increase police efficiency by giving officers greater license in searching and seizing then we are naturally lowering individual freedoms.

Politics enters this greater discourse in terms of the ideological split between Republicans and Democrats. With the rise of Barry Goldwater and Richard Nixon in the 1960’s the Republican Party became associated with a law-and-order political platform that continues to this day (Friedman, 1993; Hall, 2009). If these politics influence Fourth Amendment decision-making then electoral decisions will directly influence police operations and individual freedoms. Further, this may illustrate the larger effects of politics on criminal justice. If this study demonstrates that politics are influencing how courts interpret the Fourth Amendment it may serve to raise questions about the legitimacy of current search and seizure law. Packer (1968) contends that crime control advocates believe they are keeping society safe, but if crime control style decisions are motivated largely by politics researchers must examine whether these decisions are truly accomplishing what they profess. At best these decisions may reflect legitimate concerns about the safety of society. At worst these decisions may reflect a grasp for power in the form of party politics.

The current work will address these questions. Chapter 2 features an overview of the appellate system. Chapter 3 contains a literature review and legal history of the items surrounding the plain touch exception. Chapter 4 presents the methodology for the study. Chapter 5 contains the statistical results related to the current doctrine of the plain touch exception, and Chapter 6 features a discussion of these results. Chapter 7 features the statistical results of the binary logistic regression modeling of this study. Chapter 8 features a conclusion
that synthesizes the findings of this study. Finally, the cases that feature into this study are summarized in *Appendix 1* and *Appendix 2*. 
CHAPTER 2

THE APPELLATE SYSTEM

The law enshrouds the practice of criminal justice. Statutory law provides initial direction for criminal justice practitioners and agencies, and judicial interpretation continues to refine statutes and field operations. The United States Constitution pulses through the totality of American law by establishing both boundaries and directions for legislatures and judges, and the United States Supreme Court is the primary interpreter of the Constitution. However, the Supreme Court cannot address every procedural issue raised in the sprawling criminal justice system of America, so the lower appellate courts pick up the slack by addressing the constitutionality of the more mundane events of criminal justice. This current work addresses the impact of the law, U.S. Constitution, and judicial interpretation of criminal procedure in the area of the plain touch exception. To fully understand this process one must have an understanding of the nature of law, criminal procedure, and the American appellate process.

Courts of Appeals in America

Under the Constitutional separation of powers Congress, arguably the most representative branch of government, creates the law. The law is then enforced by the executive branch, and the courts of the judicial branch adjudicate questions of law and conduct fact finding trials to determine innocence and guilt. Traditionally, the American judicial branch is supposed to be politically neutral, allowing them to dispense justice, answer legal questions, and review the work of the other branches without bias. The current work deals with criminal procedure, and an examination of the separation of powers within this specialized area will further elucidate the functionality of these powers. The Fourth Amendment governs search and seizure law, and the procedure of the Fourth Amendment directs and constrains executive action. American police, an
organ of the executive branch, must follow the dictates of the Fourth Amendment while investigating criminal activity, searching citizens, and arresting suspected offenders. However, questions will invariably arise during police operations, and the judicial department must determine if the police followed the requirements of the Fourth Amendment.

The first step in determining the legality of police activity is during a pre-trial or trial hearing in a low-level court. The trial judge will decide if the police action was constitutional. However, the American judicial system has always operated on an assumption of judicial fallibility, and American legal practice allows for higher courts to review the decisions of lower courts. The appellate courts of America review cases from lower courts if a party, either the state or the defendant, feels that the trial court’s decision featured faulty constitutional logic. For example, a defendant may believe that a trial court judge mistakenly admitted to trial evidence that was seized in violation of the Fourth Amendment. The defendant could appeal her conviction based upon this improper admission of illegal evidence, and the appeals court would rule on whether the trial court did or did not err in its decision to admit the evidence.

The United States Supreme Court was the first court of appeals in the American judicial system, and it remains the most important and powerful judicial body. Initially, the Supreme Court handled all of the appeals for the entire federal court system, and Supreme Court justices engaged in “circuit riding” where they toured the rugged contours of the newly fashioned nation and decided appeals in the different states. Due to American federalism the various states then instituted state court systems including appellate courts to handle questions concerning state law. The volume of appeals increased over time, and when America grew in population and geography the federal court system fashioned lower courts of appeals to examine the majority of appellate cases. These federal appellate courts, which are organized into geographic circuits,
examine cases that are appealed from federal district courts, and this frees up the Supreme Court
to examine larger, more important constitutional questions through a highly selective review
process involving *certiorari* (Hall, 2009; Horwitz, 1992).

The appellate courts interpret the law that is enacted by legislatures, and through this
refinement the appellate court system acts as “interstitial legislatures” that often change, amend,
or nullify the legislature’s enactments (Horwitz, 1992). The legislatures make the law, and the
executive enforces the law. The judiciary through the appellate courts, then decide if the
executive is acting within the bounds of the Constitution, and by issuing these proclamations the
judiciary then serves as a defacto law-maker by providing new rules and procedures for the
executive to follow. This process is cyclical in nature as the legislature will seek to make new
laws to overrule judicial decisions, the executive will push back on unfavorable judicial
decisions, and the court will once again have to reinterpret the law and executive action.

The power of the judiciary is great, and appellate courts have demonstrated their
influence at several points in American history. In the nineteenth century a conservative Supreme
Court destroyed several labor-friendly laws designed to regulate railroad practice (Sanders,
1999), and President Franklin Roosevelt engaged in a heated battle with a conservative Court
when trying to implement his New Deal program (Hall, 2009). Further, the liberal jurisprudence
of the Warren Court changed American criminal procedure and society (Powe, 2000), and a lone
federal judge in Texas essentially forced the remaking of the Texas prison system (Perkison,
2010). These are but a few of the instances where appellate courts have changed American
culture, and many social critics and theorists have complained that the judiciary is ill-equipped
for this type of social engineering (Horwitz, 1977). Scholars, critics, and commentators ask,
“Should the judiciary engage in this sort of policy design and manufacture? And if so to what
level should they innovate new procedures and law?” To answer these questions we must first examine the nature of the law, and its proper place in jurisprudence.

**The Law**

Weber (1968) believed that the law occupies a prominent position in modern society. To Weber statutory law is the prime mechanism of social order and cohesion in a modern, bureaucratic society. Weber’s ideas seemingly point to the empirical reality of the “Law.” The law becomes an organically developed entity that looms outside of social reality and acts as a constraining force of social control. However, this neutral, detached conceptualization of the law is not certain, and several legal scholars and judicial practitioners have shown that society influences and directs the law. Although seemingly abstract, these questions of legal theory have a direct impact on appellate practice by helping to set norms of acceptable judicial behavior. An examination of these theories will help illuminate how the law works and why judges decide the way they do. I will first examine the idea of legal positivism or formalism. I will then turn to the theories of legal realism. Finally, I will provide an alternative to these two theories by citing scholars who establish a middle ground between the two extremes of formalism and realism.

**Formalism and realism.** The theoretical perspective of legal formalism or positivism conceptualizes the law as an idea that exists outside of man. Formalism doesn’t necessarily establish the law as a supernatural entity or platonic ideal, but this perspective does hold that the law exists as an established force or reality (Horwitz, 1992; Posner, 1990). In the American legal system formalist theorists and practitioners believe the law to be the will of the populace. The people’s will codifies into statutory law and constitutional amendments, and formalists instruct the judge to *apply* the law to the concrete situations. Interpretation is limited, and the law becomes a formulaic code that allows judges to decipher the happenstances of reality into legal
conclusions. Formalism reigned supreme in the American legal thought of the nineteenth century (Holmes, 1881; Horwitz, 1992), and formalism still arguably remains the dominant legal philosophy of the civil law of continental Europe (Posner, 1990; Merryman, 1985). However, scholars in the early twentieth century challenged legal positivism by questioning the motives of judges and the practice of judicial decision-making (Holmes, 1881; Frank, 1936).

Supreme Court Justice Oliver Wendell Holmes (1881) is often cited as the patriarch of legal realism, but the realist philosophy actually coalesced in the early twentieth century around the writings of legal scholars such as Roscoe Pound (1911) and Jerome Frank (1936). Legal realists denied that the law exists as a positive entity outside of human interpretation. Instead, they theorized that the law is codified through the legal interpretation of judges. Under realism judges do not interpret the law. Instead, they make the law by instituting decisions related to the best policy or outcome. Modifiers like “best” or “positive” imply variation in judicial decision-making, and realists accept that different judges will decide in different ways based on a variety of personal characteristics. Pound (1911) advised that judges turn to sociological data to make their decisions while Frank (1936) took a more cynical turn and identified individual psychology and neurosis as the true motivations of judicial behavior.

Strict realism and strict formalism are antithetical to each other, and these two theories assign different roles to the appellate judge. Under a strict formalistic perspective the judge should merely apply the law, and if the law does not provide an easy solution to the problem the judge should either defer to the intent of legislature or delay his decision altogether by taking the most prudent, trepidatious path. Because the law exists outside of the judge the judge must only apply the law, and this implies a non-creative, non-interventionist jurisprudence. Realism takes a different path, and this perspective advises judges to move beyond the law and make decisions
that have the best policy impact on society. Unlike formalism realism conceptualizes the law as another policy tool that can be changed to fit the situation (Hall, 2009; Posner, 1990). These two different modalities of judicial decision-making correlate with either judicial “restraint” or “activism.”

The style of decision-making classified as “judicial restraint” recommends that appellate judges utilize a formalist style of jurisprudence that does not significantly change the content of either prior judicial opinions or enacted statutes. The law, which theoretically exists as a positive entity, should not be changed to fit situations, and judges practicing restraint should not take any steps that pervert established law. “Judicial activism” takes the opposite path, and activist judges often seek to wrong social ills, fix areas of troublesome policy, and effect political change by treating the law as a malleable tool to reach a proscribed end. At times these two perspectives have fallen on both sides of the political spectrum, but these styles of judicial decision-making are often bedfellows with particular political ideologies. Judicial activism is most commonly seen as being a liberal method of decision-making, and judicial restraint more often than not falls on the right side of politics (Horwitz, 1992). However, these styles may be only theoretical abstractions, and several scholars demonstrate that both liberal and conservative judges utilize a combination of realism and formalism, of restraint and activism (Posner, 1990; 1999).

**The Middle Ground.** The idea of pure judicial restraint and activism may be unrealistic in the concrete practice of jurisprudence. Several scholars and practitioners highlight that judges actually engage in both types of behavior. Posner (1990; 1999), an appellate judge on the Seventh Circuit Court of Appeals, contends that the majority of judges follow law and practice restraint. However, the nature of the appellate system, which features cases with complicated points of law, does provide opportunities for judges to engage in activist behavior. The fact that
these complicated questions are ambiguous allows for judges to write decisions designed to facilitate what they believe to be the best policy. Posner himself recommends that judges practice restraint and only practice activism in cases that feature a conscience shocking and glaring constitutional deficiency.

Posner (1999) conceptualizes this sort of restrained activism as being dictated by what he colorfully calls the “puke test.” Using logic borrowed from Supreme Court Justice Holmes, Posner recommends that judges only practice activism if they feel that the social problems or moral deficiencies of the case reach a point where they bring forth a queasiness of the stomach bordering on nausea. If the constitutional issues of the case present such a glaring injustice that they produce a vomitus sensation Posner recommends that judges practice activism to fix the problem. Holmes (1881) also recommends an attitude of restraint and recommends that judges only practice activism when it is apparent that a law or constitutional precedent is decidedly out of touch with the policy issues of the present day. These two judges, who are among the most prominent legal minds in American history, accept that judges will practice activism and make law through their role as “interstitial legislators,” but they also recommend that judges only assume this role when glaring deficiencies in current jurisprudence and law arise.

Lewellyn (1960) conducted a study that analyzed several different types of cases within the federal circuit courts and found that most cases end in results that do not significantly change the current law. Lewellyn defined these day-to-day decisions as the “grist” of the American legal system, and the scholar determined that in the majority of cases appellate judges take the prudent path and enact decisions that do not disturb the established precedents, statutes, and practices of the current legal system. However, Lewellyn, like Holmes and Posner, accepted that judges in difficult cases may practice activism, but he thought that this was a rare phenomenon.
These examples illustrate that most appellate judges actually engage in both activism and restraint. While these theorists imply that most judges actually practice restraint they do accept that in difficult cases judges will assume a more activist role, and Posner (1990) also states that certain judges will be more likely to engage in activist roles than others. Posner states that some judges will have lower thresholds of nausea than others and will be more likely to use their power to fix what they consider social problems or constitutional deficiencies. This poses an interesting question for social theorists: What judicial characteristics influence judges to assume a more activist role? My current hypothesis predicts that it will be political orientation, and I will address this topic in greater detail in the next chapter. Social scientists are not the only individuals who are concerned with the question of what judges will be more likely to engage in activist behavior. State and federal legislatures seek to address this issue through different judicial selection methodologies. I will now address these different methodologies, which will provide a better understanding of judicial activism and accountability.

**Judicial Selection Methodologies**

The judge is supposedly an apolitical arbiter who decides points of law using a neutral lens. The Constitution gives the President the power to select federal judges and justices, and the President, theoretically, is supposed to select judges based on their ability and intellect. However, it became readily apparent that Supreme Court justices and appellate judges were anything but politically neutral, and at several points in American history judges took political stands against laws and Constitutional precedents (Hall, 2009; Powe, 2000). The most commonly cited grievance against this sort of judicial activism criticizes the unelected nature of appointed judges, and several states sought to rectify this problem by instituting different judicial selection...
methods that were more responsive to their electorates. I will now provide a brief summary of each of these methodologies.

**Federal Selection Methodologies.** The acting President appoints all federal judges. These appointments include the district or trial court judges, the appellate judges in the circuit courts, and the justices of the United States Supreme Court. At one time the president had personal oversight over all appointments, but with the growth of the American judiciary the President now relies upon an advisory committee to find suitable candidates for district court appointments. However, the President still assumes a more active role in the appointment process for the appellate judiciary due to the considerable power these institutions wield (Pika, Maltese, & Thomas, 2002). After the president selects his appointees the Senate Judiciary Committee then either accepts or rejects the President’s recommendations, and the Senate then votes to either confirm or reject a Presidential appointment. Supposedly, the Judiciary Committee acts as a popular bulwark against Presidential overreaching, but history has demonstrated that presidents succeed in appointing people who align with their political ideology. The President remains the ultimate source of influence in the appointment process of federal judges (Songer & Gin, 2002).

Starting with President John Adams and his “midnight justices” the appointment process became mired in politics. Adams, who was exiting from his term as president, appointed several federalist judges just before his term expired (Hall, 2009; McCullough, 2001). The anti-federalists, or “Jeffersonian Democrats,” immediately took steps to remove these appointees, and the federal judiciary has been mired in partisan politics ever since. Franklin D. Roosevelt is another a president who took steps to construct a more politically friendly Supreme Court by increasing the number of Supreme Court justices, which would have provided him with more
appointments and friendly faces on the Court (Horwitz, 1992). Presidents continue to engage in the practice of trying to appoint politically like-minded judges to the federal judiciary to ensure that the judicial branch of government is sympathetic to the president’s policy goals.

Politically motivated appointments influence judicial decisions, and this method of selection has drawn the ire of many American citizens throughout history. The conservative justices who repeatedly overturned populist and New Deal legislation in the early twentieth century angered the American farmer and laborer, and many populist platforms and legislators proposed amendments that would change the appointment procedure to allow more popular control (Sanders, 1999). The activism of the Supreme Court under Chief Justice Earl Warren also resulted in a hostile public attitude best summed up in the bumper stickers that advised the country to “Impeach Earl Warren” (Powe, 2000). The primary sources of these examples of public unhappiness are connected with the undemocratic nature of the appellate judiciary. The public is chagrined at the thought of an unelected official enacting landmark policy in a supposedly democratic country. Some commentators call for federal reforms, but these reforms have not come to fruition. However, several states have enacted different selection methodologies to combat what many cite as the main problems of the federal judiciary: the lack of electoral accountability and the influence of the appointing executive.

**State Selection Methodologies**

*State Appointments.* Like the federal system state governments also rely upon appointments to fill their judiciary. Appointment by the state executive or governor represents the most common sort of appointment in the state supreme courts. Executive appointments in the states feature the same issues as the federal appointment process. Partisan politics enter into the process, and governors historically choose judges who are ideologically aligned with their party
platform. Some states also turn to state legislatures to appoint supreme court judges. Because of
the more localized, immediate nature of legislative work it seems feasible that legislatures would
be more attuned to the political desires of their local jurisdictions, but state legislatures often
appoint officials that are politically aligned with the dominant party within both of the houses.
However, it could be feasible that a politically divided legislature might elect an individual who
occupies a politically moderate position. These appointment processes ultimately result in judges
who are not elected, and criticism still arises from state level appointments. Therefore, some
states have provided for selection methodologies that give the electorate total control in the
nominating process (Brody, 2008; Hall, 2009).

*Judicial Elections.* An election gives the populace a chance to choose their governmental
officials, and many states have instituted judicial elections to increase judicial accountability.
Non-partisan elections eschew party politics by ordering judges to run on politically neutral
platforms. Theoretically, this will ensure that the judiciary maintains a neutral platform that does
not favor either a Democratic or Republican ideology. However, the often ideologically charged
nature of American elections may preclude a truly politically neutral judiciary (Dimino, 2004),
and some states choose to move beyond hidden motivations and concealed political ideologies.
Partisan election allows judges to run on party platforms, and although this sort of political
campaigning may squander the reputation of a politically neutral judiciary it does allow the
electorate to make informed decisions concerning the ideology and politics of the judges that
they elect. Judicial elections give full nominating powers to the citizenry, but the informed
decisions of the appointment process, which utilizes several sources of information to choose
capable candidates, is often antithetical to the electoral process. However, some states have
combined the expert knowledge of the appointment process with the popular control of the electoral process.

*Merit Selection.* Merit selection, also known as the “Missouri Plan”, combines the expert knowledge of political appointment with the popular control of elections (Brody, 2008; Dimino, 2004). Merit selection begins with a vacancy in a state supreme court. An appointment committee made of knowledgeable individuals drawn throughout a particular jurisdiction or the state government recommends a list of suitable candidates for the vacant position. The list of candidates, who are selected because of their ability or “merit” for the position, is then examined by the governor. The governor selects an individual from the list, and the selected individual then assumes his position as judge. Electoral control enters into the process via the practice of retention elections. After the selected judge assumes her position she stand for retention elections at preordained time periods. These judges run unopposed in retention elections, and these elections serve primarily as opportunities for the electorate to hold judges accountable for their actions (Horwitz, 1992).

Merit selection is a compromise between pure electoral control and pure executive, or legislative, control of judicial appointments. Throughout history different scholars and practitioners have presented each of these methodologies as a necessary reform or “best” method for judicial selection. However, the true effect of these selection methods is uncertain. I will now briefly examine the literature surrounding judicial selection methodologies to determine how each of these methodologies has effected the judiciary over time. Further, these different methodologies will affect the research methodology and analyses of the current study, and it is best to have an understanding of how each methodology works. I will include a full discussion of
the effects of these selection methods in *Chapter 4* when discussing the methodology of this study.

**Selection Methods: Effects and Results.** The research surrounding selection methodologies is divided, and different scholars favor different methodologies for different reasons. Some scholars, as well as certain political figures, favor elections because it does allow for some form of popular or electoral control (Dimino, 2004; Sanders, 1999). Other scholars attack the idea of electoral control by citing the damaging effects of political campaigning and platform ideology in the judiciary (Horwitz, 1992; Webster, 1995). As aforementioned the executive appointment process has come under attack at several times in American history. However, it does allow for knowledgeable selection and expert input when constructing a judiciary, but this expert selection comes at the expense of electoral selection. Further, the practice of merit selection has been at the most only moderately successful in changing judicial practice (Dimino, 2004). Retention elections, the primary method of popular control in the merit selections, routinely suffer from low voter turnout and interest, and most judges succeed in retaining their position (Brody, 2008). The fact that retention elections are relatively unimportant in the process of judicial selection essentially casts the merit selection methodology as recoded version of executive appointment. Therefore, it is uncertain which selection methodology is best, and the impact of each methodology upon jurisprudence is also unclear.

**Conclusion**

The American court system serves a check upon executive power and as an interpreter of the products of the legislature. The appellate system serves as “interstitial legislatures” as they interpret and manufacture policy to suit the needs of the situation. This creative process is constrained by the pull of the law and precedent, and most judges assume a position of judicial
restraint. However, judicial activism is undoubtedly a part of the American legal culture, and some judges are more likely to engage in activism than others. The federal method of appointment removes control of the judiciary from the hands of the electorate, and the American citizenry has often directed its ire towards unelected “activist” judges. States have sought to place judicial selection in the hands of the people in order to increase judicial accountability, but the positives and negatives of these different selection methodologies are unclear. What is clear is that different judges will assume different roles at different times and in different types of cases, and this study will try to determine what judicial characteristics influence the judicial decision-making surrounding the plain touch doctrine of *Minnesota v. Dickerson* (1993).
CHAPTER 3
LITERATURE REVIEW

It is possible that the political affiliation of appellate judges influences their interpretation of the Fourth Amendment. The Federal Court of Appeals and the state supreme court decisions concerning *Minnesota v. Dickerson* (1993) allow us to test whether political affiliation creates a pro-law-enforcement stance in judicial decisions. A review of the literature concerning the Fourth Amendment and *Dickerson* will provide a foundation for the hypothesis testing of this study. The following literature review contains four areas of research. First, I examine the literature that addresses the nature of the Fourth Amendment in terms of warrants, reasonableness, and the intent of the founders. Second, I examine the literature and case law surrounding the exclusionary rule. Third, I examine the literature surrounding *Dickerson v. Minnesota* (1993) and the resulting “plain feel” or “plain touch” doctrine. Fourth, I will examine the scholarly literature concerning the *Dickerson* decision. Finally, I will examine the literature on the impact of political affiliation of the judges on judicial decision-making.

**The Fourth Amendment: Reasonableness or Warrants?**

The literature on the Fourth Amendment mainly concerns the requirement of reasonableness and the necessity of warrants. The often polarizing debate concerning these two facets of the Fourth Amendment stems from the ambiguous wording of the Fourth Amendment:

*The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*
Scholars often divide the Amendment into two clauses. The first clause concerns the protection against unreasonable searches and seizures. The second clause seems to require warrants to conduct searches. However, the exact functioning of these two requirements is uncertain, and two conflicting perspectives have developed. Some scholars advocate for the supremacy of the reasonableness clause (Amar, 1997; Newman 2007; Waite 1944), while other scholars contend that all searches require warrants (Davies, 1999; Grayson, 1987; Maclin, 2013; McInnis, 2009). The scholarly debate provides no clear answer. Opposing camps have been erected in the discourse, and the Supreme Court’s jurisprudence reflects these conflicted opinions.

Perspectives on the Fourth Amendment usually begin with an examination of the history of the Amendment as well as the intent of the framers. However, the history surrounding the Amendment allows for a variety of interpretation. Amar (1997) and Newman (2007) contend that the Fourth Amendment hinges upon the reasonableness clause, and McInnis (2009) and Grayson (1987) contend that the warrant clause is superior. These authors arrive at these radically different perspectives via analyses of the same materials. This may be a case of selective reading in light of a certain perspective, and these authors may peruse case law, the Federalist Papers, and other doctrinal artifacts for evidence to support their platform while ignoring opposing viewpoints. It is also equally possible that the materials surrounding the Fourth Amendment are so vague and ambiguous to allow for equally valid but different findings. Therefore, I will now examine both perspectives.

Supporters of the reasonableness perspective highlight the primacy of the first clause of the Amendment and declare that reasonableness delineates constitutional and unconstitutional searches (Amar, 1997; Newman, 2007). Justice Byron White wrote that reasonableness of a search is determined by “balancing the need to search against the invasion which the search
entails” (Camara v. Municipal Court of City and County of San Francisco, 1967). Supporters of this perspective contend that a focus on reasonableness allows the police to search and seize in a timely and efficient manner if they can show a legitimate and vital need for their actions. Of course the Court must still determine what exactly is reasonable, but supporters propose a variety of methods for determining reasonableness. For example Amar (1997) advocates the use of civil juries to decide if searches are truly reasonable, and Newman (2007) utilizes the standard of probable cause to determine if searches are reasonable. Regardless, the reasonableness perspective allows for searches without a warrant if these searches are deemed reasonable by public sentiment or judicial examination. The home remains a cause of concern for reasonableness supporters, and some authors still maintain that a warrant is necessary for searches of the homes (McInnis, 2009). However, this perspective routinely allows for reasonable searches in public, and supporters often decry the necessity of warrants for public searches as being “pro-criminal” (Newman, 2007).

Supporters of the Warrant Clause contend that the warrant requirement should be given primacy. These scholars advocate that the Fourth Amendment should be read in a bifurcated manner in which the warrant clause dominates the reasonableness clause (McInnis, 2009; Schulhofer, 2012). Alternatively, some scholars believe that the Amendment should be read as a unified whole where the reasonableness clause only augments the process of getting a warrant (Davies, 2007). Most pro-warrant scholars cling to Mapp v. Ohio (1961) and Katz v. United States (1967) where the Warren Court elucidated the necessity for a warrant except in clearly delineated circumstances or exceptions. Advocates of the warrant clause contend that it is only a neutral magistrate that can restrain the police and other government agents, and that warrants are necessary to check government control (McInnis, 2009). In this perspective the warrant acts as a
restraint on police action, and this perspective is often met with resistance in law enforcement communities (Long, 2006).

The perspective that gives primacy to the reasonableness clause is often conceptualized as being “pro-police” (McInnis, 2009). A focus on reasonableness gives weight and power to the discretion of the law enforcement professions. The officer no longer has to search for approval from a neutral judge. Instead, it is her articulated judgment that determines the constitutionality of the search. Supporters of the warrant requirement decry this sanction of officer discretion as infringing the privacy rights of the person being searched, and they advocate for the review by an impartial judge before performing a search (McInnis, 2009; Schulhoffer, 2012). The introduction of this neutral magistrate can offend the officer, and the warrant requirement is sometimes seen as at odds with law enforcement operations. At the core these two opposing perspectives concern the fundamental conflict between the rights of an individual and the necessities of public safety. Supporters of the reasonableness perspective give primacy to public safety and law enforcement. Supporters of the warrant clause give primacy to individual rights.

Packer (1968) defines these two perspectives as “crime control” and “due process.” The crime control perspective contains a pro-police ideology that favors the prevention and suppression of crime over the upholding of individual rights. The crime control perspective advocates that the police be given great liberties to facilitate the apprehension and arrest of offenders. Further, this perspective instructs court officials to take no action that could hamper law enforcement effectiveness. Alternatively, the due process perspective holds that the courts should take no action that could violate or reduce the constitutional rights of any offender. Due process supporters understand the focus on individual rights will reduce police effectiveness, but they are willing to pay this price for a freer society.
The inherent tension between individual rights and law enforcement is further evidenced in the jurisprudence surrounding the Fourth Amendment. Over time the Supreme Court has issued opinions and established procedure that is more attuned with a pro-police, or crime control, ideology, but other opinions have been decidedly in favor of individual rights or due process. The sometimes inconsistent stance of the Court has established an elaborate doctrine concerning search and seizure, and these varied opinions illustrate the inherent tension between crime control and due process. An examination of this jurisprudence will give further insight into this conflict.

**Note: The distinction between “liberties” and “rights”.** Any discussion about the Fourth Amendment concerns the functioning of “civil liberties” and “civil rights” in American society. In legal literature an informal language has developed where these concepts are used interchangeably. However, in all actuality the terms “liberties” and “rights” denote different concepts. Most discussions concerning the Fourth Amendment rely primarily on the term of “right”, and this stems mainly from the text of the Fourth Amendment itself that states, “The rights of the people to be secure…”. The linguistic construction of the Fourth Amendment has primed attorneys and legal scholars, who by nature focus primarily on the verbage of statutes, amendments, and precedents, to colloquially utilize the term of “right” when discussing the Fourth Amendment, but in reality the term of “liberty” is more fitting. Although this paper will continue to use the more informal usage of “right” it is best to delineate the different functionalities of these terms.

The division of the “civil liberties” and “civil rights” may have not been an overarching concern to the writers of the Bill of Rights, but the separation of these terms has developed due to changing political thought and the shifting currents of society. The term “civil liberties”
harkens back to the classical liberalism of political theorists like Locke and John Stuart Mill (Posner, 1995). Civil liberties are negative restraints on government action designed to ensure that basic freedoms, or liberties, are respected during the execution of governmental duties. So, when the founders speak of a “right…to be secure…from unreasonable searches and seizures” they are actually constructing a civil liberty that negatively restrains governmental intrusion into a basic freedom (Mill, 1859; Posner, 1995). Over time a linguistic and philosophical distinction developed between the terms of “liberty” and “right”, and this distinction rests primarily on the positive and negative aspects of government action.

“Civil liberties” primarily denote negative restraints on government actions, and the term “civil rights” has come to denote positive governmental actions designed to give equality to different, and often marginalized, sections of society. The concept of civil rights arose partly from the equal protection clause of the Fourteenth Amendment, and it grew with power and force throughout the Twentieth Century as minority groups, the impoverished, and women fought for their rights under society. The use of the government to ensure that these sections of the population rightly received their fair share of democracy became enshrined under the terminology of “civil rights” (Posner, 1995; Powe, 2000). The shift towards this progressive, positive conception of government action is visible is such liberalist theories as those of Mill (1859), and the terms of “rights” and “liberties” have come to denote the positive and negative aspects of government (Posner, 1995). Therefore, the Fourth Amendment, which is the focus of this study, primarily deals with a civil liberty that restrains government action and guarantees a freedom to remain unmolested from undue governmental interference.

However, the legal and scholarly literature surrounding the Fourth Amendment summarily ignores this distinction and consistently utilizes the term “right” when discussing
search and seizure procedure (Amar, 1997; McInnis, 2009; Newman, 2007). Partly because of the formalistic linguistics inherent in the study of law, the Fourth Amendment *does* say “right” and not “liberty”, and partly because of the “common sense” language of the legal profession that allows attorneys to gloss over the philosophical distinctions that annoy them (Hart & Honore, 1959), those that study law continue to use the term “right” when discussing the Fourth Amendment, even though they summarily recognize that the term “civil liberty” is perhaps more fitting (Posner, 1995). Since my current work is designed to be of use to the legal practitioner as well as the scholar this paper will continue this tradition, but the reader is urged to recognize that the Fourth Amendment primarily concerns a “civil liberty” instead of a “civil right”.

Further, the philosophical separation of “rights” and “liberties” may be mostly analytical as actual jurisprudence sometimes blurs the distinction between the two. The current case in question provides an example of this blurring of lines. In his concurring opinion in *Minnesota v. Dickerson* (1993) Justice Scalia writes that the purpose of the “rights” of the Fourth Amendment were designed to “preserve that degree of respect for the privacy of persons and the inviolability of their property that existed when the provision was adopted.” (p. 380). Also, *Mapp v. Ohio* (1963) refers to the “right” given by the exclusionary rule in *Wolf v. Colorado* (1949). (p. 656). *Katz v. United States* (1967) also speaks of a “right” against unreasonable governmental searches. (p. 352) An examination of this language reveals that the liberty against unwarranted government intrusion is closely related to the right to property routinely found within classical liberalism (Mill, 1859). This, of course, could be the legal professions failure to clearly delineate these terms, or it could reflect a closer relationship between “rights” and “liberties” where “civil liberties” merely represent governmental restraints designed to uphold the “civil rights” of all
American citizens. The interrelationship of “rights” and “liberties” may further contribute to the informal usage of both terms in legal writing and scholarship, and it provides another reason while this paper will continue with this somewhat dubious tradition.

A Confusing Doctrine: The Fourth Amendment from *Mapp* to *Terry*

There is an inherent tension in the Fourth Amendment between the protection individual rights and police effectiveness. Questions relating to criminal procedure are at the heart of this tension. Scholars and citizens debate how much power the police should be granted and what protections an individual deserves (Amar, 1997; Packer, 1968). The current state of the doctrine is that the police can perform a search and seizure without a warrant if there exists a reasonable necessity for the state intervention and the existence of an exigent circumstance (*Camara v. Municipal Court of City and County of San Francisco*, 1967; *Terry v. Ohio*, 1968). *Terry* (1968) validates searches and seizures necessitated by a reasonable suspicion of a specific danger to the public or the police officer, but it is unclear if warrantless searches should extend to crimes that do not pose an immediate public danger. In this section of the literature review I will briefly address the history of the modern Fourth Amendment by focusing on the period between *Mapp v. Ohio* (1961) and *Terry v. Ohio* (1968). *Mapp* represents the Warren Court’s institutionalization of a warrant preference, and *Terry* represents this same court’s hobbling of the warrant requirement of *Mapp*. The tension between individual rights and public freedom is embodied in these two cases as *Mapp* cemented the primacy of warrants while *Terry* allowed a shift towards the standard of reasonableness.

To understand the Fourth Amendment it is first necessary to address the exclusionary rule. The Supreme Court first utilized the exclusionary rule in *Boyd v. United States* (1886), but it was in the case of *Weeks v. United States* (1914) that the Court fully defined the purpose and
function of the rule (McInnis, 2009). The exclusionary rule forbids the admittance of
unconstitutionally seized evidence into trial. If evidence is seized in violation of the Fourth
Amendment then the exclusionary rule bars that evidence from the trial process. Critics decried
the exclusionary rule as a judicially created legal concept, and the public responded unfavorably
to the rule (Amar, 1993; Powe, 2000; Waite, 1944). The states failed to enact their own
exclusionary rules, and the federal courts were reluctant to force this “created” concept on state
jurisdictions. *Wolf v. Colorado* (1949) cemented this position. The opinion by Justice
Frankfurter incorporated the Fourth Amendment for state procedures, but it failed to apply any
remedy for Fourth Amendment violations. Therefore, the states were free to admit illegally
seized evidence in trial if they so desired.

The application of the exclusionary rule to only the federal government resulted in a
confusing procedural predicament. In *Silverthone Lumber Co. v. United States* (1920) Justice
Holmes had stated that the exclusionary rule protects the vitality of the Fourth Amendment. In
*Wolf* (1949) Frankfurter agreed that the Fourth Amendment needed some sort of remedy for
violations, but he resisted the urge to force the exclusionary rule on the states. Instead,
Frankfurter urged the states to institute their own procedural safeguards for protecting Fourth
Amendment rights. The states failed to do so, however, and illegally seized evidence continued
to be admitted into criminal trials (Long, 2006). The Warren Court eventually realized the
absurdity of establishing a Fourth Amendment procedural rule while refusing to extend it to the

Mapp had connections with several shadowy figures in the Cleveland underworld including
boxing promoter/ne’er-do-well Don King. After a bombing at King’s residence Cleveland police
got a tip that information related to the bomber was being held at Mapp’s residence. The police asked for entry into Mapp’s residence, and Mapp denied their request. Through threats and force the police gained entry to Mapp’s residence while denying her access to her attorney. The police did not find any evidence related to the bombing, but they did find some obscene materials. The state convicted Mapp on obscenity charges. Mapp appealed her conviction on the grounds of the unconstitutionality of the obscenity charges. Her appeal contained concerns relating to her First Amendment and Fourth Amendment rights. At first it appeared that the Court was going to overturn her conviction on First Amendment grounds, but then the Court’s opinion took an unexpected turn (Long, 2006).

The briefs and oral arguments in *Mapp v. Ohio* mainly concerned the First Amendment and the nature of obscenity, but Justice Clark led the Court in blazing a new path and incorporating the exclusionary rule as a nationwide procedural requirement. The transformation of *Mapp* into a Fourth Amendment case led to a nationwide change in criminal procedure (Long, 2006). Clark noted that *Wolf* allowed states to craft their own procedural remedies to restrain unconstitutional searches, but it was clear that the states had made no attempt to institute any of these local remedies. Instead, the states seemed content to continue the use of illegal searches in obtaining convictions. Clark stated, “The ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest.” (*Mapp v. Ohio*, 1961, p. 660) Essentially, Clark nullified Frankfurter’s states rights stance in *Wolf* by laying blame on the state’s inaction, and with these assertions the exclusionary rules extended to all fifty states.

*Mapp* (1961) applied the exclusionary rule to state proceedings, and it demonstrated the Warren Court’s pro-warrant jurisprudence best elucidated in *Katz v. United States* (1967). In
Katz the Court defined warrants as necessary in all searches except for a few clearly delineated exceptions. McInnes (2009) and other pro-warrant authors hail this period of jurisprudence as the encapsulation of the true intent of the founders and the fulfillment of the Fourth Amendment, and those that favor the primacy of the reasonableness clause malign the Warren Court’s jurisprudence as unnecessary judicial meddling (Amar, 1997). Regardless, both camps of scholars can agree that the Warren Court’s decisions created an opening for considerations of reasonableness and instituted a confusing period of Fourth Amendment procedure that continues to this day.

It was *Terry v. Ohio* (1968) that initiated this period, and Chief Justice Warren wrote the opinion that led to a new direction in criminal procedure. Before *Terry* the Warren Court addressed the reasonableness standard within the scope of administrative searches. In *Camara v. Municipal Court of City and County of San Francisco* (1967) Justice White’s opinion noted, “…Reasonableness is still the ultimate standard.” Chief Justice Warren continued this shift towards the reasonableness standard in *Terry v. Ohio* (1968). *Terry* concerned the actions of a Cleveland Police officer McFadden. McFadden was a police detective who observed some suspicious looking individuals in downtown Cleveland. McFadden observed the three men for some time before stopping them. The officer then frisked the individuals and found an illegal handgun. The individuals were convicted, and they appealed their conviction due to the lack of probable cause for the search. The Supreme Court, in an opinion authored by Chief Justice Warren, affirmed that police officers had the right to conduct these stop-and-frisks based upon a reasonable and articulable suspicion rather than more exacting standard of probable cause. Warren stated that the Court still held fast to the requirement for warrants for most searches unless exigent circumstances were present, but the Chief Justice also cited *Camara* and stated that
reasonableness was the guiding principle in all Fourth Amendment questions. In *Terry* Warren cited the need for police to protect themselves and investigate possible criminal behavior without having probable cause for arrest. Using the balancing test of *Camara* Warren compared the degree of governmental intrusion against the legitimacy of the government’s need to search, and the Chief Justice cited that the uncertain nature of police work legitimized the need for minimally invasive searches.

McInnes (2009) and Schulhoffer (2012) hold that *Terry* allowed later Courts to shift to a focus on reasonableness and nullify the primacy of the warrant requirement. Over time the Court has carved out additional exceptions and allowed more warrantless searches by declaring them reasonable. For example the Court has defined the exception related to a search incident to a lawful arrest (*Chimel v. California*, 1969), a search conducted while in hot pursuit (*Warden v. Hayden*, 1967), searches involving vehicles (*Chambers v. Maroney*, 1970), and impound based inventory searches (*South Dakota v. Opperman*, 1976). To those that favor the reasonableness standard this represents a return to type or a more adequate representation of the founder’s intent (Newman, 2007; Amar, 1997). The fact that Warren, a champion of warrants and individual rights, authored this seemingly pro-police opinion may be surprising, but in the end Warren may have been bowing to necessities of the situation. Warren was a former prosecutor and was well acquainted with the dynamic nature of policing, and he may have allowed for stop and frisks to protect police and allow them utilize their judgment in street situations (Powe, 2000).

*Terry* (1968) established the legitimacy of practice of “stop and frisk.” Under *Terry* a stop represents a minimal detention, or seizure, by the police, and the *Terry* doctrine requires that the stop be motivated by a reasonable suspicion that criminal activity is afoot. A *Terry* stop allows police officers to briefly detain and question suspicious individuals if the officer can
articulate why they suspected the individual was engaged in criminal activities. Further, *Terry* allows officers to frisk individuals for weapons to ensure officer safety. A frisk refers to an over-the-clothes and minimally invasive “pat down” search based upon tactile sensation, and the frisk is designed to find weapons without a drastic invasion of an individual’s privacy. The “stop” allows police to fulfill the investigative function of policing, and the “frisk” ensures officer safety during the investigation.

*Terry* remains important for criminal procedure and our current discussion of plain touch/feel for two reasons. First, *Terry* provides the material circumstances for searches based upon plain feel. *Terry* allows officers to stop individuals based upon a reasonable suspicion and then institute a frisk for weapons. It is during these frisks that officers may feel items that are not weapons but are still easily identified as contraband. Contraband refers to any item that is illegal to possess regardless of inherent danger, and since *Terry* only allowed the seizure of weapons it was unclear if officers could seize contraband they feel during a frisk. Second, *Terry* instituted a test for reasonableness in criminal searches and seizures that allowed later justices and Courts to carve out more exceptions to the warrant rule. Plain view represents one of these exceptions, and the intersection of plain view and *Terry* resulted in *Minnesota v. Dickerson* and the plain touch doctrine.

**Minnesota v. Dickerson: From Plain View to Plain Feel**

*Terry v. Ohio* (1968) opened the door for the institution of reasonableness standard in search and seizure law. The reasonableness standard is often cited as being pro-law-enforcement, and subsequent Court decisions continue the trend of allowing greater officer freedom while creating more exceptions to the warrant rule (Maclin, 2013). The balancing test of *Camara* (1967) weighs the degree of government intrusion against the nature of the governmental need.
In *Terry* Chief Justice Warren decided that the police officers could stop and frisk individuals based upon a reasonable suspicion of criminal activity. The Court continued this trend of creating exceptions to the warrant requirement, and over time different Courts have created exceptions relating to various places, events, and people. Some critics decry these exceptions as a nullification of the warrant requirement and the exclusionary rule (Maclin, 2013). The “plain view” exception intersects with the *Terry* doctrine to create the plain feel exception found within *Minnesota v. Dickerson* (1993). I will now examine the nature of the plain view exception before moving on to the specifics of *Dickerson*.

Writing in *Washington v. Chrisman* Chief Justice Burger (1982) stated, “The "plain view" exception to the Fourth Amendment warrant requirement permits a law enforcement officer to seize what clearly is incriminating evidence or contraband when it is discovered in a place where the officer has a right to be.” (p. 6). The plain view exception essentially legitimizes the happenstance discoveries inherent in police work. If in an officer is constitutionally allowed to enter or maintain a presence in a particular area then any contraband the officer observes through plain sight can be seized as evidence. However, the officer must have probable cause to believe that the evidence is contraband (*Texas v. Brown*, 1983).

In what is currently the leading case in the plain view doctrine, *Arizona v. Hicks* (1987), Justice Scalia further enunciated the probable cause requirement in plain view seizures. Scalia wrote that any movement, seizure, or further tactile manipulation of evidence in plain view amounts to a search. Any action of this sort requires probable cause to be justified under the plain view exception, and reasonable suspicion does not in itself justify any sort of seizure. In short for an item to be seized under the plain view exception the item’s incriminating nature must be “immediately apparent.”
It is worth mentioning that plain view searches no longer have to be inadvertent as once required under *Coolidge v. New Hampshire* (1971). In *Horton v. California* (1990) the Court held that officers could conduct plain view searches for immediately apparent contraband with the purpose of locating evidence of illegal activities. As it now stands an officer may institute a purposeful plain view search in an area where she is constitutionally allowed, but in order to manipulate or seize the evidence the officer must have probable cause to believe the evidence to be illegal or incriminating. The plain view doctrine was invariably destined to interact with the stop and frisk procedure approved in *Terry* (1968), and this interaction resulted in the plain touch doctrine.

*Minnesota v. Dickerson* (1993) concerned the arrest of an individual on charges relating to the possession of crack cocaine. On November 9, 1989 two police officers observed Dickerson leaving a known crack house. The officers stopped Dickerson and initiated a *Terry* stop due to the reasonable suspicion of Dickerson’s engagement in criminal activity. During the frisk one of the officers felt a small lump in Dickerson’s pocket. With his hands still outside the offender’s clothes the officer “examined” and “slid” the object to determine its identity. After this manipulation the officer decided that the object was most likely crack cocaine, and he removed the object and found that it was indeed crack cocaine. Dickerson was arrested and subsequently convicted on possession charges, and he appealed his conviction to the Minnesota Supreme Court. The Minnesota Supreme Court vacated the conviction on Fourth Amendment grounds by stating that the plain view exception did not extend to plain feel in *Terry* stops. Dickerson then appealed to the United States Supreme Court who granted certiorari.

Writing in *Minnesota v. Dickerson* Justice White agreed that the search was unconstitutional, but White disagreed with the summary dismissal of the plain feel exception by
the Minnesota Supreme Court. After all, the plain view exception allows officer to seize evidence that they can plainly see in locations where they are constitutionally allowed, and officers can constitutionally “feel” offenders during a frisk. White held that plain view did extend to a plain feel exception in *Terry* stops, but the tenets of plain view still held. Citing *Arizona v. Hicks* (1987) White held that for the plain feel exception to be valid the illegal nature of the felt item must be readily apparent. Therefore, the officer conducting the frisk must at once and without any manipulation be able to determine an object’s illegal nature through the offender’s clothes. If an officer can tell an objects illegality through the “patting” of a “pat-down” the officer has probable cause to seize the object.

It is notable that *Minnesota v. Dickerson* was a unanimous opinion. Chief Justice Rehnquist, Justice Blackmun, and Justice Thomas did dissent in part to White’s opinion, but these justices agreed with White’s legal logic. They were instead unhappy that White vacated the conviction on what they considered an unclear trial transcript. Finally, a disgruntled Justice Scalia wrote a concurring opinion in which he expressed his unhappiness with the *Terry* doctrine, but he agreed with White’s logic concerning the plain feel exception. Therefore, the plain feel exception came into existence with a favorable consensus by the deciding justices. Under the plain feel doctrine an officer can seize evidence she feels during an outside-the-clothes frisk, or “pat-down,” if the illegal nature of the evidence is apparent without any further direct manipulation of the evidence. The decision obviously favors law enforcement as it carves out another exception to the warrant requirement by allowing officers to seize evidence obtained through their direct action.

*Dickerson: A Review of the Literature*
Because *Dickerson* is the focus of this study a review of the academic and legal literature concerning the case and its effects is appropriate and will further define the functioning of plain feel. The literature contains a diametric split in opinion and analysis of the case. The majority of the articles concerning *Dickerson* conceptualize the case as an assault on the warrant requirement and the greater Fourth Amendment. I have deemed these articles “anti-*Dickerson*.” Alternatively, the “pro-*Dickerson*” articles conceptualize the case as a favorable extension of the reasonableness doctrine. To best extrapolate the findings and opinions of these studies I will now provide a brief summary of each article within this designated “anti” and “pro” framework. I will also summarize the main points of these perspectives before giving a greater summary of the totality of the literature.

**Anti-*Dickerson* Literature: Dickerson as an Assault on the Warrant Requirement.** I have organized these articles primarily by chronological order, and when possible first author serves as the secondary organizer. The first article, by Lantz (1993), was actually authored before the Court’s decision on *Dickerson* in 1994. Lantz set a dominant theme in the anti-*Dickerson* literature by defining the plain touch doctrine as an assault on the Fourth Amendment right that allows police officers to operate as if they have a general warrant. Lantz defined the *Terry* doctrine as only allowing seizures of and searches for weapons, and the author believes that any extension of this doctrine is at odds with the intention of *Terry*. The author also does not believe that plain view extends to plain touch because touch is naturally more unreliable than sight.

Writing after the Court’s decision, Buethe (1994) agreed with Lantz after conducting a standard doctrinal analysis. First, Buethe gave a summary of the case before delving into the arguments of both the state and the defendant. The author then provided a brief history of the
plain feel exception and noted that some courts accepted the rule while other courts rejected it. This prompted the Court to clarify the plain feel exception, and the author contended that the standards given by the Court in *Dickerson* would allow police officers to circumvent the Fourth Amendment.

Doty (1994) began her article with a brief history of the Fourth Amendment, and she then outlined the numerous exceptions to the warrant requirement. The author then discussed the history of the plain touch exception before launching into a discussion of the events surrounding the arrest of Dickerson. The author believed that the decision in *Dickerson* stems from the government’s desire to combat the illegal drug trade, and she believed that the probable cause standard of *Dickerson* and plain touch is not adequately protect Fourth Amendment rights. Instead, she recommended the Court authorize a standard of reasonable certainty where the officer would be required to be certain to the point of calling off all further searches concerning the found object. The author also felt that officers would be able to circumvent the requirements of *Dickerson* by merely stating that any seized object had an immediate appearance of illegality, and she feared that this would lead the widespread use of pretext stops in policing.

Lehman (1994) also conceptualized *Dickerson* as an erosion of the Fourth Amendment. The author began her article by summarizing the *Dickerson* case, and she then provided a quick analysis of the *Terry* doctrine. Lehman held that *Dickerson* represents the first, and illogical, extension of the *Terry* doctrine of by the Court, and she contended that the decision would lead to abuses tantamount to general warrants. Specifically, the author believed that the decision would lead to police officers instituting pre-text stops based upon *Terry* to justify searches for drug evidence.
Liebman (1994) authored an article with similar conclusions. Liebman agreed that *Dickerson* essentially instituted a doctrine of general warrants aimed at seizing drug evidence. The author defined this as an illogical extension of *Terry* via the balancing test of reasonableness. Liebman contended that *Terry* was based upon the vital government interest of seizing weapons. Therefore, the government was justified in searching for this evidence in the minimally invasive search. However, the governmental interest in seizing drug evidence, the logical target of plain touch seizures, was not as vital as seizing weapons, and a frisk related seizure of drug evidence should not be justified under the *Terry* doctrine. Instead, Liebman advocated using canine searches to verify any suspected drug evidence revealed during a *Terry* stop.

Macintosh (1994) believed that the “immediately apparent” standard should be more rigorous than probable cause. Further, the author believed that the *Dickerson* court misapplied the immediate apparent standard in this case and agreed with Chief Justice Rehnquist’s recommendation to send the case back to the trial court for further consideration. Macintosh further critiqued the Court’s reasoning due to three main concerns. First, the author believed that the frisking officer would not have legal access to search inside of the clothes of the searched individual. Second, the author believed that the immediately apparent standard is not workable. Finally, the fears related to pre-text stops are reiterated, and Macintosh believed that *Dickerson* stops would be unjustified *Terry* stops with ulterior motives.

Miller (1994) also defined *Dickerson* as an unconstitutional assault on the Fourth Amendment. The author stated that there is no legitimate governmental interest in seizing drug evidence found during a frisk. Further, the author believed that *Dickerson* would allow officers to institute pre-textual stops to find drug evidence. The author believed that the warrant
exception related to a lawful arrest would allow officers to seize this same evidence. Theoretically, a plain touch search furnished probable cause for a seizure of evidence, and the author believed that a plain touch search would then necessarily furnish probable cause for arrest. Essentially, the author advocated officers arresting offenders off of plain touch probable cause and then searching via the lawful arrest exception.

Bradley (1995) agreed with Miller. Bradley cited the 1982 Washington state case of *State v. Broadnax* as the correct approach. In *Broadnax* the Washington Supreme Court rejected the plain touch exception due to the inherent unreliability of tactile analysis. Bradley believed this was the correct path, and although the Washington court later reversed its position to agree with *Dickerson* Bradley believed that both the United States Supreme Court and the Washington Supreme Court should return to the thinking in *Broadnax* and void the plain touch exception. Finally, the author conceptualized the exception as an assault on the Fourth Amendment.

Chriske (1995) also believed that the decision would allow officers to engage in pre-text stops by giving them a guide for courtroom testimony. The author began her articles with a summary of the jurisprudence surrounding the Fourth Amendment, *Terry* stops, and the plain view exception. She then analyzed the specifics of the *Dickerson* decision as well as the concurring and dissenting opinions. Chriske feared that *Dickerson* teaches officers how to lie during testimony to ensure their illegally seized evidence is admitted at trial. The author also believed *Dickerson* supplants the supposedly objective standard of *Terry* with a subjective standard that relies upon officer testimony.

Poulin (1997) offered the only anti-*Dickerson* article written after any appellate cases had been decided under the plain touch doctrine. The author began by agreeing that plain feel should give enough probable cause for arrest. Therefore, any seizure related to plain touch should be
justified by the lawful arrest exception. The author then examined the appellate cases concerning plain touch, and she found that the courts were having trouble instituting the *Dickerson* doctrine. Some courts were using a subjective test and rubber-stamping the testimony of the officer. The author did state that some courts were skeptical of officer claims, and she conceptualized this as the best path for jurisprudence. The author ended by offering three pieces of advice for the appellate courts. First, judges should physically examine the evidence to determine the validity of officer testimony. Second, the judge should view the frisk and seizure from the vantage point of a disinterested observer. Finally, the court should ensure that the *Terry* doctrine was not overstepped and that the initial frisk was merely a pat-down.

**Summary of the Anti-*Dickerson* Literature.** Several themes are apparent in the anti-*Dickerson* literature. First, the authors routinely decried *Dickerson* as an unfortunate extension of the reasonableness approach and an assault on the warrant requirements. Second, the authors agreed that drug evidence would be the primary target of *Dickerson* searches. Third, these authors agreed with the Minnesota Supreme Court and stated that touch would not be as reliable as sight. They also agreed that touch could not justify probable cause. Finally, the authors believed that the government interest in seizing drug evidence did not justify a plain touch seizure. It is also worth noting that two authors believed that plain touch should furnish enough probable cause to justify an arrest, and this would then justify any seizure via the exception relating to a search upon a lawful arrest. Perhaps most importantly these authors routinely cite the *Dickerson* doctrine as vague, and they fear that judges will have no clear guidance in deciding questions relating to the admissibility of evidence. Therefore, these decisions may be arbitrary and tinged with the personal preferences of the deciding justices.
**Pro-Dickerson Literature: A Legal Necessity.** The pro-Dickerson articles mostly conceptualize the Court’s decision as the natural course of past jurisprudence. Hilber (1994) presented a doctrinal analysis that illustrates how the Court was right in combining the *Terry* doctrine with the plain view exception. Hilber began her article with an examination of the *Terry* doctrine, the plain view exception, and the specifics of the Dickerson case. She concluded that the two doctrines necessarily combined in the plain touch exception. The author also contended that the Court adequately balanced state interest against individual liberty.

Harvey (1995) compared the *Dickerson* decision with the New York case of *People v. Diaz* (1993). In *Diaz* the New York Court of Appeals rejected plain touch and held that touch is by nature more unreliable than sight. Harvey believed that this decision institutes an unworkable hierarchy of senses that would create bedlam in the courtroom. Harvey believed the New York logic was unnecessary and confusing. The author cited *Dickerson* as the correct decision and advised courts to institute tactile, physical reenactments to determine if the edicts of plain touch were upheld.

Schneider (1995) agreed with the above articles via a standard doctrinal analysis. The author began her analysis by examining the *Dickerson* case. She noted that the Court first affirms that *Terry* still allows reasonable stops without a warrant, and she then analyzed the Court’s application of plain view to the frisking process. The author then took a middling approach to her analysis of *Dickerson*, and she stated that the plain view exception is valid. However, she contended that the Court’s implementation as an extension of the *Terry* doctrine had created an unworkable standard for police officers and judicial examination.

Wadsack (1995) contended that the *Dickerson* Court was correct in instituting plain touch, but this author recommended that the Court go further. The author began his article with
an analysis of the jurisprudence surrounding the Fourth Amendment and reasonableness. Wadsack believed that the immediately apparent standard will be unworkable, and the author instead recommended a narrow expansion of the *Terry* doctrine that allows officers to search for drug related evidence when the standard of reasonable suspicion is satisfied. The author cited the great damage done by the drug trade, and he believed that this creates a compelling government interest that reasonably allows an expansion of the *Terry* doctrine.

Harvey (1996) agreed that *Dickerson* was reasonable. The author began his analysis by discussing the nature of the Fourth Amendment and the sometimes confusing jurisprudence that surrounds search and seizure law. The author then delved into the specifics of the *Dickerson* case. He cited the common arguments against the *Dickerson* rationale. First, he cited the criticism that *Dickerson* imparts a low standard for seizing evidence, but the author believed that the jurisprudence surrounding the plain view exception destroys this argument. Second, the author then detailed the criticism concerning the unreliability of sight, but he contended that this argument really addresses the reasonableness of a touch based search. He believed that the plain feel exception is reasonable because the *Terry* doctrine defines frisks, a touch based search, as reasonable.

Finally, Bradley (1997) examined several appellate cases and determines that *Dickerson* is the most workable standard as compared to *Diaz*. Bradley perhaps represented the most pro-police commentator on *Dickerson*. The author cited the damage done by the drug trade and recommends that the Court takes no path that decreases law enforcement effectiveness. Bradley contended that a plain touch search is minimally intrusive, and he compared this to the harm and responding government interest in controlling the drug trade. He even went as far as arguing for further police license in conducting frisks aimed at securing drug related contraband.
Summary of the pro-Dickerson literature. The pro-Dickerson literature acknowledges that the plain touch doctrine may create difficulties, but these authors routinely conceptualize plain touch as a legal necessity. They believe that the drug trade creates a compelling governmental interest that justifies plain touch seizures. Further, these authors believe that the Court should allow police greater freedom in seizing drug evidence through Terry stops. Perhaps most interestingly the pro-Dickerson authors use the balancing test of reasonableness to justify the Court’s decision, and these authors never conceptualize Dickerson as an assault on the Fourth Amendment or the warrant requirement.

Summary of the Dickerson literature. The ideological split in the Dickerson literature is clear. Those that disagree with the Court’s decision conceptualize Dickerson as an assault on the Fourth Amendment. These authors favor the warrant requirement and routinely write commentary that can be conceptualized as pro-rights. Alternatively, the pro-Dickerson authors support the reasonableness perspective, and they routinely use rhetoric that is pro-police. This division in the literature harkens back to the greater debate about the correct interpretation of the Fourth Amendment and lends credence to the hypothetical effect of political orientation in Dickerson related appellate court decisions. After all the ideological split may continue in the courtroom, and liberal and conservative judges may display different patterns of decision-making.

The literature also provides several concerns about the functionality of Dickerson. First, the immediately apparent standard may be unworkable, and courts may rely too heavily on police testimony due to the ambiguity of the Dickerson doctrine (Buethe, 1994; Chriske, 1995; Doty, 1994). Second, the sense of touch is unreliable as compared to the other senses (Bradley, 1995). Third, the police may use pre-text stops to search for drug evidence (Chriske, 1995;
MacIntosh, 1994; Miller, 1994). Fourth, *Dickerson* may provide an instruction manual for police perjury by furnishing officers with ready-made testimony in relation to evidence suppression and admittance (Chriske, 1994; Doty, 1994; MacIntosh, 1994). Finally, *Dickerson* doctrine may be so vague that judges are free to decide plain touch cases without guidance (Schneider, 1995; Wadsack, 1995). These concerns may be valid, but no recent study has examined the appellate court cases to determine if any of these phenomena has influenced decisions related to plain touch. However, the ambiguity of the plain touch doctrine allows for a significant amount of judicial discretion regarding the decisions related to suppression and admission of evidence, and it is up to research to determine which variables impact judicial decision-making in these scenarios. Political affiliation of the judge may be an influencing variable. An analysis of the cases related to plain touch would both reveal the current functioning of the plain touch doctrine in relation to these concerns and the impact of political orientation on the judicial decision-making concerning *Dickerson*.

**Judicial Decision-Making.**

Appellate judges make their decisions in the relative security of the appellate courtroom. These judges utilize trial records, written briefs, and oral briefs to reach their decisions. As in any decision-making processes the judge is not an island. She is an individual subject to various constraints and influences. Drawing from prior literature I subdivided these constraints into three categories to facilitate reading and analysis. I address each of these categories in turn. First, I will discuss the impact of political affiliation on judicial decision-making. Second, I will address the impact of legal variables on judicial decision-making. Third, I will examine the effect of the individual characteristics of the appellate judge on the decision-making process. Finally, I will
end the discussion by examining the various methods of judicial selection and how they impact questions of research methodology.

**Political Orientation and Judicial Decision-Making.** Prior literature has demonstrated that political orientation and affiliation can influence judicial decision-making. Theoretically, Democratic judges will issue more liberal and pro-rights decisions, and Republican judges should issue more conservative, or pro-police, decisions. The literature has validated these assertions by using the political affiliation of the appointing official of the judge as the proxy for judicial political affiliation. Executive officials, who appoint appellate court justices, choose candidates who reflect their own political ideology, and some scholars accuse certain executive officers of “court packing.” Court packing refers to filling the judicial ranks with ideologically similar justices who will routinely decide cases in a certain way (Hall, 2009). Prior literature has demonstrated the validity of political affiliation of the appointing official as a proxy for the political ideology of the deciding justices, and the political affiliation of the appointing official can serve as an adequate, primary independent variable when examining the impact of political affiliation on judicial decision-making (George, 1998; Goldman, 1975; Pinello, 1999; Songer & Ginn, 2002; Zorn & Barnes-Bowie, 2010).

**“Republican” and “Democratic”: The pitfalls of a “two-party” operationalization.** The current study seeks to detect the effects of political affiliation on judicial decision-making. Prior research has shown that Republican and Democratic judges routinely make ideologically influenced decisions (Cross, 2003; Goldman, 1977; Pinello, 2000). These researchers use the political party of the appointing president as a proxy for the political affiliation of the appellate judge. While the above studies display a consistent effect of political ideology on judicial decision-making they undoubtedly obfuscate certain nuances within the greater sphere of politics.
and ideology. Like these earlier works this study will classify judges as either “Republican” or “Democratic” and operate on the assumption that Republican judges will institute more pro-police or conservative decisions than their Democratic counterparts. However, this study does recognize the methodological shortcomings of this binary conception of political ideology, and I now provide a brief summary of these shortcomings before explaining why the two-party analytical method is the best for this work.

History has shown us that judges identifying with the modern Republican party are often more conservative than Democratic judges (Hall, 2009; Powe, 2000), and Republican judges often do enact more pro-police decisions than Democratic judges (Cross, 2003). However, it is important to recognize that these findings represent totalities and analytical categories. Modern society illustrates that a binary conception of political ideology is perhaps over-simplified, and different individuals or factions within the Republican or Democratic party may have ideologies that are opposed to the dominant trends in the greater party structure. For example southern Democrats have historically espoused an ideology that is far more punitive than their northern counterparts (Caro, 1990; McCullough, 1992), and the Democratic platform under President Bill Clinton was decidedly conservative in attitudes towards criminal justice (Friedman, 1993). Further, libertarian and populist ideologies cloud analyses concerning the Republican parties as judges subscribing to these principles might favor an approach of classical liberalism which favors individual rights and liberties over police intrusion (Sanders, 1999). These concepts illustrate that a binary, two-party organizational schema may not reveal all the idiosyncrasies or factionalism within modern party politics, but prior research has shown that the binary operationalization of political ideology does prove adequate for social science research.
Cross (2003) and Goldman (1977) recognize that the effects of political ideology differ over time, and the authors also recognize that the two-party split may be imperfect. However, by using the party distinctions of “Republican” and “Democratic” as analytical concepts instead of empirical representations of reality researchers can analyze the effect of political affiliation in totality. As with any analytical abstraction it is important to clarify that these operationalizations are constructs that do not adequately reflect individual, or factional, differences within the Republican or Democratic party, but these concepts do show that in totality Republican judges are often more likely to institute decisions that favor the police. If anything the presence of judges within a party who do not subscribe to the dominant party ideology may lessen the chance of a study to find significant results. For example the work of Cross (2003), which finds a pro-police ideological slant in Republican judges but does not control for “libertarian” or “populist” Republicans, may provide stronger findings than a study that controlled for these different factions since Cross’s study is still finding significant results in spite of a lack of controls for those unruly judges who defy their party’s platform.

The nature of this study also provides support for using this binary conception of political ideology. In order to build on the prior research concerning the Dickerson decision I have elected to use the distinctions of “Republican” and “Democratic” as analytical substitutions for “Conservative” and “Liberal” because the prior research routinely prophesied that Republican judges would abuse the plain touch doctrine to institute conservative decisions to favor the police and erode individual rights. Therefore, the use of a binary conception of political ideology not only provides an analytical methodology that builds off of prior research concerning the effects of politics on judicial decision-making, but it also allows for a testing of the presumptions of the prior research concerning the topic at hand.
For these reasons I will use a two-party operationalization for political ideology while acknowledging this methodology’s shortcomings. However, the fact that certain intraparty factions may enact jurisprudence decidedly at odds with the dominant ideology of their party does deserve further research. The trick in conducting this research is to determine which judges actually occupy this shadowy area of jurisprudence, which may be especially difficult as the norm of unanimous decisions may pull these judicial albatrosses in to alignment with their party’s dominant ideology (Cross & Tiller, 1998). The methodology of this study may provide avenues to conduct this more in-depth research as the combination of doctrinal and statistical analysis may identify the judges that subscribe to ideologies that run counter to their party’s preferred platform. If this study reveals that a certain political ideology has a significant effect on judicial decision-making then further research must institute a more nuanced analysis that determines which factions or types of judges really provide the impetus for this effect.

**Legal Context and Judicial Decision-Making.** Cross (2003) presents a study that demonstrates that other case-related factors mitigate the influence of political orientation. Specifically, Cross demonstrates that appellate justices also consider legal factors and the dominant “strategy” of the current Supreme Court. Cross found that legal factors were best operationalized as the decision of the lower court, as appellate justices often seem to use the legal reasoning of the lower court to justify their own opinion. Strategic factors refer to the ideology of the current Supreme Court. Theoretically, a Republican Court should influence lower Courts to institute more conservative opinions. Cross’s study demonstrates that political affiliation is mediated by other factors related to the specific case and the greater political atmosphere. Any empirical analysis should seek to control for these and other variables when determining the effect of political orientation on appellate court decision-making. It is worth
noting that the above studies only concerned federal appellate cases. Since this study features both federal and state appellate cases I will institute a methodology that accounts for the judicial selection process of each jurisdiction.

Prior literature has also demonstrated that legal context may vary by jurisdiction. A number of researchers have conducted citation analyses to determine judicial success (Anderson, 2011; Cross & Lindquist, 2009; Kosma, 2008; Landes, Lessig, & Solamine, 1998). These scholars utilize frequency of citation to determine the quality and influence of the judge. Hypothetically, higher frequencies of citation equate to more successful and competent judges. These studies utilize the individual judge as the unit of analysis, but they consistently demonstrate a significant effect based upon institutional location. The different Circuits of the Federal Courts of Appeals have different levels of influence and contain their own peculiarities in judicial decision-making. Further, Collins and Moyer (2008) found that appellate cases decided in the south had different outcomes than cases decided in other geographic locations. Therefore, it is possible that geographical location influences local legal contexts that might in turn influence judicial decision-making.

**Individual Characteristics and Judicial Decision-Making.** Prior research has demonstrated that the individual characteristics of the appellate judge can affect decision-making. However, these studies have shown unclear, and sometimes contradictory, effects. For example Songer, Davis, and Haire (1994) found that gender had no significant effect upon judicial decision-making, but when Farhang and Wawro (2004) analyzed the effect of gender within a panel context they found that female judges had a liberal effect upon their male colleagues. Further, the authors found that a lone woman on a three-judge panel could exercise
more influence on the decision-making process than a panel featuring a majority of women. Further, the effect of race or ethnicity on judicial decision-making is unclear.

Farhang and Wawro (2004) and Bonneau and Rice (2009) found that the race or ethnicity of the appellate judge was not a significant predictor of judicial decision-making. However, Collins and Moyer (2008) found that race could affect decision-making. Specifically, the authors found that minority women had a significant impact on judicial decision-making. Perhaps Farhang and Wawro (2004) state it best by saying, “race and gender are distinct categories and it is commonplace for studies to reach different findings with respect to race and gender variables within a particular type of case…” Race, ethnicity, and gender undoubtedly intersect with local legal contexts, the constitutional area under examination, and case specifics. Therefore, any study that is seriously examining judicial decision-making must account for these variables.

The professional background of the judge may also influence judicial decision-making. Hypothetically, more experienced or more mature judges may make different decisions than newer and younger judges. Goldman (1975) found a modest effect for age, and the author also found an effect for the occupational history of the judge. Specifically, prior experience as a judge or a prosecutor was found to have an effect of decision-making. Further, the research has found that specific law schools have effects on judicial decision-making (Cross & Lindquist, 2009). Specifically, a study on the federal judiciary found that attendance at Harvard or Yale Law School significantly affected judicial decision-making (Landes, Lessig, & Solamine, 1998). However, these same authors found that academic performance as measured by editorial positions of law reviews, publications, and undergraduate performance were not significantly related to judicial quality and influence.
Judicial Selection Processes. Finally, prior research has also demonstrated that judicial selection methods result in different institutional capacities and practices. Specifically, judicial selection methodologies may influence how political affiliation affects decision-making. Further, these methodologies also impact the process of trying to determine the political affiliation of the appellate judge. The ideal judge is apolitical (Hall, 2009), and this sometimes makes the determination of the political affiliation of an appellate judge difficult. Cross (2003) recommends using the political affiliation of the appointing official as a proxy for the political affiliation of an appellate judge. Cross utilizes the political affiliation of the appointing President to determine the political affiliation of the federal appellate judge, and this methodology will transfer over to some state supreme courts. However, not every jurisdiction utilizes executive appointment, and judicial selection methodologies vary by state. Any study that seeks to determine the effect of political affiliation on judicial making must account for the judicial selection process of each jurisdiction. Federal appellate justices gain their position through presidential appointment.

State supreme courts utilize a variety of judicial selection methodologies (Brody, 2008). First, some states allow the governor to appoint each state supreme court judge, and Cross’s methodology of utilizing the political affiliation of the appointing official can adequately serve as a proxy for the political affiliation of these judges. Also, some state supreme courts utilize the Missouri Plan for judicial selection. Under the Missouri Plan a nominating committee compiles a list of suitable judicial candidates. The governor then selects one of the nominated candidates (Brody, 2008; Dimino, 2004). Since the governor still appoints the judge under the Missouri Plan the political affiliation of the appointing official can serve as a proxy for the political affiliation of the appellate judge in these states. However, some states utilize a partisan or non-partisan election for selecting state supreme court judges. In states with partisan elections the political
affiliation of the appellate judges is easily determined, but in states with non-partisan elections it may be more difficult to determine the political affiliation of appellate judges. Chapter 3 addresses these concerns in greater detail.

**Conclusion**

The plain feel exception allows officers to seize non-weapon contraband during a legal *Terry* stop if the illegal nature of the contraband is immediately apparent during a frisk. The officer may not manipulate the evidence beyond what is allowed in a standard pat-down when trying to determine if the evidence is illegal. Critics decry the plain touch exception as an assault on the Fourth Amendment and the warrant requirement, but supporters believe that it is a logical extension of the reasonableness doctrine. The ideological split is clear. Conservatives and supporters of the reasonable perspective believe the plain touch exception to be necessary for police to function effectively, and liberals and supporters of the warrant requirement believe plain touch to be an assault on the rights of the public. The political division within the *Dickerson* literature may also manifest in appellate jurisprudence due to the ambiguity inherent in the plain touch doctrine. Appellate justices have no clear guidance when determining whether a plain touch seizure was lawful or unconstitutional.

The ambiguity inherent in the plain touch exception may force judges to rely on their subjective analysis of police testimony, and subjective tests by definition allow for a large amount of personal bias. Prior research has shown that the political orientation of the judge can influence appellate decision-making. Therefore, political orientation may influence decisions relating to the plain touch doctrine. Republican justices may institute more pro-police decisions, and Democratic justices may institute more pro-rights decisions. The rest of this study seeks to determine the effect of political orientation on judicial decision-making as related to *Dickerson*.
and the plain touch exception. Also, the study will institute a doctrinal analysis to determine if
the concerns espoused by the critics and supporters of the _Dickerson_ decision have manifested in
the appellate case law surrounding the plain touch exception.
CHAPTER 4

METHODOLOGY

The aims of the current study are twofold. First, I seek to determine the current state of jurisprudence regarding the plain touch doctrine of *Minnesota v. Dickerson* (1993). Second, I seek to determine the impact of political orientation on judicial decision-making concerning the plain touch doctrine. I will accomplish these goals through a two-part methodology. To accomplish the first goal I will conduct a doctrinal analysis. I will then accomplish the second goal through regression modeling. The current section details the specifics of this methodology. First, I outline the sampling procedure used for this analysis. I then detail the methodology used for the doctrinal analysis. Finally, I outline the methodology and variables utilized for the regression modeling.

**Sampling**

Specialized and directed legal analyses do provide one benefit. Namely, it is possible to use the entire population within one analysis. The current study seeks to determine the current state of plain touch jurisprudence through an analysis of the federal and state appellate decisions concerning plain touch in the aftermath of *Dickerson v. Minnesota* (1993). When gathering the cases for this analysis I found the number was sufficient for analysis but small enough to allow inclusion of the entire population of cases. To gather the cases I conducted a search of appellate cases for the terms “plain touch” and “plain feel” as well as mention of “*Minnesota v. Dickerson.*” I utilized Lexis Nexis to conduct these searches, and I then conducted an extensive search using Google Scholar to ensure I had not missed any cases. Further, I will also include any cases cited in of the appellate cases I examine. I included all federal circuit court of appeals as well as state supreme courts. The search yielded N=105 appellate court cases where the
### Federal Cases: (N=45)
(Granted by President)

2. Ponce v. United States (1993) 5th
5. United States v. Craft (1994) 8th
15. United States v. Rogers (1997) 2nd
27. Ball v. United States (2002) D.C.
33. United States v. Bustos-Torres (2005) 8th
35. United States v. Davis (2006) 8th
41. United States v. Johnson (2011) 3rd
42. United States v. White (2011) 3rd
43. United States v. Cowan (2012) 8th
44. United States v. Goode (2012) 3rd

### State Cases (N=63):

#### Alabama: (Partisan Election)

#### Michigan: (Non-Partisan Election)
82. People v. Champion (1996)
83. People v. Custer (2001)

#### Colorado: (Missouri Plan)
49. People v. Brant (2011)

#### Minnesota: (Non-Partisan Election)
84. State v. Lemert (1997)

#### Connecticut: (Missouri Plan)
51. State v. Clark (2001)

#### Missouri: (Missouri Plan)

#### Delaware: (Appointed by Governor)
52. Hicks v. State (1993)

#### Montana: (Non-Partisan Election)
86. State v. Collard (1997)
|                              |                                |
| Georgia: (Non-Partisan Election) |                                |
|                              |                                |
| Illinois: (Partisan Election)  | Oklahoma: (Missouri Plan)       |
|                              |                                |
| Kansas: (Missouri Plan)        | Pennsylvania: (Partisan Election) |
|                              |                                |
| Kentucky: (Non-Partisan Election) |                                |
| 73. State v. Lipscomb (2002)  | South Dakota: (Appointed by Governor) |
| 76. State v. Guillory (2009)  |                                |
|                              |                                |
| Louisiana: (Partisan Election) | Tennessee: (Merit Selection)    |
|                              |                                |
| Maryland: (Appointed by Governor) |                                |
|                              |                                |
| Washington: (Non-Partisan Election) |                                |
deciding justices addressed the admissibility of evidence gathered through a plain touch seizure. 

*Table 4.1* presents a list of these cases.

**Analytical Plan: Doctrinal Analysis**

**Prior Literature.** The majority of the scholarly literature concerning the potential ramifications of the plain touch exception was published shortly after the decision in *Dickerson*. The literature presented several concerns about the functionality of the plain view doctrine. I have synthesized these concerns into five broad points of analysis. *Table 4.2* presents these “focal concerns.” Theoretically, the cases may reflect these problematic areas as the courts struggle to adequately define and implement the *Dickerson* doctrine. The subjective nature of *Dickerson* may present situations with which justices struggle, and the opinions may feature judicial attempts to enunciate their logic and attempts to overcome the difficulties of *Dickerson* as conceptualized in the literature.

<table>
<thead>
<tr>
<th>Concern #1: The Immediately Apparent Standard is Unworkable</th>
</tr>
</thead>
<tbody>
<tr>
<td>Concern #2: The Unreliability of Touch Compared to Sight</td>
</tr>
<tr>
<td>Concern #3: The Use of Pretextual <em>Terry</em> Stops to Justify Searches for Drugs</td>
</tr>
<tr>
<td>Concern #4: Over-reliance on Officer Testimony</td>
</tr>
<tr>
<td>Concern #5: The Inherent Vagueness and Lack of Guidance of the <em>Dickerson</em> Doctrine</td>
</tr>
</tbody>
</table>

**Method.** To determine if these focal concerns have affected the implementation of the plain touch exception I will utilize a doctrinal analysis that quantitatively assesses the prevalence of specific types of decisions. I will utilize specific types of decisions to determine the presence of the five functional concerns outlined in *Table 4.2*. The proposed methodology will also yield descriptive statistics related to the *Dickerson* doctrine. Frequencies relating to date of decision,
location, type of offense, and outcome will be produced through the gathering and ordering of data for this methodology and the methodology related to regression analyses. The descriptive statistics coupled with an informed reading of the cases will provide a broad portrait of the current state of the plain view exception. Further, the doctrinal analysis will enunciate the historical development of Dickerson, and the functioning of the plain touch exception from foundation to the present may be illuminated. I will now present the specific methodology utilized to determine the prevalence of each functional concern in Table 4.2.

**Focal concern #1: The immediately apparent standard.** To determine if this concern manifests in the appellate decisions I will examine the types of evidence allowed at trial by the Dickerson doctrine. I will categorize the types of evidence into three categories: Drug, Weapon, and Incriminating Evidence. Drug evidence concerns seized items that are actual illegal substances, and the Weapon category refers to any seized weapon. Finally, the category of Incriminating Evidence refers to evidence that is not actually illegal in nature but is related to the fruits or instruments of a crime. Theoretically, if the immediately apparent standard is workable then courts should routinely agree as to what evidence is immediately apparent. However, if there is a large disagreement in the types of evidence allowed at trial it will illustrate that the courts are indeed struggling with the immediately apparent standard.

**Focal concern #2: The unreliability of touch compared to sight.** Judicial decisions, most likely in state courts, which cite a rejection of plain touch seizures due to the unreliability of touch will provide the point of analysis for this study. The federal courts are ruled by the Supreme Court’s assertion in Dickerson that touch is indeed as reliable as sight, but state courts may reject this argument and rule that touch is by nature unreliable. If a state court strikes down
a Dickerson seizure or the entire Dickerson doctrine that decision provides support for this functional concern.

**Focal concern #3: The use of pretextual stops.** The fear that officers will utilize pretextual stops to justify Dickerson seizures was a dominant trend in prior legal research. To determine if this concern manifested into reality I will examine if appellate courts have suppressed evidence due to unreasonable stops. Therefore, any case that involves a pro-rights decision to suppress evidence based upon an unreasonable stop may provide support that police officers are engaging in this sort of behavior. At the very least it will show that appellate judges are sensitive to this sort of police behavior.

**Focal concern #4: Over reliance on officer testimony.** In order to determine if appellate judges are too heavily relying on officer testimony I will examine the appellate decisions. If the judges cite the officer testimony as a reason to either allow or suppress Dickerson evidence from trial I will consider this an instance when courts are relying on officer testimony. Theoretically, if the majority of cases are decided in this manner then this should establish the validity of this functional concern.

**Focal concern #5: The lack of guidance in the Dickerson doctrine.** Critics assailed the Dickerson doctrine as vague and having no clear guidance for other court officials. Legally, this concern is related to judicial decision-making. Dickerson contained no specific method for deciding the legality of plain touch seizures, and critics believed that this left judges free to decide in any method they saw fit. To determine if this is true I will examine the method used to decide the appellate cases concerning plain touch. I will subdivide the decisions in to three categories. First, I will have a no stated method category. Hypothetically, the lack of a stated decision-making process should illustrate a comfort and familiarity with Dickerson. Second, I
will have a category referring to decisions based solely on officer testimony. This category relates to decisions where the judges use only officer testimony to justify their decisions. Finally, I will have a category related to cases where judges decide by examining the totality of the circumstances. I operationally define this approach where judges cite more than one factor of the case as justifying their decision. If this functional concern is true and there is no guidance in the Dickerson doctrine then no category should manifest as dominant in the analyzed decisions. Table 3.3 presents these categories as well as the other categories related to all of the functional concerns.

<table>
<thead>
<tr>
<th>Table 4.3: Focal Concern Operations</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Focal Concern #1: The Immediately Apparent Standard</strong></td>
</tr>
<tr>
<td>Type of Evidence Allowed:</td>
</tr>
<tr>
<td>0: Drug</td>
</tr>
<tr>
<td>1: Weapon</td>
</tr>
<tr>
<td>2: Incriminating Evidence</td>
</tr>
<tr>
<td><strong>Focal Concern #2: The Unreliability of Touch</strong></td>
</tr>
<tr>
<td>Case Outcome</td>
</tr>
<tr>
<td>0: Evidence Allowed at Trial</td>
</tr>
<tr>
<td>1: Evidence Suppressed Due to Unreliability</td>
</tr>
<tr>
<td><strong>Focal Concern #3: The Use of Pretextual Stops</strong></td>
</tr>
<tr>
<td>Case Outcome</td>
</tr>
<tr>
<td>0: Evidence Allowed at Trial</td>
</tr>
<tr>
<td>1: Evidence Suppressed Due to Initial Stop</td>
</tr>
<tr>
<td><strong>Focal Concern #4: The Over Reliance on Officer Testimony</strong></td>
</tr>
<tr>
<td>Case Outcome</td>
</tr>
<tr>
<td>0: Officer Testimony Not Cited</td>
</tr>
<tr>
<td>1: Officer Testimony Cited</td>
</tr>
<tr>
<td><strong>Focal Concern #5: Vagueness of Dickerson Doctrine</strong></td>
</tr>
<tr>
<td>Type of Decision Used</td>
</tr>
<tr>
<td>0: No Method Cited</td>
</tr>
<tr>
<td>1: Officer Testimony</td>
</tr>
<tr>
<td>2: Totality of the Circumstances</td>
</tr>
</tbody>
</table>

Analytical Plan: Regression Modeling
**Prior Literature.** The prior literature concerning the *Dickerson* doctrine indicates that appellate judges have a large amount of discretion in either allowing or suppressing evidence related to plain touch seizures. Hypothetically, the personal characteristics of the judge may influence the decisions related to the plain touch exception. The current study seeks to ascertain if the political orientation and affiliation of the deciding judges influence the judicial decision-making surrounding the plain touch exception. The prior literature demonstrates that the political affiliation of the appointing official serves as an adequate proxy for the political orientation of the judge. Also, the literature demonstrates that legal and strategic control variables may mitigate the effects of political affiliation.

**Statistical Analysis.** I will utilize binary logistic regression to determine the effect of political orientation on judicial decision-making. The regression model will seek to determine if political orientation increases or decreases the chances that evidence gathered from a plain touch seizure will be either suppressed or allowed at trial. Binary regression modeling serves as the best model for this sort of analyses due to the dichotomous and final nature of judicial decision making. The judge institutes a final opinion in either the affirmative or negative, and a binary model fully captures the finality of appellate decisions. After all there is no continuous variation in judicial decision-making, and any attempt to assign a continuance to the outcome variable of this study would represent an unnecessary step of abstraction and a further removal from empirical reality.

**Unit of Analysis.** When analyzing judicial decision-making the researcher must choose between two research designs. The researcher can either use the case or the individual judge as the unit of analysis. In the first alternative the individual case or opinion serves as the focus of the study allowing the researcher to capture the dynamics of decision-making within the context
of the appellate panel. Alternatively, the researcher could use the individual judge as the unit of analysis. This methodology would let the researcher understand the effect of individual judicial characteristics better, but it would also sacrifice the ability to understand the group decision-making process of the panel. Historically, researchers have utilized both of these methodologies. Researchers most interested in the individual characteristics of the judge have naturally chosen the judge as the unit of analysis (Bonneau & Rice, 2009; Goldman, 1975; Songer, Davis, & Haire, 1994). However, these studies participate in what Farhang and Wawro (2004) call “the neglected importance of institutional structure.”

Appellate decision-making occurs in a group context, and while individual factors will undoubtedly have an affect the group as a whole must assume primacy. Farhang and Wawro (2004) illustrate that various factors of the institutional structure of appellate decision-making push and pull individual judges in different directions. Perhaps this is best illustrated in the startling prevalence of unanimous decisions in appellate court systems. Unanimous decisions are so common that scholars refer to this as “norm.” Unanimity on the appellate court systems becomes an expected outcome which undoubtedly pulls the individual judge in certain directions (Atkins & Green, 1976; Cross & Tiller, 1998; Farhang & Wawro, 2004). The expectation of unanimity also explains the virtual lack of dissents in the appellate court systems as panels may engage in bargaining or coercion to ensure that judges join the dominant opinion (Farhang & Wawro, 2004; Hettinger, Lindquist, & Martinique, 2004; Peterson, 1981).

These powerful group dynamics influence the individual decision-making process, and research concerning appellate decision-making must account for them. By using individual cases as the unit of analysis the entire institutional decision-making process can be ascertained. Of course this requires a sacrifice in terms of fully understanding individual judicial characteristics.
due to the operationalizations necessary to place individual variables within the panel context. For federal appellate cases I will utilize binary, dichotomized variables that reflect the presence of judges with certain individual characteristics within the panel context. For state cases and analyses that combine both state and federal cases I will utilize percentage-based variables that reflect the number of judges on the panel with specific individual characteristics. I will include a more detailed discussion as I address the different types of variables in this study. *Table 4.3* includes these variables as well. Although these dichotomized or group-level variables may not fully show individual differences in decision-making they will assess the effects of these variables within the institutional or group context.

**Predictor Variables.**

*Affiliation of Appointing Official: The Best Party Proxy.* The apolitical nature of the appellate judges makes direct determinations of the political affiliation of individual judges at times difficult. Researchers have designed several useful methods to determine the political affiliation or ideology of the judge. A recent study utilized campaign contributions for state supreme court judges seeking election in non-partisan elections (Cann, 2007). Researchers have also utilized content analysis on appellate opinions to determine political affiliation (Segal and Cover, 1989). However, these sorts of determinations require specific qualitative and quantitative methodologies that often prove far beyond the scope of studies where political affiliation serves as a predictor variable. To ease analysis researchers have often turned to other signifiers of political affiliation as proxies for judicial politics.

The most common proxy for the political affiliation of appellate judges is the political affiliation of the appointing official. As Cross (2003) states, “While this proxy for judicial ideology is obviously imperfect, it seems unlikely to produce a false positive correlation. Any
deviation of the judge's ideology from that of the appointing president will only obscure or understate a true correlation of ideology and outcomes.” Other researchers have also provided similar assertions. Goldman (1975) discovered a consistent effect by using the affiliation of the appointing official as a proxy for liberalism and conservatism. Cross and Tiller (1998) also found that the party of the appointing official was a significant predictor of judicial decision-making. George (1998) determines affiliation of the appointing official to be a “good proxy” for the affiliation of the individual judge. She cites the highly political process of judicial appointment and the concrete and anecdotal evidence concerning the appointment process as supporting this assertion.

In terms of federal appellate courts the most common argument against utilizing the affiliation of the appointing official is the supposed impact of the Senate judiciary committee and the Senate majority. However, Songer and Ginn (2002) addressed this issue and found that presidential affiliation was the strongest predictor of judicial decision-making even when controlling for circuit, state, and senatorial influences. Further, the authors found only one instance of significant, though minor, senatorial impact. If the home-state senator, or the senator of the jurisdiction where the judge would have her office, was of the same political party as the president then the effect of the political affiliation of the appointing official was increased. However, senatorial influence became insignificant when the senatorial influence was of the opposite party of the president. Therefore, as Cross (2003) states senatorial influence would be unlikely to create a false positive in an analysis, and the appointing official seems to be the best proxy.

Finally, in a meta-analysis of 140 studies Pinello (1995) found that judicial political ideology was significant predictor across all jurisdictions and studies. Most studies in this meta-
analysis utilized the party of the appointing official as the proxy for judicial ideology. This proxy showed the same consistent effects as the more sophisticated proxies requiring analytical construction. Therefore, the use of the political affiliation of the appointing official seems to be as good as or better than the other methods used to determine the political affiliation of the judge. The affiliation of the appointing official also allows for historical analyses of cases over many years as it may be impossible to determine campaign contributions, endorsements, and other related variables for non-recent appointment or selection processes.

Finally, this study will utilize a two-party operationalization that splits political affiliation into either “Republican” or “Democratic. This study accepts that the modern party system may be factionalized and that individual judges may cling to ideologies that are at odds with dominate party ethos, but the binary operationalization has been historically proven effective by prior research (Cross, 2003; Goldman, 1977). These researchers found that this dichotomized conception of affiliation provided significant results, and this methodology also allows for a testing of the predictions of the scholarly literature concerning the Dickerson decision. However, I also accept that this crude operationalization is somewhat limited, and further research should attempt a more nuanced examination of the specifics of political ideology within the greater party structure. Hopefully, this study will serve as a starting point for these future analyses

**Jurisdictional Specifics.** The political affiliation of the appellate judge provides the predictor variable for the regression modeling of this study. Cross (2003) and Goldman (1975) recommend using the political affiliation of the appointing official as a proxy for the political affiliation of an appellate judge. However, due to the variety of judicial selection methodologies this may not always be possible. In Federal courts the political affiliation of the appointing president will serve as a proxy for the affiliation of the judge. In state supreme courts where the
governor appoints the judge the political affiliation of the governor will serve as an adequate proxy. Also, in states that utilize the Missouri Plan I will utilize the political affiliation of the judge. In states that utilize partisan elections the political affiliation of the judge is well-known, and I will use this information to determine the affiliation of the deciding judge.

The final, and most troublesome, selection methodology is non-partisan elections. To determine the political affiliation of these judges I will utilize the electoral context of the entire state. Specifically, I will examine the legislative or executive elections in the same year as the judicial election. I will then determine the party of the majority of officials elected and utilize the majority as a proxy for the judge’s political affiliation. Therefore, if a state elects a majority of Republicans to the state legislature in the same year that they elect a judge I will classify that judge as Republican. This classifying methodology is undoubtedly imperfect as there is no direct method to determine the specific impact of party politics in non-partisan elections as there is in the appointment, merit selection, and partisan electoral process. However, the literature is largely silent on this issue within the context of using political affiliation as a predictor variable, and I will utilize this tentative proxy at this time.

Model Specifics. I will utilize two different predictors to determine the effect of political orientation on judicial decision-making. First, I will follow the methodology of Cross (2003) and utilize the political orientation of all the deciding justices. Because the number of appellate judges sitting on a case varies by jurisdiction I will utilize four regression models to best determine the effects of political affiliation on judicial decision-making. First, I will create a regression model that includes all of the appellate cases (n=108). Second, I will institute a regression model containing the cases (n=45) decided in Federal courts. Third, I will institute a model that only includes state appellate cases (n=63). Each of these models will use the
<table>
<thead>
<tr>
<th><strong>Table 4.4</strong> Variables</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Outcome Variables:</strong></td>
</tr>
<tr>
<td>Decision of Court</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td><strong>Predictor Variables:</strong></td>
</tr>
<tr>
<td>Political Affiliation of State and Federal Judges</td>
</tr>
<tr>
<td>Political Affiliation of Authoring Judge</td>
</tr>
<tr>
<td><strong>Control Variables:</strong></td>
</tr>
<tr>
<td><strong>Legal Context</strong></td>
</tr>
<tr>
<td>Lower Court Decision</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>Year of Decision</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>Supreme Court at Decision</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>Circuit of Decision</td>
</tr>
<tr>
<td>Geographic Distribution</td>
</tr>
<tr>
<td>Type of Evidence</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td><strong>Individual Characteristics:</strong></td>
</tr>
<tr>
<td>Gender</td>
</tr>
<tr>
<td>Minority</td>
</tr>
<tr>
<td>Minority*Female Interaction</td>
</tr>
<tr>
<td>Average Age of Judges on Panel</td>
</tr>
<tr>
<td>Prosecutorial Experience</td>
</tr>
<tr>
<td>Judicial Experience</td>
</tr>
<tr>
<td>Educational Background</td>
</tr>
<tr>
<td>Harvard and Yale</td>
</tr>
</tbody>
</table>
percentage of Republican judges on the deciding panel as the primary predictor variable. The division of these analyses by jurisdiction will illuminate the current state of the Dickerson doctrine and jurisdictional difference. Finally, I will also run a regression model utilizing only the political affiliation of the judge who authors the opinion. I will include all cases (n=108) in this model. The addition of this final model may help illuminate the effect of the political affiliation of the authoring judge upon the decision of the greater panel.

**Control Variables.** Following the methodology of Cross (2003) and other researchers I will include several control variables. I have categorized these variables into two categories related to legal context and individual characteristics.

**Legal Context.** First, I will include variables related to legal context. Cross (2003) demonstrates that appellate courts are sometimes unlikely to overturn lower court decision, and I will include a variable that determines if the outcome of the appellate decision was the same as the lower court decision. A similar decision should adequately conceptualize whether legal factors had any influence on the appellate court’s decision. I will also include a variable related to the strategic aim of the Supreme Court. In a longitudinal analysis different Courts may influence appellate decision making in different ways. However, the current study features cases under the umbrella of only two courts: the Rehnquist Court and the Roberts Court. The ideological similarities of these Courts is well known, but I will include a dichotomized variable reflecting the Court presiding at the time of the opinion. Further, I will also include evidence type and the year of the decision to further reflect any possible strategic aims of the criminal justice or judicial system. After all the plain touch exception is routinely characterized as a judicial weapon in the war on drugs, and case type may affect the outcome of the judicial
opinion. Finally, different historical trends may influence appellate decision-making and a temporal variable will adequately capture the effects of these historical trends.

Prior research has also demonstrated that geographic location effects judicial decision-making. Hypothetically, different jurisdictions and legal contexts may influence how judges make their decisions. I will utilize jurisdiction to control for these effects. For the federal courts I will utilize the circuit of the appellate court to control for the effects of geography. For state courts I will utilize this same measure by placing the state court within the federal circuit that envelops it. This method gives two overt benefits. First, the categorization will be the same for both federal and state courts allowing for easy comparison between the two types of judiciaries. Second, it is possible that the same forces that create legal contexts may impact state and federal courts in the same way. Similar demographics, economic interests, and political forces may affect a state and its overlapping federal circuit, and these two jurisdictions may hypothetically have the same legal contexts. If this assertion is not true then the models containing only state or federal jurisdictions may show different results by circuit giving further analytical power to this study. In the event that the use of federal circuits proves unfeasible due to the distribution of the cases I will utilize a dichotomized variable reflecting geographic placement in the “South” as recommended by Collins and Moyer (2008). Table 4.3 also contains these and other control variables.

**Individual Characteristics.** Prior research has also demonstrated that several individual characteristics have an impact on judicial decision-making. I will include several individual-level variables as controls. First, I will include variables reflecting the presence of females and minorities in the judiciary. I will include a variable that reflects the percentage of female judges on the panel. I will also include a variable reflecting the percentage of minorities on the panel,
and I will test for an interaction between the percentages of female and minority judges. Second, I will include a variable reflecting the average age of the judges of the panel. Third, I will include two variables relating to the past experience of the judge. I will utilize a variable reflecting the percentage of judges who had experience as a prosecutor. I will also include a variable reflecting past judiciary experience as well. Finally, I will include a variable reflecting the educational background of the judge, and I will repeat the process for the percentage of judges who attended law school at either Harvard or Yale I operationalize a top-tier law school as any school that has historically appeared at least once in the top twenty law schools as compiled by Lomio, Wayne, and Wilson (2008).

**Outcome Variable.** The outcome for both of the regression analyses will be a dichotomized representation of the final judicial decision. Rather than splitting the decision as either affirmation or overturning I will dichotomize the variable as either pro-police or pro-rights/pro-offenders. The dichotomization schema will be as follows:

*Outcome Variable: Appellate Decision Reflecting Suppression of Evidence:*

0: The evidence was suppressed at trial.

1: The evidence was not suppressed at trial.

The “0” portion of the binary variable represents the pro-rights outcome, and the “1” portion of the binary variable represents the pro-police outcome. The binary nature of this variable should allow the regression analyses to adequately assess the effect of the political affiliation of the deciding justices. *Table 3.4* also contains this variable.

**Research Question and Hypotheses.** The research question within these regression analyses is as follows: Does judicial political affiliation influence the outcome of appellate cases
concerning the plain touch exception? Hypothetically, Democratic judges should be more likely to institute pro-rights decisions and suppress evidence gathered through plain touch seizures, and Republican judges should be more likely to institute pro-police decisions and allow evidence at trial. The specific hypotheses for the regression analyses follow:

*The Effect of Political Affiliation of the Panel of Justices on Case Outcome:*

H₀: The political affiliation of the panel of justices will not affect the case outcome.

H₁: The political affiliation of the panel of justices will affect the case outcome.

*The Effect of the Political Affiliation of the Authoring Justice on Case Outcome:*

H₀: The political affiliation of the justice authoring the opinion will not affect the case outcome.

H₁: The political affiliation of the justice authoring the opinion will affect the case outcome.
CHAPTER 5
RESULTS: DOCTRINAL ANALYSIS

For ease of analysis I have split the results into two sections. First, I present the results for the doctrinal analysis, and I will address the results of the regression analyses separately. The doctrinal analysis summarizes the historical development of *Dickerson* as well as the current state of the plain touch exception. To begin I present a quick summary of the totality of the current doctrine through the use of basic descriptive statistics. I then address each of the focal concerns that were outlined in the methodology section of this study. I then provide a summary of the current state of the plain touch exception in light of both the focal concerns and the descriptive statistics. This bifurcation of the results highlights the intricacies of each methodology, and the results of the doctrinal analysis illuminate several trends in the data that provide context for the later regression analyses.

**The Dickerson Doctrine:**

**Jurisdictional Divisions**

There was a total of N=108 appellate cases that involve the plain touch exception. *Table 5.1* presents the names of these cases, and a summary of each case can be found in *Appendix 1* and *Appendix 2*. There were n=45 cases within the federal appellate system, and n=63 cases were decided by the various state supreme courts. *Table 5.1* illustrates the spatial distribution of these cases. For analytical purposes I have utilized the federal circuits as geographical templates and have placed the state supreme court decisions within these circuits. I have included a map of the geographical locations of these circuits in *Appendix 3*. The results show great variation within the geographical distribution of the decisions related to *Dickerson*. When both federal and state
cases are considered together each of the twelve circuits feature an average of $M=9$ cases.

However, the average belies the great variation between the circuits and jurisdictions.

<table>
<thead>
<tr>
<th>Circuit</th>
<th>Total</th>
<th>Federal</th>
<th>State</th>
</tr>
</thead>
<tbody>
<tr>
<td>N=108</td>
<td>n=45</td>
<td>N=63</td>
<td></td>
</tr>
<tr>
<td>D.C.</td>
<td>8 (7.4%)</td>
<td>8 (7.4%)</td>
<td>--</td>
</tr>
<tr>
<td>1</td>
<td>4 (3.4%)</td>
<td>3 (6.7%)</td>
<td>1 (1.6%)</td>
</tr>
<tr>
<td>2</td>
<td>4 (3.7%)</td>
<td>1 (2.2%)</td>
<td>3 (4.8%)</td>
</tr>
<tr>
<td>3</td>
<td>15 (13.9%)</td>
<td>4 (8.9%)</td>
<td>11 (17.5%)</td>
</tr>
<tr>
<td>4</td>
<td>12 (11.1%)</td>
<td>4 (8.9%)</td>
<td>8 (12.7%)</td>
</tr>
<tr>
<td>5</td>
<td>13 (12%)</td>
<td>3 (6.7%)</td>
<td>10 (15.9%)</td>
</tr>
<tr>
<td>6</td>
<td>17 (15.7%)</td>
<td>8 (17.8%)</td>
<td>9 (14.3%)</td>
</tr>
<tr>
<td>7</td>
<td>3 (2.8%)</td>
<td>2 (4.4%)</td>
<td>1 (1.6%)</td>
</tr>
<tr>
<td>8</td>
<td>12 (11.1%)</td>
<td>6 (13.3%)</td>
<td>6 (9.5%)</td>
</tr>
<tr>
<td>9</td>
<td>8 (7.4%)</td>
<td>4 (8.9%)</td>
<td>4 (6.3%)</td>
</tr>
<tr>
<td>10</td>
<td>9 (8.3%)</td>
<td>2 (4.4%)</td>
<td>7 (11.1%)</td>
</tr>
<tr>
<td>11</td>
<td>3 (2.8%)</td>
<td>0 (0%)</td>
<td>3 (4.8%)</td>
</tr>
</tbody>
</table>

There is a great variation in the amount of cases that have been decided in each circuit. When both jurisdictions are considered together the sixth circuit contains the most decisions ($n=17$), and the Third and Seventh circuits have the least ($n=3$). In totality the Third, Fourth, Fifth, Sixth, and Eight circuits have the majority of the cases, and the First, Second, Seventh, and Eleventh circuits have relatively few cases. When split by jurisdiction the results show that a few circuits contain a significant number of cases, and these circuits differ in each jurisdiction. The federal courts decided an average of $M=3.75$ cases per circuit, and the state courts decided an average of $M=5.25$ cases per circuit. In the federal courts the D.C., sixth, and eighth circuits contain the majority of the cases, but in the state courts the third, fourth, fifth, and sixth circuits contain the majority of the cases. Graph 5.1 presents these results in visual format. Further, the
differences in state courts are further pronounced when individual states are considered. Table 5.2 presents these results.

Graph 5.1
Geographical Distribution

Twenty-three states have addressed the *Dickerson* doctrine within their supreme courts. Of these states each contains a small number of decisions related to the plain touch doctrine \((M=2.42)\), but a few states feature many decisions. Delaware, Kentucky, Louisiana, and Pennsylvania each have addressed the plain touch exception five or more times. These contentious states partially explain the prominence of the Third, Sixth, and Fifth circuits within the state jurisdictions. More importantly this also means that twenty-seven states have not
addressed the plain touch exception at the state court level. So, in terms of geographical
distribution there appears to be no clear pattern as to why certain states choose to address
Dickerson and others do not. Only a few widely separated circuits feature a prominence of cases,
and these large numbers may be the result of activist state court systems.

<table>
<thead>
<tr>
<th>State</th>
<th>n</th>
<th>State</th>
<th>n</th>
</tr>
</thead>
<tbody>
<tr>
<td>AL</td>
<td>2</td>
<td>MT</td>
<td>2</td>
</tr>
<tr>
<td>AK</td>
<td>--</td>
<td>NE</td>
<td>3</td>
</tr>
<tr>
<td>AZ</td>
<td>--</td>
<td>NV</td>
<td>1</td>
</tr>
<tr>
<td>AR</td>
<td>--</td>
<td>NH</td>
<td>--</td>
</tr>
<tr>
<td>CA</td>
<td>--</td>
<td>NJ</td>
<td>--</td>
</tr>
<tr>
<td>CO</td>
<td>2</td>
<td>NM</td>
<td>--</td>
</tr>
<tr>
<td>CT</td>
<td>2</td>
<td>NY</td>
<td>--</td>
</tr>
<tr>
<td>DE</td>
<td>6</td>
<td>NC</td>
<td>--</td>
</tr>
<tr>
<td>FL</td>
<td>--</td>
<td>ND</td>
<td>--</td>
</tr>
<tr>
<td>GA</td>
<td>1</td>
<td>OH</td>
<td>--</td>
</tr>
<tr>
<td>HI</td>
<td>--</td>
<td>OK</td>
<td>1</td>
</tr>
<tr>
<td>ID</td>
<td>--</td>
<td>OR</td>
<td>--</td>
</tr>
<tr>
<td>IL</td>
<td>1</td>
<td>PA</td>
<td>5</td>
</tr>
<tr>
<td>IN</td>
<td>--</td>
<td>RI</td>
<td>--</td>
</tr>
<tr>
<td>IA</td>
<td>--</td>
<td>SC</td>
<td>1</td>
</tr>
<tr>
<td>KS</td>
<td>4</td>
<td>SD</td>
<td>1</td>
</tr>
<tr>
<td>KY</td>
<td>6</td>
<td>TN</td>
<td>1</td>
</tr>
<tr>
<td>LA</td>
<td>7</td>
<td>TX</td>
<td>3</td>
</tr>
<tr>
<td>ME</td>
<td>--</td>
<td>UT</td>
<td>--</td>
</tr>
<tr>
<td>MD</td>
<td>4</td>
<td>VT</td>
<td>1</td>
</tr>
<tr>
<td>MA</td>
<td>1</td>
<td>VA</td>
<td>3</td>
</tr>
<tr>
<td>MI</td>
<td>2</td>
<td>WA</td>
<td>1</td>
</tr>
<tr>
<td>MN</td>
<td>1</td>
<td>WV</td>
<td>--</td>
</tr>
<tr>
<td>MS</td>
<td>--</td>
<td>WI</td>
<td>--</td>
</tr>
<tr>
<td>MO</td>
<td>1</td>
<td>WY</td>
<td>--</td>
</tr>
</tbody>
</table>

Table 5.2 presents a distribution by year. For both jurisdictions there was an
average of M=5.14 cases decided per year. Federal courts handled an average of M=2.14 cases
per year, and the state courts decided an average of M=3 cases per year. This jurisdictional
difference could stem from the more expansive nature of the state court system. Interestingly, the federal system shows a slight decline in the number of decisions per year, but the state courts have a highly irregular distribution with an high of n=11 cases in the 2000. The year of 2000, which has the highest number of decisions of any year, features no unexplained jurisdictional outlier that explains this large quantity. In fact seven states instituted eleven decisions with no state instituting more than two decisions in that year. Graph 4.2 presents this data in visual form.

<table>
<thead>
<tr>
<th>Year</th>
<th>Total</th>
<th>Federal</th>
<th>State</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>N=108</td>
<td>n=45</td>
<td>n=63</td>
</tr>
<tr>
<td>1993</td>
<td>6 (5.6%)</td>
<td>4 (8.9%)</td>
<td>2 (3.2%)</td>
</tr>
<tr>
<td>1994</td>
<td>6 (5.6%)</td>
<td>5 (11.1%)</td>
<td>1 (1.6%)</td>
</tr>
<tr>
<td>1995</td>
<td>3 (2.8%)</td>
<td>2 (4.4%)</td>
<td>1 (1.6%)</td>
</tr>
<tr>
<td>1996</td>
<td>7 (6.5%)</td>
<td>3 (6.7%)</td>
<td>4 (6.3%)</td>
</tr>
<tr>
<td>1997</td>
<td>5 (4.6%)</td>
<td>2 (4.4%)</td>
<td>3 (4.8%)</td>
</tr>
<tr>
<td>1998</td>
<td>5 (4.6%)</td>
<td>3 (6.7%)</td>
<td>2 (3.2%)</td>
</tr>
<tr>
<td>1999</td>
<td>4 (3.7%)</td>
<td>1 (2.2%)</td>
<td>3 (4.8%)</td>
</tr>
<tr>
<td>2000</td>
<td>15 (13.9%)</td>
<td>4 (8.9%)</td>
<td>11 (17.5%)</td>
</tr>
<tr>
<td>2001</td>
<td>9 (8.3%)</td>
<td>2 (4.4%)</td>
<td>7 (11.1%)</td>
</tr>
<tr>
<td>2002</td>
<td>7 (6.5%)</td>
<td>1 (2.2%)</td>
<td>6 (9.5%)</td>
</tr>
<tr>
<td>2003</td>
<td>5 (4.6%)</td>
<td>4 (8.9%)</td>
<td>1 (1.6%)</td>
</tr>
<tr>
<td>2004</td>
<td>3 (2.8%)</td>
<td>1 (2.2%)</td>
<td>2 (3.2%)</td>
</tr>
<tr>
<td>2005</td>
<td>2 (1.9%)</td>
<td>2 (4.4%)</td>
<td>0 (0%)</td>
</tr>
<tr>
<td>2006</td>
<td>3 (2.8%)</td>
<td>1 (2.2%)</td>
<td>2 (3.2%)</td>
</tr>
<tr>
<td>2007</td>
<td>4 (3.7%)</td>
<td>2 (4.4%)</td>
<td>2 (3.2%)</td>
</tr>
<tr>
<td>2008</td>
<td>4 (3.7%)</td>
<td>1 (2.2%)</td>
<td>3 (4.8%)</td>
</tr>
<tr>
<td>2009</td>
<td>5 (4.6%)</td>
<td>1 (2.2%)</td>
<td>4 (6.3%)</td>
</tr>
<tr>
<td>2010</td>
<td>4 (3.7%)</td>
<td>1 (2.2%)</td>
<td>4 (6.3%)</td>
</tr>
<tr>
<td>2011</td>
<td>3 (2.8%)</td>
<td>2 (4.4%)</td>
<td>1 (1.6%)</td>
</tr>
<tr>
<td>2012</td>
<td>4 (3.7%)</td>
<td>3 (6.7%)</td>
<td>1 (1.6%)</td>
</tr>
<tr>
<td>2013</td>
<td>2 (1.9%)</td>
<td>0 (0%)</td>
<td>2 (3.2%)</td>
</tr>
<tr>
<td>2014</td>
<td>1 (.9%)</td>
<td>0 (0%)</td>
<td>1 (1.6%)</td>
</tr>
</tbody>
</table>

**Table 5.3**

Decisions Per Year

**Treatment of Lower Court Decision: Reversal or Affirmation**
The appellate courts in this study showed diversity in the treatment of lower court decisions. An appellate court can either affirm or reverse the decision of the lower courts. An affirmation represents an acceptance of the legal and factual determinations of the lower court, and a reversal represents a rejection of the legal logic of the lower court. Table 5.4 presents the affirmation rates in totality and by jurisdiction. These rates of affirmation are in relation to the court that is directly below the appellate court. The courts affirmed a slight majority of the cases (n=63, 53%), but there was a sharp division in the affirmation rates of the different jurisdictions.
The federal circuit courts were much more likely to affirm lower courts (n=38, 84.4%), while the state courts affirmed only a minority of the cases (n=25, 39.7%). These sharp jurisdictional differences may reflect the nature of the state and federal court systems. The federal circuit courts receive appeals from the federal district courts, and there exists no separation between the appellate court and the trial court. However, the state supreme courts often sit at the pinnacle of a multi-level appellate system. These supreme courts may receive appeals from courts that sit between the trial court and the supreme court. Therefore, jurisdictional organizations may slightly skew the numbers presented above.

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Affirm</th>
<th>Reverse</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal</td>
<td>38 (84.4%)</td>
<td>7 (15.6%)</td>
<td>45</td>
</tr>
<tr>
<td>State</td>
<td>25 (39.7%)</td>
<td>38 (60.3%)</td>
<td>63</td>
</tr>
<tr>
<td>Total</td>
<td>63 (58.3%)</td>
<td>45 (41.7%)</td>
<td>108</td>
</tr>
</tbody>
</table>

Appellate courts primarily review questions concerning legal and procedural decisions, and most appellate courts give the trial court primary responsibility in factual determinations. The trial court is better poised to determine the veracity of facts in terms of witness testimony, physical evidence, and police procedure. Therefore, appellate courts may be more likely to affirm the decisions of the trial court rather than a lower court of appeals. For the federal circuit courts this poses no methodological problem as there are no intervening appellate courts between the circuits courts and the federal district courts. However, the state supreme courts have intervening appellate courts. To address this issue it might be better to see the level of affirmation and reversals in the state supreme courts in relation to the trial courts. Table 5.5 presents these results. The rate of affirmation in relation to the trial court demonstrates a reversal.
in the trend outlined in Table 5.4. The state supreme courts are now slightly more likely to affirm (n=36, 57.1%) the judgment of the trial court. While this is still a lower rate than found in federal circuit courts (n=38, 84.4%) it still represents a majority within the data. It is safe to say that most of the appellate courts affirm the decision of the trial court, which is to be expected given the nature of the appellate system.

<table>
<thead>
<tr>
<th>Type of Decision</th>
<th>Trial Court</th>
<th>Lower Court</th>
<th>Fed/State Trial Court</th>
</tr>
</thead>
<tbody>
<tr>
<td>Affirm</td>
<td>36 (57.1%)</td>
<td>25 (39.7%)</td>
<td>74 (68.6%)</td>
</tr>
<tr>
<td>Reverse</td>
<td>27 (42.9%)</td>
<td>38 (60.3%)</td>
<td>34 (31.4%)</td>
</tr>
<tr>
<td>Total</td>
<td>63</td>
<td>63</td>
<td>108</td>
</tr>
</tbody>
</table>

**Table 5.5**

Affirmation of Trial Courts in State Supreme Courts

**Outcome: Suppression or Admission of Evidence**

The appellate courts in this study were more likely to allow plain touch evidence at trial than they were to suppress the evidence. The federal and state courts instituted pro-police decisions by allowing evidence in n=68 (63%) cases. The federal courts especially showed a pro-police slant in their jurisprudence by allowing evidence in n=32 (71.1%) cases. The state courts showed less of an ideological slant by only allowing evidence in 57.1% (n=36) of their cases, but each jurisdiction instituted pro-police decisions in the majority of their cases. Table 5.6 presents this evidence. Also, the rates of pro-police decisions when coupled with the rates of affirmation and reversal also reveal several interesting trends. When both jurisdictions are considered together an affirmation of the trial court decision resulted in a pro-police decision to allow the evidence in n=61 (56.5%) of the cases. Therefore, of the n=68 cases where the evidence was allowed at trial 89.7% featured an affirmation of the trial court decision. Further, of the n=40
cases that resulted in a suppression evidence n=27 (67.5%) of these cases featured a reversal of the trial court decision. These trends continue when each jurisdiction is considered on its own, but the federal court system shows a stronger affinity for this combination of affirming trial court decisions and allowing evidence at trial. Table 5.7 presents these statistics.

<table>
<thead>
<tr>
<th></th>
<th>Total</th>
<th>Federal</th>
<th>State</th>
</tr>
</thead>
<tbody>
<tr>
<td>Evidence Supp.</td>
<td>40 (37%)</td>
<td>13 (28.9%)</td>
<td>27 (42.9%)</td>
</tr>
<tr>
<td>Evidence Allowed</td>
<td>68 (63%)</td>
<td>32 (71.1%)</td>
<td>36 (57.1%)</td>
</tr>
<tr>
<td>Total</td>
<td>108</td>
<td>45</td>
<td>63</td>
</tr>
</tbody>
</table>

**Descriptive Statistics**

These basic descriptive statistics reveal several trends within the data. First, geographical distribution varies by jurisdiction, and some circuits contain more cases than others. When both jurisdictions are considered together each geographic area contains at least one opinion. Twenty-three states have commented on *Dickerson* at the supreme court level, and most of these states have only considered between one and three cases concerning the plain touch exception. Second, the temporal distribution of the cases also reveals jurisdictional differences. The federal cases feature a general decline in the number of cases decided per year, but the state supreme courts feature an irregular jump in the year 2000 followed by a slight decline. Finally, the appellate courts in this study are very likely to affirm the decision of the trial court, but the state courts are less likely to affirm than the federal courts. Further, the state supreme courts are slightly more likely to reverse rather than affirm the decision of any lower appellate court. These basic statistical results illustrate that there are differences within the federal and state court systems. I
will now turn to the focal concerns highlighted in Table 5.2 to further quantify and examine the results of the doctrinal analysis.

<table>
<thead>
<tr>
<th></th>
<th>Total</th>
<th>Federal</th>
<th>State</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Affirm</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>N</td>
<td>Y</td>
<td>N</td>
</tr>
<tr>
<td><strong>Suppressed</strong></td>
<td>27 (25%)</td>
<td>13 (12%)</td>
<td>5 (11.1%)</td>
</tr>
<tr>
<td></td>
<td>22 (34.9%)</td>
<td>5 (7.9%)</td>
<td></td>
</tr>
<tr>
<td><strong>Allowed</strong></td>
<td>7 (6.5%)</td>
<td>61 (56.5%)</td>
<td>2 (4.4%)</td>
</tr>
<tr>
<td></td>
<td>5 (7.9%)</td>
<td>31 (49.2%)</td>
<td></td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>108</td>
<td>45</td>
<td>63</td>
</tr>
</tbody>
</table>

**Focal Concerns**

The focal concerns outlined in the Methodological section of this work stem from the literature surrounding the *Dickerson* decision. These analytical concepts allow for a systematic examination of the cases concerning the plain touch exception that is influenced by prior research. I now address the statistical results of the doctrinal analysis in terms of the operationalizations for each of these concerns. In each section I will provide a quick description of the focal concern before launching into the statistics and conclusions.

**Focal Concern #1: The Immediately Apparent Standard**

The literature surrounding the *Dickerson* decision harangued the Reihnquist Court for implementing what the scholars believed to be an unworkable doctrine. The scholars believed that the “immediately apparent” standard would be unworkable in the appellate court system, and they feared the courts would construct a confusing doctrine concerning what type of evidence could be legally seized under the plain touch exception. If these contentions are true then the decisions in this analysis should show no clear trends in what kind of evidence the courts
allowed during trial. To begin this analysis I first present a statistical breakdown of what kind of crimes were featured in the appellate decisions. I then move into a discussion concerning the different types of evidence that were allowed at trial. Finally, I discuss two evidential areas where there is a great division in the courts, but these cases constitute a small minority of the total sample.

Table 5.7 presents the descriptive statistics concerning the types of crimes featured in this analysis. Drug offenses constituted an overwhelming majority of the cases (n=100, 92.6%) in both jurisdictions. The other types of offenses represented only a small portion of the totality of the cases. For example the state courts featured one property offense and two violent offenses that represented only 4.8% (n=3) of their total decisions. The federal courts featured one property offense and four weapons-related offenses that represented only 11.1% (n=5) of their total decisions. Drug offenses, which may be the logical target of most Dickerson seizures, undoubtedly exercise a great pull on the Dickerson doctrine, and if the immediately apparent standard is workable then the courts should show a strong preference in their decisions to allow or suppress drug evidence at trial. If there is a strong preference in this trend then it could be hypothesized that the immediately apparent standard is workable in the great majority of plain touch jurisprudence.

<table>
<thead>
<tr>
<th>Type of Offense</th>
<th>Total</th>
<th>Federal</th>
<th>State</th>
</tr>
</thead>
<tbody>
<tr>
<td>Drug</td>
<td>100 (92.6%)</td>
<td>40 (88.9%)</td>
<td>60 (95.2%)</td>
</tr>
<tr>
<td>Violent</td>
<td>2 (1.9%)</td>
<td>0</td>
<td>2 (3.2%)</td>
</tr>
<tr>
<td>Property</td>
<td>2 (1.9%)</td>
<td>1 (2.2%)</td>
<td>1 (1.6%)</td>
</tr>
<tr>
<td>Weapon</td>
<td>4 (3.7%)</td>
<td>4 (8.9%)</td>
<td>0</td>
</tr>
<tr>
<td>Total</td>
<td>108</td>
<td>45</td>
<td>63</td>
</tr>
</tbody>
</table>
Statistics. The cases feature three types of evidence that was seized through the plain touch exception. The majority of the cases (n=89, 82.4%) featured drug related evidence. Drug related evidence refers to either actual physical drugs or illegal drug paraphernalia. Drug evidence could be anything from rocks of crack cocaine, baggies of marijuana, or a “crack pipe.” Weapons-related evidence featured in n=3 (2.8%) cases and relates to either illegally possessed firearms or ammunition. Finally, the category of “incriminating evidence” featured in n=16 (14.8%) cases. Incriminating evidence refers to evidence that is not inherently illegal but leads to either contraband or the arrest of an individual for a particular crime. Table 5.9 presents these statistical results. Since drug evidence represents a majority of the cases a clear rate of either allowance or suppression should hypothetically represent the workability of the immediately apparent standard within the totality of the Dickerson doctrine.

<table>
<thead>
<tr>
<th>Type of Evidence</th>
<th>Total</th>
<th>Federal</th>
<th>State</th>
</tr>
</thead>
<tbody>
<tr>
<td>Drug</td>
<td>89 (82.4%)</td>
<td>32 (71.1%)</td>
<td>57 (90.5%)</td>
</tr>
<tr>
<td>Weapon</td>
<td>3 (2.8%)</td>
<td>3 (6.7%)</td>
<td>0</td>
</tr>
<tr>
<td>Incriminating</td>
<td>17 (13.8%)</td>
<td>10 (22.2%)</td>
<td>6 (9.5%)</td>
</tr>
<tr>
<td>Total</td>
<td>108</td>
<td>45</td>
<td>63</td>
</tr>
</tbody>
</table>

The results of Table 5.10 show some interesting jurisdictional differences. When both jurisdictions are considered together the courts allow most drug evidence at trial (n=58, 65.2%). The federal courts have a clear preference for allowing drug evidence into district court proceedings (n=26, 81.3%), but the state courts allow a slight majority into trial court proceedings (n=32, 56.1%). Likewise, the federal courts, which contained all the weapons-related cases, seems to favor allowing this evidence at trial (n=2, 66.7%), but the paucity of these
cases may preclude the establishment of any certain trend. When both jurisdictions are considered together the courts are evenly split when considering incriminating evidence as they allowed only 50% of this evidence into trial proceedings. However, jurisdictional specifics exist in these cases. Federal courts are slightly less likely to allow this evidence into trial (n=4, 40%), but state courts are more likely to allow this evidence at trial (n=4, 66.7%). Table 4.9 presents these results. These results establish that federal courts accept that drug evidence is by its nature immediately apparent, and when certain other evidentiary factors are controlled this acceptance also extends to the state courts.

<table>
<thead>
<tr>
<th>Evidence</th>
<th>Total</th>
<th>Federal</th>
<th>State</th>
</tr>
</thead>
<tbody>
<tr>
<td>Drug</td>
<td>31 (34.8%)</td>
<td>58 (65.2%)</td>
<td>6 (18.8%)</td>
</tr>
<tr>
<td></td>
<td>26 (81.3%)</td>
<td>25 (53.9%)</td>
<td>32 (56.1%)</td>
</tr>
<tr>
<td>Weapon</td>
<td>1 (33.3%)</td>
<td>2 (66.7%)</td>
<td>0</td>
</tr>
<tr>
<td>Incrimin.</td>
<td>8 (50%)</td>
<td>8 (50%)</td>
<td>4 (40%)</td>
</tr>
<tr>
<td>Total</td>
<td>108</td>
<td>45</td>
<td>63</td>
</tr>
</tbody>
</table>

Drug evidence represents the majority of evidence at issue in the cases in this study. The federal circuits show a clear preference for admitting this evidence at trial, and this implies that they accept that drug evidence is most likely immediately apparent to police officers. The state courts do not show this trend. However, the calculations above feature all drug evidence. If we exclude the drug evidence that was suppressed due to other evidentiary concerns, which are considered apart and often before the immediately apparent standard, a clear preference for admitting drug evidence at trial manifests. Specifically, if drug evidence that was seized while in
a rigid container or as the result of an improper Terry stop, which are two evidentiary concept we will soon discuss, is excluded from these analyses the results show that both the federal and state jurisdictions usually allow “Pure Drug” evidence at trial. The analytical concept of “Pure Drug” refers to drug contraband that is either directly on a person or contained in a non-rigid container such as a bag. A bag of marijuana, a rock of crack cocaine, or a “crack pipe” are all examples of this evidentiary category. When both jurisdictions are considered together the courts allow n=49 (80.3%) of this “Pure Drug” evidence. Federal courts allow a clear majority of this evidence n=23 (92%), and state courts also show this trend, although to a somewhat lesser degree (n=26, 72.2%). Therefore, it appears that both the federal circuit courts and state supreme courts agree that drug evidence is immediately apparent to the frisking officer. Table 5.11 presents these results.

<table>
<thead>
<tr>
<th></th>
<th>Total</th>
<th>Federal</th>
<th>State</th>
</tr>
</thead>
<tbody>
<tr>
<td>Evidence Suppressed</td>
<td>12 (19.7%)</td>
<td>2 (8%)</td>
<td>10 (27.8%)</td>
</tr>
<tr>
<td>Evidence Allowed</td>
<td>49 (80.3%)</td>
<td>23 (92%)</td>
<td>26 (72.2%)</td>
</tr>
<tr>
<td>Total</td>
<td>61</td>
<td>25</td>
<td>36</td>
</tr>
</tbody>
</table>

**Container and Incriminating Evidence.** While the courts seem to agree that drug related, and perhaps even weapons-related, evidence can be immediately apparent the courts are split when considering incriminating evidence and evidence in rigid containers. Table 5.9 shows that when both jurisdictions are considered together the appellate courts are evenly matched as to whether or not to allow incriminating evidence at trial. However, each separate jurisdiction shows opposites trends when considered alone. The federal circuit courts allowed 60% of the
evidence, but the state courts allowed only 33.3% of the incriminating evidence at trial. Therefore, we can state that the courts are grappling with the immediately apparent standard when applied to incriminating evidence.

Evidence in rigid containers also presents this same problem. Rigid containers provide a problematic evidentiary area for appellate judges. There were n=21 (19.4%) cases that featured evidence which was concealed in a rigid container. Except for one case all of this evidence was drug related. For example in Missouri v. Rushin (1998) a police officer conducted a frisk, felt what he immediately recognized to be a rigid candy container, and seized the container because his past experience led him to believe that these containers often contained narcotics. Courts are split on whether this sort of officer experience and testimony can validate a seizure of a medicine bottle, which by nature is not immediately apparent as contraband. When both jurisdictions are considered together we find that court allowed this type of evidence in only n=9 (42.9%) of the cases, and like incriminating evidence the jurisdictions show different trends when considered separately. The federal courts were evenly split when considering evidence in containers, but the state supreme courts showed a greater affinity to suppress the evidence and allowed only 41.1% (n=7) of this type of evidence at trial. Table 5.12 presents these statistics. The categories of incriminating evidence and evidence contained in rigid containers features jurisdictional differences and no clear trend in judicial decision-making, and the courts are struggling to rectify these types of evidence with the immediately apparent standard.

<table>
<thead>
<tr>
<th></th>
<th>Federal</th>
<th>State</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Evidence Suppressed</strong></td>
<td>2 (50%)</td>
<td>10 (58.8%)</td>
</tr>
<tr>
<td><strong>Evidence Allowed</strong></td>
<td>2 (50%)</td>
<td>7 (41.2%)</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>4</td>
<td>17</td>
</tr>
</tbody>
</table>

Table 5.12 Evidence in Rigid Container
Focal Concern #2: Unreliability of Touch vs. Sight

The bulk of the anti-Dickerson literature criticized the plain touch exception due to the suspected fallibility of tactile perception. These critics established a hierarchy of senses and placed sight at the pinnacle in terms of reliability. Touch was seen as unreliable and incapable of determining the identity of contraband objects. Theoretically, this sort of logic could have transferred over into the appellate cases contained in this study. While the federal courts are bound by the precedent of the Dickerson decision state supreme courts can choose to invalidate the plain touch exception to the Fourth Amendment. However, of the state supreme courts that have analyzed Dickerson no state has called into question the reliability of touch in their majority opinion. Two cases do feature a dissent that mentions this concern, but the language contained in these dissents is not binding to state practice.

Focal Concern #3: “Pre-Textual” Stops

The literature around Dickerson prophesized that the plain touch exception would motivate police officers to use “pretextual” or unjustified Terry stops to search for drug contraband. These unjustified frisks would enable police officers to enact general warrants for drug contraband. Although the scholars routinely used the term “pretextual” the courts mainly analyzed Terry stops to make sure that officers were not performing frisks for the sole purpose of searching for drugs or other contraband. The courts routinely analyzed the validity of the initial Terry stop to ensure that it was motivated by reasonable suspicion, and the courts then ensured that the initial pat-down was motivated by an articulable suspicion that the offender possessed a weapon. If either the stop or frisk were seen as unjustified a court often suppressed the evidence at trial without a real consideration of the validity of the plain touch seizure. The presence of this
sort of suppression within the cases in this study may dispel the critics fear that the courts are essentially sanctioning a “general warrant” to find drug contraband.

**Statistics.** Table 5.13 presents the results concerning the suppression of evidence in this manner. When both jurisdictions are considered together the courts suppressed evidence in n=10 (9.3%) cases due to improper Terry stops. The federal courts suppressed evidence in n=3 (6.7%) cases, and the state courts featured n=7 (11.1%) cases with this type of suppressions. These results illustrate that appellate courts are sensitive to the use of unjustified Terry stops in order to seize drug contraband, but the threshold for the validation of a Terry stop within an appellate court seems to be relatively low as fewer than one-tenth of cases featured a suppression due to an improper Terry stop. I will discuss this focal concern at greater length in Chapter 5 by utilizing the language of the judicial opinions to explain the role of Terry examinations in plain touch decision-making.

<table>
<thead>
<tr>
<th>Number of Cases</th>
<th>Total (9.3%)</th>
<th>Federal (6.7%)</th>
<th>State (11.1%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
<td>108</td>
<td>45</td>
<td>63</td>
</tr>
</tbody>
</table>

**Focal Concern #4: Over-Reliance on Officer Testimony**

The literature concerning Dickerson routinely stated that officers would be able to justify a plain touch seizure through the recital of select “magic words”. The critics feared that courts would rely too much on officer testimony. An over-reliance on testimony would allow police officers to lie or state post-hoc reasons for their actions. The critics thought that courts would accept this testimony verbatim and allow all evidence into trial. The statistical analysis of this portion seeks to determine how many cases utilized officer testimony in their decision-making
process. Theoretically, if a majority of cases utilize officer testimony then the warnings of the Dickerson scholars may be true. However, the mere use of officer testimony does not necessarily equate to an over-reliance within the court system, and the Focal Concern #5 features an in-depth analysis of the use of officer testimony in the decision-making process.

Statistics. A majority of the opinions feature an analysis or mention of officer testimony. When both jurisdictions are considered together the courts analyzed officer testimony in n=95 (88%) of the cases in this analysis. The state courts were more likely to analyze officer testimony in their cases (n=59, 93.7%), and the federal courts were slightly less likely to use officer testimony (n=36, 80%). These results show that courts at least consider officer testimony during their opinions. Further, in the cases where the courts used officer testimony the courts allowed evidence in n=63 (66.3%) of the cases. The state courts were slightly less likely to allow evidence in the cases were they used officer testimony (n=34, 57.6%) than the federal courts (n=29, 80.6%). Table 5.14 presents these results. The federal courts display a clear trend for cases that use officer testimony to end in a pro-police decision, but these courts are less likely to use officer testimony in the first place. Therefore, it can be stated that there is no clear evidence that courts are over-relying on officer testimony, and this is supported by the evidence featured in the next focal concern.

<table>
<thead>
<tr>
<th></th>
<th>Total</th>
<th>Federal</th>
<th>State</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Suppressed</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Used Test.</td>
<td>N</td>
<td>Y</td>
<td>N</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Allowed</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>N</td>
<td>Y</td>
<td>N</td>
</tr>
</tbody>
</table>

Table 5.14

Officer Testimony by Jurisdiction

<table>
<thead>
<tr>
<th></th>
<th>Total</th>
<th>Federal</th>
<th>State</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Total</strong></td>
<td>108</td>
<td>45</td>
<td>63</td>
</tr>
<tr>
<td><strong>Allowed</strong></td>
<td>63 (58.3%)</td>
<td>3 (6.7%)</td>
<td>29 (64.4%)</td>
</tr>
</tbody>
</table>
Focal Concern #5: Lack of Direction

The literature surrounding the plain touch exception often cited a problematic vagueness or lack of direction within the Dickerson decision. The critics felt that the Dickerson Court instituted a conservative precedent without giving courts explicit instructions on how to analyze plain touch evidence. The critics felt that the courts would begin to use officer testimony as the sole factor in plain touch decision-making, and this would allow the police to seize any evidence they wanted by saying the correct words during trial. Theoretically, if Dickerson did result in procedural chaos then no clear method of decision will manifest in the cases analyzed in this study. To test this I categorized three types of decision-making as explained in the Methodology section. The category “none” refers to opinions where they offered no explanation for their decision, the category “officer testimony” refers to decisions based solely on officer testimony, and “totality of the circumstances” refers to decisions that used two or more factors when deciding whether or not to allow evidence at trial. If a clear majority emerges in one of these styles of decision-making then it could be hypothesized that Dickerson did not result in the feared procedural bedlam.

Method of Decision. Of the three methods of decision “totality of the circumstances” was the most common. When both jurisdictions are considered together n=55 (50.9%) of the cases in this study utilized this method of decision-making. The category of officer “testimony” was utilized in n=38 (35.2%) cases, and the category of “none” was featured in only n=15 (13.9%) cases. The federal cases were slightly more likely (n=25, 55.6%) to utilize the totality of the circumstances approach than the state cases (n=30, 47.6%). Table 5.15 presents this data. The data shows that the totality of the circumstances approach is the most prevalent approach for
judicial decision-making in plain touch cases. This also holds true for the federal circuit courts, but the state supreme courts were almost as likely to use officer testimony (n=26, 41.1%) as their primary source of decision-making. However, an examination of the rates of suppression and allowance reveals an interesting trend in the data.

<table>
<thead>
<tr>
<th>Method of Decision</th>
<th>Total</th>
<th>Federal</th>
<th>State</th>
</tr>
</thead>
<tbody>
<tr>
<td>None</td>
<td>15 (13.9%)</td>
<td>8 (17.8%)</td>
<td>7 (11.1%)</td>
</tr>
<tr>
<td>Officer Testimony</td>
<td>38 (35.2%)</td>
<td>12 (26.7%)</td>
<td>26 (41.3%)</td>
</tr>
<tr>
<td>Totality of Circ.</td>
<td>55 (50.9%)</td>
<td>25 (55.6%)</td>
<td>30 (47.6%)</td>
</tr>
<tr>
<td>Total</td>
<td>108</td>
<td>45</td>
<td>63</td>
</tr>
</tbody>
</table>

Table 5.16 presents the rates of suppression for each type of decision-making in each jurisdiction. The results show that the totality of the circumstances approach is more likely to be associated with the admission of evidence at trial, and the category of “officer testimony” is more likely to be associated with a suppression of evidence. When both of jurisdictions are considered together the totality of the circumstances approach was associated with an allowance of evidence in 81.8% (n=45) of the cases where this method was used. Further, the “officer testimony” approach was only associated with an allowance of evidence in 42.1% (n=16) of the cases where this method was used. The trend also holds true for state supreme courts where the use of officer testimony only resulted in allowance of evidence in 30.8% (n=8) of the cases where it was used. The association between officer testimony and the suppression of evidence results from the sequential decision-making utilized by the appellate courts. As mentioned above each case begins with the analysis of the legality of the Terry stop and frisk. The courts then analyze the testimony of the searching officer. If the officer’s testimony fails to pass muster the
courts suppress the evidence. Therefore, the use of officer testimony in decision-making often comes before a full analysis.

<table>
<thead>
<tr>
<th>Method</th>
<th>Total</th>
<th>Federal</th>
<th>State</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Suppress</td>
<td>Allow</td>
<td>Suppress</td>
</tr>
<tr>
<td>None</td>
<td>8 (7.4%)</td>
<td>7 (6.5%)</td>
<td>5 (11.1%)</td>
</tr>
<tr>
<td>Testimony</td>
<td>22 (20.4%)</td>
<td>16 (14.8%)</td>
<td>4 (8.9%)</td>
</tr>
<tr>
<td>Totality</td>
<td>10 (9.3%)</td>
<td>45 (41.7%)</td>
<td>4 (8.9%)</td>
</tr>
<tr>
<td>Total</td>
<td>108</td>
<td>45</td>
<td>63</td>
</tr>
</tbody>
</table>

The cases in this study feature a sequential logic where officer testimony is often considered before the full circumstances of the case. If the officer testimony is lacking certain evidentiary concerns then the evidence suppressed. Chapter 5 features a more detailed discussion of this decision-making, but cases where evidence is suppressed due to officer testimony often do not feature a full consideration the case. A suppression based upon officer testimony is essentially incomplete decision-making. Table 5.16 illustrates that there were a total of n=22 (20.4%) cases that featured this type of decision-making. The federal circuit courts only featured n=4 (8.9%) of these cases, but the state courts featured n=18 (28.6%) of these cases. If these decisions are removed from the sample, which leaves behind only opinions with complete decision-making, the statistical results shows that the totality of the circumstances approach represents the clear majority in judicial decision-making in each jurisdiction. Table 5.17 presents this evidence. The results illustrate that when all of evidence is considered in a full decision-making process courts often rely upon a totality of the circumstances approach, which is logical.
since most courts equate the immediately apparent standard with probable cause. Once again
Chapter 6 will feature a more in-depth discussion of these trends.

<table>
<thead>
<tr>
<th>Method of Decision</th>
<th>Total</th>
<th>Federal</th>
<th>State</th>
</tr>
</thead>
<tbody>
<tr>
<td>None</td>
<td>15 (17.4%)</td>
<td>8 (19.5%)</td>
<td>7 (15.6%)</td>
</tr>
<tr>
<td>Officer Testimony</td>
<td>16 (18.6%)</td>
<td>8 (19.5%)</td>
<td>8 (17.7%)</td>
</tr>
<tr>
<td>Totality of Circ.</td>
<td>55 (64%)</td>
<td>25 (61%)</td>
<td>30 (66.7%)</td>
</tr>
<tr>
<td>Total</td>
<td>86</td>
<td>41</td>
<td>45</td>
</tr>
</tbody>
</table>

**Conclusion**

The statistical results of the doctrinal analysis establish several trends. The courts were more likely to affirm the trial court’s decision and allow evidence at trial. However, the state supreme courts were less likely to allow evidence at trial when compared to the federal courts. The majority of the cases in this study concerned drug offenses, and there were only a few unusual cases concerning weapons, violent, or property crime in both jurisdictions. Further, the results of the statistical analyses relating to the focal concerns illustrate that the negative prophesies of the critics of *Dickerson* did not manifest. First, the courts routinely agree that drug evidence, which constitutes the bulk of the evidence considered in plain touch appellate cases, can be immediately apparent to a frisking officer. Second, the courts accept that tactile detection is not by nature unreliable. Third, the courts are sensitive to the use of “pretextual” or unjustified *Terry* stops to search for drug contraband. Finally, the courts are not over-reliant on officer testimony, and most cases utilize a totality of the circumstances approach to analyze plain touch
seizures. Chapter 6 contains an in-depth discussion concerning these doctrinal statistics and situates these statistics within the language of the opinions.
CHAPTER 6
DISCUSSION: DOCTRINAL ANALYSIS

The academic and legal literature surrounding *Dickerson v. Minnesota* (1993) conceptualized the plain touch exception as an instance of conservative judicial activism that further eroded the protections of the Fourth Amendment. Critics felt that the *Dickerson* decision enacted a general warrant under the guise of the *Terry* doctrine. However, the development of the plain touch exception shows these fears to be unfounded. The federal and state courts have enacted a body of jurisprudence to protect against the development or enactment of the dreaded “general warrant”. The statistical results presented in Chapter 4 establish that both the federal circuit courts and the state supreme courts follow remarkably similar logic when deciding cases. However, there do exist a few jurisdictional specifics. I now situate those results within the language of the opinions to provide context and establish legal functionality. I first address the basic descriptive statistics and examine the opinions to explain trends within the data. I then address each of the focal concerns. Finally, I provide a summary of the doctrinal analysis and give a sequential outline of the decision-making process that the appellate courts use in cases concerning the plain touch exception.

Descriptive Statistics

Jurisdictional Specifics

The cases contained no clear geographical distribution, but when divided by jurisdiction certain trends emerge. The federal circuit courts decided on average four cases per circuit, and each individual state supreme court decided on average three cases. There is variation within these numbers, but each individual court authored only a few opinions concerning the plain touch exception. The functionality of the appellate process and the principle of precedent explain
this trend of few decisions. An appellate court serves to clarify law, and if no new legal issue is raised within a case, or if the case does not have a glaring constitutional illegality, then the appellate court will have no procedural issue to address. In short an appellate court is not required to address the same procedural questions repetitively. Therefore, if an appellate court institutes a decision about either the totality of the plain touch exception or a finer point within the *Dickerson* doctrine then all further cases that address this same point would not require appellate review.

This process of clarification and legal refinement can take several cases, but some courts have decided the procedural questions of *Dickerson* in a singular case. For example the Second Circuit Court of Appeals addressed the plain touch exception in the case of *United States v. Rogers* (1997). In a short opinion the Second Circuit judges addressed three large issues within plain touch jurisprudence. The judges first associated the immediately apparent standard with probable cause, clarified the amount of tactile manipulation allowed in a *Terry* search, and addressed the level of certainty an officer must have before he seizes plain touch evidence. *Rogers* is the only *Dickerson* case that the Second Circuit has decided, and they managed to clarify several points in one opinion. *State v. Rushing* (1996) is an example of “one case” decision-making in the state supreme courts. In *Rushing* the Supreme Court of Missouri approves the plain touch exception under the Missouri Constitution, equates the immediately apparent standard with probable cause, establishes a precedent for the totality of the circumstances approach to judicial decision-making, and even addresses the legality of plain touch seizures of evidence in rigid containers. These cases are examples of appellate courts covering large amounts of ground in one opinion and then choosing not to address the issue at further junctures.
However, other courts have taken a more hesitant approach and addressed different concepts over a span of several cases.

Some courts choose to address individual intricacies through several decisions. In the federal courts the Fourth Circuit provides an example of this style of jurisprudence. In *United States v. Raymond* (1998) the court addressed the amount of manipulation allowed in *Terry* searches in light of the plain touch exception. In *United States v. Works* (2009) the court addressed the ability of police officers to distinguish between powdered cocaine and flour during a plain touch seizure, and in *United States v. Hernandez-Mendez* (2010) the court addressed the applicability of the plain touch doctrine to a weapons seizure. Finally, in *United States v. Roach* (2012) the court refined the standards for plain touch seizures in light of an offender’s admission of guilt before the officer actually seized the evidence. It is possible that this jurisprudence developed due to happenstance. The court may have been addressing new issues as they arose within the criminal justice system, but the court could have decided the cases on the merits, or chose not to hear these cases, and let their first opinion stand as precedent. Instead, the Fourth Circuit decided to address multiple issues through several cases.

The Supreme Court of Kansas provides an example of this sequential decision-making within the state courts. In *State v. Wonders* (1998) the court rectified the plain touch exception with the Kansas constitution and recommended a totality of the circumstances approach for decision-making. The court refined this approach in *In the Matter of L.A.* (2001), and then addressed the distinction between a search incident to a lawful arrest and a plain touch seizure in *Kansas v. Payne* (2002). Finally, in *Kansas v. Lee* (2008) the court recommended a three prong analytical test for determining the legality of plain touch seizures and addressed the use of unjustified *Terry* stops to institute plain touch seizures. The Kansas court refined their plain
touch jurisprudence over time, and several other courts have followed suit. There seems to be no geographic or statistical distinction between why courts may only address one or many plain touch cases, and it is most likely either one of two phenomena. These courts may feature a legal culture that favors one method of jurisprudence over the other, or it could just be the happenstance of the criminal justice system providing many cases for certain courts to decide.

While most courts have decided around three or four cases some courts have issued a relatively high number of opinions related to *Dickerson*. In the federal courts the Sixth Circuit Court provides an example of a court that features an inordinate number of cases. The court decided eight cases, and only one of these cases, *United States v. Butler* (2000), featured a tricky procedural issue relating to an unjustified *Terry* search and a “Yahtzee” game. However, three of the cases did feature a reversal of the trial court’s ruling, which is relatively rare within the federal cases analyzed in this study. Therefore, it could be that appellate courts may institute more decisions if they are dealing with an unruly lower court that does not follow the precedent or desire of the appellate court. The Supreme Court of Kentucky provides an example of a state court with a multitude of decisions that feature a high rate of reversals. Kentucky issued six opinions, and four of these involved a reversal of a lower court decision. However, two of the cases also involved tricky procedural questions. Kentucky is actually within the geographical bounds of the Sixth Circuit, but there appears to be no uniting factor behind these high frequencies of cases besides the rates of reversal and location. Future research should delve further into why certain courts issue more opinions upon plain touch than others.

**Historical Development**

*Table 4.3* shows a historical decline in the number of plain touch cases decided per year within the appellate court system. The federal courts display this decline since the beginning, and
the state supreme courts feature an unexpected peak of cases in the year 2000, which is followed by a decline in frequency. The principle of precedent most likely explains this decline. *Dickerson* (1993) was a decision by the United States Supreme Court and represents a source of procedure, and sources of procedure often contain blank spaces that need clarification by the appellate court system. Over time the appellate courts will clarify each concept, establish new precedents, and reduce the need for appellate review in a particular area. The courts then will only feel the need to intervene in areas of uncertainty or if lower courts issue decisions that defy established precedent, and this process will generally manufacture a greater number of cases in the years immediately following the initial Court decision. The concept of precedent may explain the decline in federal cases. Further, the unexpected spike in state cases in the year 2000 may represent a sort of procedural delay between the federal and state jurisdictions. It could be that the *Dickerson* (1993) decision took a few years to wind its way up through the state appellate systems before finally reaching the state supreme court, which resulted in a multitude of cases in the year 2000.

**Rates of Reversal and Affirmation**

The courts in this study were more likely than not to affirm the decision of the lower court. The federal circuit courts routinely (84.4%) affirmed the decision of the federal district courts. The state courts also were more likely (57.1%) to affirm the decision of the trial court. However, the state supreme courts were less likely (29.7%) to affirm the decision of any lower appellate court. The high rate of the affirmation of trial court decisions reflects the delineation between the roles of these types of courts. The appellate court serves merely to review legal issues and procedural problems, and the trial court is the primary finder and decider of fact. In *State v. Wonders* (1998) the Kansas Supreme Court stated, “If the findings of the trial court on a
motion to suppress evidence are based on substantial evidence, the appellate court must not substitute its view of the evidence for that of the trial court.” Likewise, the Fourth Circuit Court stated, “We review legal conclusions involved in the district court's suppression determination de novo, but review factual findings underlying the legal conclusions for clear error.” (United States v. Raymond, 1998). The concept of de novo refers to the appellate courts ability to analyze legal questions from the beginning regardless of the lower court’s decision.

These quotes show that appellate courts as a whole are likely to accept the factual findings of the trial court, but they do retain the ability to overturn trial court factual findings if a clear error exists. Like most legal concepts the term “clear error” allows room for interpretation, and different judges and courts may be more likely to reject trial court factual findings than others. The state appellate courts seem to have a legal culture that allows for more factual interpretation than the federal courts. The state supreme courts feature a higher rate of trial court reversals, but the state supreme courts very rarely challenge a trial courts finding of fact directly. More commonly the courts attack the type of evidence (Purnell v. State, 2002), the legal nature of an officer’s testimony (Frazier v. Commonwealth, 2013), or the nature of the stop (Stokes v. State, 2001). However, it is arguable that the constant use of officer testimony to overrule trial court decisions, which is featured in 52.9% of the cases where an appellate court reversed the decision of the trial court and over 55% of cases where evidence was suppressed, may be a sort of factual analysis by appellate courts.

The use of officer testimony to suppress evidence and overrule the factual finding of a trial court may be an instance of factual analysis by appellate courts. However, the courts themselves conceptualize this sort of analysis as being part of their review of the legal record. For example the Supreme Court of Pennsylvania used an officers testimony to invalidate a plain
touch seizure due to the testimony containing what they considered improper search and seizure procedure. In this case the officer testified that he looked inside of a pocket before seizing the evidence, but the officer assured the trial court that he knew what the evidence was before he visually examined it. The Pennsylvania court then overturned the seizure due to the officer testimony because of this procedural point (Commonwealth v. Graham, 1998). Therefore, it is hard to say whether, and at what point, these appellate courts are engaging in the reexamination of a trial court’s fact findings and not merely examining legal points within an earlier decision.

**Rates of Suppression**

Both the federal circuit courts and the state supreme courts were more likely to allow evidence at trial than they were to suppress the evidence, but the state supreme courts were almost 20% less likely to admit plain touch evidence at trial. The high rate of admission of evidence to trial most likely reflects the deference to the judgment of the trial court. Most of the cases within this analysis were appeals by a criminal offender who was convicted after a motion to suppress was rejected by the trial court. Since the appellate courts in this study were more likely to affirm trial court decisions, which in these cases were decisions to admit plain touch evidence at trial, it is only natural that there would be a high rate of pro-police decisions in this study. In fact the as Table 4.7 shows the case outcome was closely related to trial court affirmation and reversal. Affirmations usually resulted in admission of evidence, and reversals usually resulted in suppression of evidence. However, differences in the rate of admission do exist between the state and federal courts, and this most likely stems from a difference in the legal cultures of these systems.
Jurisdictional Differences

It is apparent is that there are differences within the legal cultures of the federal and state appellate courts. For both courts an affirmation of the trial court most likely equated to an admission of the evidence at trial, and a reversal of the trial court usually resulted in a suppression. However, the federal courts were much more likely to affirm the trial courts, and this resulted in a high rate of admission of evidence at trial. The state supreme courts were much more likely to reverse a trial court decision, which in turn resulted in a higher rate of suppression. Cross (2003) found that the federal circuit courts have a norm of deference to trial judgments, and the data and this current study support his findings. The fact that the state supreme courts feature a higher rate of reversal may mean that the state systems do not have this norm of deference, that the norm is not as rigid, or that other variables influence state supreme court decision-making. These questions will be addressed in Chapter 6 via regression analysis, but it is safe to say that state supreme courts feature a legal culture that may allow for other factors to influence judicial decision-making.

The methodology of this study, which features both a statistical analysis and a doctrinal reading, further bolstered this contention. It is apparent that a difference exists in the quality or flavor of the various cases, jurisdictions, and courts within this study. For example I was struck by the paucity of legal logic within the opinions authored by the Alabama Supreme Court (Ex Parte Warren, 2000) and the Supreme Court of South Dakota (State v. Sleep, 1999), and a few states, especially Pennsylvania (Commonwealth v. Graham, 1997) and Louisiana (State v. Wilson, 2000), featured odd legal reasoning that was of a different stripe than the logic of the Federal Circuit Courts. Cross and Lindquist (2009) developed a method to measure judicial quality. While I cannot quantitatively say that the state supreme courts sometimes feature a lower
quality of judicial decision-making, which involves an abstraction that may defy measurement, I can say that I developed a “feel” for the plain touch cases as I read them, and the state supreme courts seemed to issue opinions that were often at odds with the major trends in plain touch decision-making. The data concerning the focal concerns further illustrate these differences.

**Focal Concerns**

The literature surrounding the *Dickerson* decision was mainly critical, and these critics pointed out a bevy of problems that they believed would result in a further erosion of rights. The critics all thought the plain touch exception contained numerous loopholes that could be exploited by the police at the expense of the rights of criminal offenders. However, as the data shows these concerns were unfounded, and the plain touch exception has developed into a body of jurisprudence where the appellate courts have taken steps to ensure that the rights of offenders are protected. This section features a sequential discussion of each of these focal concerns, and I will utilize the language of the opinions to contextualize the statistical data presented in Chapter 4. I will then provide a brief summary of the totality of these focal concerns before moving into an overall discussion of jurisprudence surrounding the plain touch exception.

**Focal Concern #1: The Immediately Apparent Standard**

The courts routinely agree that police officers can immediately recognize drug evidence, which is the primary evidence found in plain touch seizures, through tactile analysis. Critics state that this admission of drug evidence stems from an over-reliance on officer testimony and a manipulation of the system by police officers, but an analysis of the cases reveals that these routine admissions mainly stem from the courts’ interpretation of the immediately apparent standard. The courts correlate “immediately apparent” with the more practical concept of “probable cause.” The Eighth Circuit Court associates the immediately apparent with probable
cause by citing two earlier Supreme Court decisions (United States v. Cowan, 2012). Texas v. Brown (1983) states that the use of “immediately apparent” was an “unhappy choice of words” and implies that “an unnecessary certainty is required” to satisfy the standard. Further, in Payton v. New York (1980) the Supreme Court stated that an objects criminal nature is immediately apparent if the officer has “probable cause to associate the property with criminal activity”.

The association of “immediately apparent” with probable cause is also found within the jurisprudence of the state supreme courts. The Court of Criminal Appeals of Oklahoma cited Texas v. Brown and stated, “Immediately apparent for purposes of plain feel analysis does not mean that an officer must know for certain that the item felt is contraband, only that there is probable cause to associate the item with criminal activity.” (Hallcy v. State, 2007). However, the Pennsylvania Supreme Court issued several opinions where they claimed that plain touch seizures require a standard higher than probable cause (Commonwealth v. Graham, 1998; Commonwealth v. Hall, 1999; Commonwealth v. Stevenson, 2000). In these opinions the Pennsylvania court stated that immediately apparent actually meant immediate recognition at touch, which the court conceptualized to be a higher standard than probable cause. In a dissenting opinion Pennsylvania Justice Castille stated that this interpretation of the immediately apparent standard essentially renders the plain touch exception a “nullity.” Castille states, “Interpreting the plain feel doctrine to require identifying a substance to the exclusion of any other would leave no grist for the mill.” (Commonwealth v. Stevenson, 2000). Castille states that any standard other than probable cause neuters the plain touch exception, which is at odds with the Dickerson decision and requires a level of ability not commonly found in police officers.
The substitution of probable cause for the standard of immediately apparent comes with several benefits. First, appellate courts have a working definition of probable cause. In *Brinegar v. United States* (1949) the Supreme Court stated,

“In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.” (p.175).

Probable cause is more than “bare suspicion”. Instead, it occurs when the “facts and circumstances” would lead a reasonable officer, or man, to believe that an offense had been committed (*Carroll v. United States*, 1925). The definition of probable cause is based upon probability (*State v. Mitchell*, 1995), and it removes the requirement of complete certainty in search and seizures. Instead, an officer must demonstrate that the facts and circumstances led him to believe that there was a probability that a crime had occurred or the evidence of a crime was present.

The fluid concept of probable cause lends itself to a specific methodology. In *Illinois v. Gates* (1983) the Supreme Court adopted a totality of the circumstances approach when analyzing specific questions concerning probable cause. The Court stated, “As these comments illustrate, probable cause is a fluid concept, turning on the assessment of probabilities in particular factual context, not readily, or even usefully, reduced to a neat set of legal rules.” (p. 232). Probable cause lends itself to a totality of the circumstances approach that is analyzed through the eyes of the searching or arresting, and hopefully reasonable, officer. By analyzing all of the circumstances that surround a seizure the courts can determine if the probable cause
standard was satisfied, and this allows for courts to examine the plain touch exception without the rigorous and almost impossible standard advocated by a strict interpretation of the immediately apparent standard as found in the Pennsylvania decisions. The analysis of the specific circumstances utilized in probable cause determinations in relationship to plain touch seizures is presented in the analysis concerning Focal Concern #5.

The use of probable cause provides a working methodology for analyzing plain touch cases and allows appellate courts to analyze plain touch seizures without neutering the Dickerson decision. As the aforementioned Justice Castille illustrated any other interpretation of the immediately apparent standard effectively destroys the functionality of the plain touch exception, which was undoubtedly contrary to the intent of the Dickerson court (Commonwealth v. Stevenson, 2000). The totality of the circumstances approach, the accepted method for probable cause determinations, allows courts to handle the trickier terminology of “immediate appearance” or “immediate recognition.” Therefore, the immediately apparent standard is not unworkable as many critics feared. It became a workable concept by the institution of a probable cause standard. However, as the Pennsylvania opinions illustrate some state courts are more likely to resist this substitution, and different courts may evaluate the “totality of the circumstances” in different ways. The more problematic types of evidence also display great divisions in plain touch jurisprudence.

**Types of evidence.** The courts are very likely to allow drug evidence at trial. Drug evidence refers to contraband specifically connected to illegal substances or their use. The courts have examined numerous plain touch seizures that involve a wide variety of drug related evidence. A few examples will help illustrate this category of evidence. Drug evidence could be paraphernalia like a “crack pipe” (State v. Brant, 2011) or a pipe used to smoke marijuana
Commonwealth v. Pakaki, 2004), but it is most commonly bags of illegal substances like marijuana (Frazier v. Commonwealth, 2013), powdered cocaine (United States v. McGlown, 2005), and crack cocaine (State v. Taylor, 2013). When the courts apply the totality of the circumstances approach to determine probable cause they routinely agree that an officer can tactiley determine the identity of these substances during a frisk. However, the other types of evidence analyzed in this study provide more problematic decisions for the courts.

Weapon related evidence. The federal circuit courts decided a few cases related to weapons offenses. These decisions present a blurring of the lines between Terry v. Ohio (1968) and Minnesota v. Dickerson (1993). Terry, which is specifically allows for the seizure of dangerous, weapons-related contraband, would seemingly be the natural choice for analyzing weapons-related seizures during frisks. However, the circuit courts have interpreted Dickerson to justify the seizure of weapons-related evidence. For example in United States v. Miles (2001) an officer seized a rigid container that contained bullets. The Ninth Circuit suppressed this evidence because they felt the officer didn’t have probable cause to seize the bullets due to his inability to accurately judge what was in the box. Miles represents a situation where an officer couldn’t ascertain the identity of evidence through plain touch because the evidence was in a container. If the bullets had been in a pocket it is possible that the judges would have used Terry to decide the case. Two other cases involve tactile manipulation of a bag within the reach of a person. In these cases an officer touched a canvas bag or purse, immediately felt what he recognized to be a gun, and seized the evidence (United States v. Thomson, 2003; United States v. Hernandez-Mendez, 2010). In another case the Ninth Circuit curiously classified a handgun as incriminating evidence and stated that the officer could not know whether or not the handgun was illegal when he seized
it. Therefore, Dickerson, and apparently Terry, didn’t apply to this seizure because the handgun could not be immediately apparent as contraband (United States v. Hale, 2004).

The curious nature of each of these cases illustrates the problem of applying Dickerson to weapons-related seizures. Since Terry allows the seizure of weapons during a frisk it represents the natural choice for analyzing weapons-related seizures. However, questions arise when the identity of weapons-related evidence is hidden by a rigid container, found by accidental touching, or not immediately seen as being illegal. More importantly these decisions characterize Dickerson as an extension of the Terry doctrine, and they illustrate a subtle legal issue where the courts try to determine at what point a Terry frisk, which is designed to find weapons, ends and at what point a plain touch seizure begins. The discussion concerning Focal Concern #3 will feature a more in-depth analysis of this procedural point, but courts are grappling with this doctrinal distinction.

Incriminating evidence. Courts are split on whether or not incriminating evidence can be seized under the Dickerson doctrine. Incriminating evidence refers to evidence that is directly connected to a crime but is not inherently illegal. For example a large amount of money seized from a pocket led to a drug arrest in United States v. Busto-Torres (2005), and a pair of ski goggles led to a robbery arrest in a curious Montana case (State v. Collard, 1997). Although it is not illegal to carry a large amount of money or a pair of ski goggles, the officers used the evidence in these examples to provide probable cause for an arrest or a more in depth search. The courts are split whether incriminating evidence can be immediately apparent under the plain touch exception, and they often turn to the totality of the circumstances to justify the seizure. However, some courts have stated that incriminating evidence cannot be apparent as contraband, which means they do not allow it as evidence at trial.
Four cases involving the seizure of car keys illustrate the difficulty of applying the plain touch exception to incriminating evidence. These cases, all involving drug offenses, feature an officer seizing car keys during a frisk of an offender. The keys then led to an arrest or a search of a car that produced actual contraband. In *Purnell v. State* (2002) the Delaware Supreme Court suppressed evidence seized in this manner. A police officer, who was acting on a tip concerning the trafficking of narcotics, conducted a frisk of an offender, and the offender informed the officer that he had arrived to the area by bus. The officer recalled that he had felt a pair of car keys, which seemed to defy the offender’s contention that he had travelled by bus, and the officer conducted another frisk and seized the keys. The officer used the key fob to locate the offender’s car, and a search of the car led to the discovery of drug contraband. The Delaware court suppressed the evidence by ruling that the keys were not immediately apparent as contraband. The court also ruled that second frisk was unconstitutional since it aimed to finding incriminating evidence and not a weapon. *Speight v. United States* (1996), a remarkably similar case in the D.C. Court of Appeals, also stated that incriminating evidence like car keys could not be seized under the *Dickerson* doctrine because they could not be immediately apparent as contraband.

Two cases did allow the seizure of car keys as incriminating evidence. In *McCracken v. State* (2012) the Maryland Court of Appeals allowed the seizure of a set of car keys that were found during a frisk. However, unlike the above cases, the crime involved in this case, “hacking” or the unregistered operation of a taxi, was directly related to the seized evidence. Car keys are items is carried in everyday life. It is arguable that their connection to a drug crime is relatively spurious, but “hacking” is a crime that involves the use of car keys, which makes the seizure of the incriminating evidence in this case more logical. The Eighth Circuit also allowed car keys to be seized as incriminating evidence, and their decision also contained an additional circumstance
that made the seizure of the keys logical. *United States v. Cowan* (2012) concerns the seizure of a set of car keys during a frisk where the officer was acting under a search warrant that targeted all the vehicles near a residence. The offender denied driving to the location, and the officer used the seized keys to locate the car. A search produced drug contraband. The Eight Circuit allowed the evidence primarily because of the search warrant, and this allowed them to bypass the tricky application of the immediately apparent rule.

A strict interpretation of the immediately apparent rule does equate to problems when analyzing the plain touch seizures of incriminating contraband, but the use of a totality of the circumstances approach may negate these problems and make judicial decisions easier. Both *McCracken* and *Cowan* feature a circumstance that justifies the seizure, and other courts feature a more robust type of analysis. In *State v. Collard* (1997) the Montana Supreme Court allowed the seizure of a set of ski goggles that led to an arrest and conviction for armed robbery. The officer who seized the goggles had stopped a suspicious individual shortly after a robbery had occurred. The officer knew that the individual who had robbed the store was wearing ski-goggles, and the traffic stop took place mere minutes from the location of the robbery. The court applied these circumstances with the officer’s testimony that he immediately recognized the identity of the goggles during the frisk, and the court ruled the evidence was admissible. *United States v. Busto-Torres* (2005) features similar logic. In this case the Eight Circuit allowed incriminating evidence. The court examined the knowledge of the officer, the location of the seizure, and the type of evidence before deciding to allow the incriminating evidence, in this case a large sum of money, at trial.

While the totality of the circumstances approach may make these decisions easier the courts are not set on this method of decision-making in cases involving incriminating evidence.
For example the Eighth Circuit primarily relied on the officer testimony to justify the seizure in *United States v. Cowan* (2012), but the First Circuit used this same method to suppress evidence in *United States v. Schiavo* (1994). The fact that different courts can reach different outcomes in similar cases illustrates the fact that the plain touch seizure of incriminating evidence raises problems. The totality of the circumstances approach may make these cases easier to handle, but the outcome of these cases is still uncertain (*United States v. Hale*, 2004). The allowance of the seizure of non-illegal items that are often carried by individuals in their day-to-day life is uncertain under *Dickerson*. *Terry* allows for the seizure of dangerous items and *Dickerson* allows for the seizure of contraband, but neither of these doctrines specifically allow for the seizure of incriminating evidence. However, it is logical that officers can seize evidence which they have probable cause to believe is associated with criminal activity. If we accept that “immediately apparent” is equated with “probable cause,” which is the common association within *Dickerson* related opinions, then the seizure incriminating evidence should be allowed, but a stricter interpretation of “immediately apparent” may preclude the plain touch seizures of incriminating evidence.

*Rigid containers*. The seizure of evidence in rigid containers also provides another troublesome evidentiary area within *Dickerson* jurisprudence. Several cases have dealt with this type of evidence, and most of these cases involve drug crimes. *State v. Rushing* (1996) provides an example of this type of seizure. In this case a police officer conducted a frisk and felt what he immediately recognized to be a “Life Savers” candy container. The officer, who had previous narcotics experience, knew that offenders often carried narcotics in these containers. The officer seized the evidence, the evidence was allowed at trial, and the offender was convicted. The Supreme Court of Missouri ultimately allowed the evidence at trial by citing the totality of the
circumstances, but the courts are ultimately divided on these types of seizures. The main problem is whether tactile analysis can reveal the illegal identity of contraband contained in a rigid container. A candy container or medicine bottle is not overtly illegal, but it is possible that the totality of the circumstances could point to the illegal evidence within these bottles. However, courts are divided on whether or to what degree courts to equate “immediately apparent” with “probable cause” in these cases.

When these seizures are justified they are most often justified through probable cause determinations utilizing the totality of the circumstances approach to decision-making. In the aforementioned Rushing (1996) the court cited the officer’s testimony and prior experience, the nature of the stop, and the location of the stop to justify the seizure. In United States v. Maldonado (1995) the Seventh Circuit allowed the seizure of container made of “duct tape” by examining similar factors. In another heavily cited case the Supreme Court of Michigan utilized the totality of the circumstances approach to allow the seizure of a medicine bottle containing crack cocaine (People v. Champion, 1996). The central concept in these and other cases is that while a pill bottle or other rigid container is not “immediately apparent” as contraband the totality of the circumstances can lead a reasonable officer to believe that these containers contain illegal contraband.

Courts that use a more strict interpretation of “immediately apparent” often suppress evidence found in a rigid container. In Commonwealth v. Stevenson (2000) the Pennsylvania Supreme Court stated that rigid containers could never be immediately apparent as contraband. The court stated that plain touch exceptions do not apply when an officer “merely feels and recognizes by touch an object that could be used to hold either legal or illegal substances, even when the officer has previously seen others use that object to carry or ingest drugs.”
Supreme Court of Alabama also displayed similar logic by stating that the incriminating nature of the contents of “a hard-shell, closed container…cannot be immediately apparent to the officer until he seizes it and opens it.” (Ex Parte Warren, 2000). Both of these cases cite the case of State v. Bridges (1997) where the Tennessee Supreme Court pointed out the difficulty of rectifying the immediately apparent standard and contraband contained in rigid containers, but the Tennessee court did state this type of evidence could be admitted at trial through a thorough evidentiary hearing.

The admissibility of rigid containers seized via the plain touch exception is primarily determined by a court’s interpretation of the immediately apparent standard. A probable cause analysis based on the totality of the circumstances approach positions the courts to admit this type of evidence at trial. An analysis of People v. Champion (1996) further illustrates this distinction. In this case two police officer witnessed a suspected drug transaction in an open air drug market in a high crime area. The officers approached one of the offenders, whom they promptly recognized as a prior arrestee, and they decided to frisk the offender. The officer felt what he immediately recognized to be a pill bottle, and the officer knew that these bottles were often used to store narcotics. The Michigan Supreme Court examined all the circumstances around the case: The offender tried to walk away when the police approached him, the offender was trying to hide something in his groin area, the officer conducting the frisk had twenty years of experience, and the antecedent circumstances seemed to point to drug activity. The court stated, “We cannot imagine that any reasonable person, given all of the above circumstances, could have concluded that Mr. Champion was carrying prescription medication, or any other legitimate item, in the pill bottle in his groin region.” The Champion court illustrates that a
totality of the circumstances approach will often lead to admissions of container-related evidence at trial.

**Conclusion.** The courts are divided on whether or not certain types of evidence can be immediately apparent. However, for the bulk of plain touch cases, which concern drug offenses, the courts do agree that the immediately apparent standard is workable, and the courts routinely agree that officers can seize drug contraband under the plain touch exception. While their prophesies of chaos manifest the critics of the *Dickerson* raised valid points when they questioned the workability of the immediately apparent standard. The courts realized this and drew upon the earlier decisions of *Texas v. Brown* (1983) and *Payton v. New York* (1980). They then substituted the functional concept of “probable cause” for the problematic “immediately apparent”. While some courts resist this interpretation it is the most common method for deciding cases, and the statistics show that a totality of the circumstances approach is workable and can justify the admission of any of the evidentiary types contained in this analysis.

**Focal Concern #2: Reliability of Touch**

The literature concerning the *Dickerson* decision often contained what Michigan Justice Mallet would later characterize as a “shrill insistence” that *Dickerson* was an illogical extension of the *Terry* doctrine (*People v. Champion*, 1996). One of the central critiques within this body of literature was the contention that touch or tactile analysis is not as reliable as sight or visual analysis. The critics used this logic to advise against the extension of the plain view doctrine into the *Terry* doctrine. Since touch is not as reliable as sight the critics felt that plain view could never become plain touch. *Focal Concern #2* analyzes these critiques within the state supreme courts. The federal circuit courts are bound by the decision of the United States Supreme Court,
but the state supreme courts could theoretically decline to allow the plain touch seizure into their states jurisprudence by finding that touch is not as reliable sight.

**Dissenting opinions.** No majority opinions featured within this analysis felt that touch was by nature more unreliable than sight. However, two dissents did feature admonitions about the reliability of touch as compared to sight. In *State v. Trine* (1996) Connecticut Supreme Court Justice Berdon wrote:

“Both the United States Supreme Court's analysis in *Dickerson* and the majority's analysis in this case hinge on a flawed premise: contraband may possess distinctive "tactile characteristics." It does not take much experience, either on the part of a police officer or a judge, to be able to determine accurately the existence of a gun, knife, billy club or other weapon by the sense of touch. This is because weapons possess distinctive physical characteristics that lend themselves to being identified by touch. Contraband, such as drugs, however, does not possess such distinguishing tactile characteristics.” (p. 247).

These fears really harkens back to the hostility to the totality of the *Terry* doctrine best expressed in Justice Scalia’s dissenting opinion in *Dickerson* (1993). Justice Berdon expressed fears that the unreliability of touch would equate to improper *Terry* searches directed towards poor minorities for the purpose of finding drug contraband (*State v. Trine*, 1996). Critics feared that *Dickerson* would allow officers to seize evidence based off the unreliable sense of touch and then allow officers to justify these seizures afterwards. The other dissenting opinion summarized this fear nicely. Illinois Supreme Court Justice Heiple wrote:

“Realistically, no matter how absurd or unsupportable such a contention may be, a defendant will not be able to successfully challenge it. The "plain touch" doctrine
will encourage officers to investigate any lump or bulge in a person's clothing or pockets that arouses their curiosity during the course of a patdown search. If the item turns out to be contraband, then its seizure can be retrospectively justified. If it turns out to be something else, then there is no case and the matter ends there. In the interim, a citizen is subject to an unwarranted intrusion into his personal privacy far beyond the intrusion contemplated by the weapons patdown search.” (People v. Mitchell, 1995, p. 1025).

However, the other courts handily reject this idea. For example the majority opinion in State v. Trine (1996) stated that courts routinely accept that officers can tactiley discover weapons. The Connecticut Supreme Court then stated, “Contraband may well possess tactile characteristics that, to a trained and experienced police officer, are as discernable and distinctive as a familiar sight, odor, taste or sound.” Likewise in Commonwealth v. Zahir (2000) the Pennsylvania Supreme Court stated that the arguments for the reliability of sight far overcome the arguments against the plain touch exception. These two opinions as well as the general direction of Dickerson jurisprudence contend that touch is reliable, and most courts recommend a probable cause determination to assess whether an officer could have recognized the identity of the contraband during the frisk. Further, the courts routinely agree with Harvey (1995) and hold that a rejection of the reliability of touch would create an unworkable hierarchy of senses.

Focal Concern #3: Pretextual Stops

The literature surrounding Dickerson routinely feared that officers would use “pretextual” Terry stops to seize contraband under the plain touch exception. The critics use of the term “pretextual” may be a confusing misnomer as the United States Supreme Court allowed the use of justified pretextual stops in Whren v. United States (1996). The critics main concern is that
officers will use unjustified *Terry* stops that fall outside of the bounds of accepted procedure to institute the seizure of plain touch evidence. The use of unjustified *Terry* stops to seize drug contraband is a legitimate concern, and contrary to the critics’ fears the courts are sensitive to this abusive police practice. Several courts routinely mention these fears, and they have instituted procedural restraints to curb unjustified, overly intrusive police practices.

**Results.** Ten (9.3%) of the cases within this analysis feature a suppression of the evidence due to an unjustified *Terry* stop. These rejections illustrate that the courts are sensitive to this type of police activity, and these decisions help establish the sequential process in *Dickerson* decision-making. An analysis of the *Terry* stop provides the first step within the appellate review of a plain touch seizure. The primacy of the *Terry* analysis in the sequence of decision-making reflects the language of the *Dickerson* decision itself. In both the plain view and plain touch exceptions the officer must be legally present in the situation that leads to the seizure. Therefore, the courts must make this initial determination before analyzing any other feature of the plain touch seizure. The analysis of the *Terry* stop and frisk features several components, and an examination of the cases mentioned above illustrate these components.

First, the courts determine whether the *Terry* stop and frisk were motivated upon reasonable suspicion and a fear that weapons might be present. In *Frazier v. Commonwealth* (2013) the Supreme Court of Kentucky examined a case where two officers performed a frisk on an offender. The officers articulated no reasons to justify the frisk, and the court struck down the seizure due to the illegitimate nature of the frisk. The court cited the officer’s testimony as demonstrating no articulable suspicion that the offender might have a weapon. Instead, the officer initiated the frisk because he had a strong suspicion that the offender “had something to hide.” The language in this opinion best characterizes the initial fear of the critics of *Dickerson.*
The officer initiated a frisk only to find contraband, and the Kentucky court was ready to strike down the seizure due to this improper practice. *Frazier* concerns the legality of the initial stop or frisk, but courts are also sensitive to the duration of the stop and frisk.

In *United States v. Butler* (2000) the Sixth Circuit analyzed a case where officers extended a *Terry* stop because they suspected criminal activity was occurring. The officers initiated a traffic stop related to an investigation concerning the trafficking of cocaine, and the officers frisked the individuals within the car. The officers found nothing during the initial frisk, but they had a strong suspicion that something criminal was afoot. The officers then took the individuals down to the police station and after an odd chain of events eventually seized a large amount of cocaine, which was found hidden in a “Yahtzee” game that was carried by one of the offenders. The state tried to justify this under the plain touch exception, and the Sixth Circuit stated that the plain touch exception applies to the minimal intrusion of a normal *Terry* stop and frisk. An officer cannot use the suspicion generated from an unfruitful frisk to detain an individual until evidence is found and then justify the seizure under the *Dickerson* doctrine. The logic contained in this decision states that a frisk cannot ramble on until the officers reach a favorable conclusion.

A frisk must be brief, non-intrusive, and end when the officer is satisfied that the offender does not have a weapon. Further, the officers cannot initiate another frisk to seize evidence. *(Purnell v. Delaware, 2002)*. In *Ex Parte James* (2000) the Alabama Supreme Court analyzed a case where an officer initiated a frisk and found no weapons. The offender then reached into his pocket, which the officer had already determined did not contain a weapon, and the officer initiated another search to seize the contents of the pocket. The Alabama court invalidated this search by holding that a *Terry* frisk ends after an officer determines that an individual has no
weapons. Any other frisk after this point is unjustified since Terry only allows frisks for weapons. These opinions show that officers cannot initiate frisks for any contraband, and the courts are sensitive to unjustified frisks. The courts require officers to search for weapons, and any questionable frisks may be struck down as unconstitutional.

**Focal Concern #4: Officer Testimony**

The literature surrounding Dickerson prophesized that appellate courts and trial judges would over-rely on officer testimony to analyze plain touch cases. The critics felt that the courts would primarily utilize officer testimony to decide whether or not to allow evidence at trial, and they feared that officers would soon learn the magic words of “immediately apparent,” which would result in automatic decisions in favor of the officer. The statistical analysis connected to this focal concern determined the number of cases that used officer testimony. The analyses revealed that a great majority of the cases utilized this type of evidence. However, an examination of the language of the opinions establishes that the courts may utilize this evidence but they do not over-rely on officer testimony.

**Results.** The statistics reveal that the courts analyzed officer testimony in 88% of the cases. The federal were slightly less likely (80%) to use officer testimony as compared to the state courts (93.7%). A cursory examination of these numbers seems to point to an over-reliance on officer testimony, but the sequential decision-making contained in the opinions reveals otherwise. As mentioned above the first step in plain touch decision-making is an analysis of the initial Terry stop and following frisk. Following this initial determination the courts then analyze the testimony the officer. While the courts place officer testimony within the analysis of the totality of the circumstances officer testimony is the first circumstance examined. A failure of the officer to say the correct things or poor officer testimony often invalidates a seizure before any
other evidence is examined. The discussion concerning *Focal Concern #5* will feature a more in-depth discussion of the placement of officer testimony within plain touch decision-making. The current discussion now analyzes the court’s language concerning officer testimony and the role they assign themselves when analyzing the words of the police.

The District Columbia Court of Appeals stated: “We recognize that this plain-feel doctrine can be abused. Trial courts must be careful to assure that a police officer's "immediately apparent" recognition of a concealed drug package, for example, is not too casually claimed or accepted. “ (*Dickerson v. United States*, 1996, p. 513). This quote illustrates a commonality within the *Dickerson* related cases. The fear of “magic words” is legitimate, but the courts have set themselves up as a bulwark against this potential abuse by the police. In the above case the D.C. court recommended utilizing a totality of the circumstances approach to ensure that these abusive practices do not manifest in the court system.

The Supreme Court of Kansas also stated, “We are not unaware that experienced, knowledgeable law enforcement officers know the "magic words" to be related when their searches and seizures are challenged…We will not abandon our required standard of review and focus on evidence...Findings on these issues remain the function of the trial court.” (*State v Wonders*, 1998, p. 601). This excerpt by the Kansas court shows that courts are sensitive to abuse of “magic words”. It also illustrates that the trial court, which is the primary investigator of fact within the court system, makes the initial determination about the validity of officer testimony. The appellate courts in this study were very likely to affirm the factual findings of the trial courts, but they also established clear precedents and directions for the trial courts to facilitate a better review of officer testimony. The courts recommended a probable cause determination that analyzed the officer testimony as one factor within the totality of the circumstances. Further, the
courts also recommended a hesitant approach when trying to determine the validity of the officer’s words.

The above cases mention fears about “magic words” and “abuses” by the police (*Dickerson v. United States*, 1996; *State v. Wonders*, 1998). The appellate courts recognize that they may have draw different factual inferences that those of the trial court, but they give trial courts the duty of analyzing officer testimony to uphold the constitutional rights of the accused (*United States v. Yamba*, 2007). The Maryland Court of Appeals went as far to classify the testifying officer as expert witness, and the court specifically legitimized the trial judge’s ability to discount an officer’s testimony due to a perceived lack of credibility (*Jones v. State*, 1996). These cases show that the appellate courts will often accept the factual inferences of the trial judge, but the appellate judges instruct the trial courts to approach officer testimony with a cautious and analytical eye.

The appellate courts accept that the trial court will make the factual determination concerning the testimony of the seizing officer. However, the appellate courts do overturn cases based upon faulty officer testimony, and the courts often make these determinations due to deficiencies with the officer testimony (*State v. Boyer*, 2007; *State v. Heath*, 2000). These reversals illustrate an interesting trend in *Dickerson* decision-making. The appellate courts specifically mention their deference to the trial court’s judgment concerning officer testimony, but the court will rule on the legal technicalities of officer testimony. The courts expect certain words from the searching officer. For example in *State v. Boyer* (2007) the Louisiana Supreme Court relied on officer testimony to suppress evidence seized under the plain touch exception. In this case the officer testified that he felt something “abnormal,” and the court stated that “abnormal” is not “immediately apparent.” Therefore, they suppressed the evidence at trial.
Boy er illustrates that courts expect officers to testify of “immediate recognition,” and this
may mean that the appellate courts are essentially directing the officer to use the “magic words”
the critics of Dickerson feared would lead to a degradation of civil rights. The appellate courts’
formulaic use of these keywords establishes a certain expectation of police officers, and the
precedent of these decisions instructs trial courts to make correct and legally sound
determinations concerning the testimony of the searching officer. The appellate courts expect
police officers to utter certain phrases during their testimony, and by suppressing evidence due to
a lack of these words the courts are establishing guidelines for both the trial judge and the police
officer. Further, the courts ensure that these magic words are not the sole determiner of plain
touch decision-making by recommending a totality of the circumstances approach to decision-
making, which ensures that neither trial courts or police officers mainly rely on professions of
“immediate appearance” or other legalistic terminology.

Focal Concern #5: Method of Decision

The critics of Dickerson decision feared that the plain touch exception would result in
procedural chaos. The critics believed that the Dickerson Court instituted a conservative
exception to the warrant requirement that featured no direction for judicial decision-making.
They believed the plain touch exception would result in a confusing body of jurisprudence with a
multitude of decision-making methodologies. If these prophecies are true then the opinions in
this study should show no clear trend in judicial decision-making. The statistical analysis
pertaining to this focal concern features three categories of decision-making. The category of
“none” correlates to opinions where the court did not bother to define their process of decision.
The category of “officer testimony” associates with opinions where the court relied primarily on
officer testimony to determine the admissibility of evidence. Finally, the category of “totality of
the circumstances” correlates to a determination of probable cause where the courts analyzed several of the circumstance surrounding the seizure. If any one of these methods presents a clear majority then the fears of procedural chaos were unfounded.

**Results.** The totality of the circumstances approach was the most common method of decision-making in this study. In cases with complete decision-making the totality of the circumstances approach was twice as likely to be used. However, the courts did use other methods to decide these cases. In order to truly understand the prevalence of the totality of the circumstances approach each of these methods of decision must be examined. The examination of these methods further reveals the sequential method utilized by courts to analyze plain touch cases, and an understanding of this sequential process further cements the primacy of the probable cause interpretation of the immediately apparent standard.

**None.** The category of “none” featured in only 13.9% of the cases in this study. These cases feature a myriad of different situations and are scattered throughout the jurisdictions. The lack of a specified method in this category does seem to raise the specter of confusion and chaos, which critics predicted would result from the lack of direction in the *Dickerson* decision. For example in *United States v. Brooks* (1993) the Eighth Circuit suppressed evidence by stating that the record did not support a seizure under the plain touch exception, but the court did not elucidate why or how they reached this decision. If the appellate court serves as a definer and clarifier of law *Brooks* represents a failure in appellate decision-making. In *State v. Lemert* (2014) the Supreme Court of Minnesota allowed plain touch evidence at trial. The court did not cite a method of decision-making, but they did confirm the applicability of *Dickerson* to their case. Also, in *State v. Sleep* (1999) the South Dakota Supreme Court curiously combined the doctrine of plain view and plain touch by allowing officers to order offenders to empty their
pockets based upon the suspicion of a weapon. The court allowed this sort of seizure under Dickerson without explaining their logic. These opinions feature a lack of or unspecified decision-making. Cases like these are antithetical to the current trend in Dickerson decision-making that utilizes a particularized probable cause determination based on the totality of the circumstances, but not every case in this category features such a blatant lack of explanation.

Some “none” cases feature unique circumstances that the courts interpreted as being outside the bounds of Dickerson. For example the Sixth Circuit Court of Appeals suppressed the admission of incriminating evidence at trial. The court felt that this evidence, a pager, could not be seized under the plain touch exception, and they summarily excluded the evidence without a full explanation of their decision-making. (United States v. Garcia, 2007). Jones v. Commonwealth (2010) features a similar situation where the Supreme Court of Virginia suppressed incriminating evidence because they felt it fell outside the bounds of Dickerson. A court may also suppress evidence due to the unusual nature of a seizure. For example the seizure in United States v. Butler (2000) was so clearly erroneous that the Sixth Circuit suppressed the evidence without delving into the specifics of their decision-making. These cases show that courts sometimes decide plain touch cases without a full explanation of their decision-making because they feel the case is outside the boundaries of Dickerson or contains a clear error. However, cases that feature no explanation of decision-making do not help lower courts make determinations about plain touch seizures, but these cases represent only a small minority of the sample in this study.

Officer Testimony. The statistics reveal that officer testimony was utilized as a method of decision in n=38 (35.2%) of the cases in this study. The size of this figure would seemingly point to an over-reliance on officer testimony as a method of decision-making, but a fuller examination
of the statistics refutes this contention. A great portion of the n=38 cases decided in this manner were instances where poor officer testimony resulted in the suppression of evidence, and this further reveals the sequential process of plain touch decision-making. In the discussions relating to Focal Concern #3 and Focal Concern #4 the data revealed that courts begin their examination of plain touch seizures by affirming the legality of the initial Terry stop and frisk. Following this the courts then examine the testimony of the officer to ensure that officer professes certain legal necessities relating to immediate recognition. If this examination of officer testimony produces deficiencies the court is likely to suppress the evidence without a full consideration of the circumstances surrounding the plain touch seizure. Therefore, a suppression of evidence due to officer testimony represents an incomplete decision that was aborted before a full consideration of the totality of the circumstances.

Decisions featuring a suppression of evidence due to officer testimony are incomplete decisions, and if controls are instituted for these decisions the statistics reveal that officer testimony was only utilized in 18.6% of the cases featuring full decision-making, which means that the reliance on officer testimony as a method of decision-making was significantly underutilized as compared to the totality of the circumstances approach (64%). However, these remaining cases (n=16) represent instances where the courts did rely solely on officer testimony to allow evidence at trial. So, courts do sometimes rely only on officer testimony to institute decisions, and this brings to mind the concept of “magic words.” An examination of the cases featuring officer testimony as a method of decision reveals certain trends within the appellate system. The cases that feature this method of decision and ended in the admission of evidence at trial reveal what courts consider “good” testimony, and an examination of the cases that resulted in a suppression of evidence reveals what courts consider “bad” testimony.
Good testimony vs. Bad testimony. The discussion concerning Focal Concern #4 demonstrated that the courts wish to see certain terminology in the officer testimony related to a plain touch seizure. The courts frequently mentioned a desire for a profession of immediate recognition or immediate appearance. In United States v. Proctor (1998) the First Circuit upheld the legality of a plain touch seizure by relying primarily on the contention the officer “immediately” recognized the identity of the contraband during a search. Similarly, in Commonwealth v. Hall (1999) the Supreme Court of Pennsylvania suppressed evidence from trial because the officer’s testimony featured no profession of immediate recognition. State v. Corpany (1993) features a similar case where the Colorado Supreme Court suppressed evidence at trial because the officer did not mention that the evidence was immediately apparent as contraband. These cases illustrate a general desire by appellate judges to see certain phrases within an officer’s testimony. If these phrases aren’t present then the courts may suppress the evidence.

Most courts also desire the officer to profess certainty of recognition, but this expectation is not universal throughout the case. The Supreme Court of Kentucky suppressed evidence at trial because the officer stated that he thought an item “might be” narcotics. (Commonwealth v. Crowder, 1994). Likewise the Louisiana Supreme Court suppressed evidence due to testimony where the officer used the phrase “could have been.” (State v. Boyer, 2007). However, some courts do leave room for error. In United State v. Rogers (1997) the Second Circuit Court of Appeals allowed evidence at trial when the officer stated that he was uncertain about the identity of the object during his testimony. The court held that the officer still had probable cause to seize the evidence even with his professed uncertainty about the objects identity. The Nebraska Supreme Court also allowed evidence at trial even though the officer was mistaken about the
identity of the object during the seizure (State v. Craven, 1997). The Rogers court utilized the concept of probable cause to justify the seizure, and the Craven court specifically mentioned the use of totality of the circumstances when explaining their logic.

These four cases feature different outcomes with similar testimony. The courts’ conceptualization of the immediately apparent standard explains these differences. In Craven and Rogers the courts utilized a probable cause determination where the testimony was only one factor within the totality of the circumstances. However, in Crowder and Boyer the courts utilized a more rigorous application of the immediately apparent standard where they suppressed the evidence by punishing the officer for “bad” testimony. A probable cause determination is the most common method used to analyze Dickerson cases, and an analysis of the totality of the circumstances does not require the officer to be certain of the identity of the contraband found during a plain touch seizure (United States v. Rogers, 1997). By examining the totality of the circumstances courts do not need to rely on officer testimony solely to determine the admissibility of evidence in plain touch seizures, and good testimony, which results in the admission of evidence at trial, is testimony that fits well into these probable cause determinations.

Testimony that results in the admission of evidence at trial helps to establish a totality of the circumstances that leads towards a pro-police decision. This type of testimony features several factors, but several commonalities manifest during a review of the cases in this study. First, courts usually wish to see a profession of “immediate recognition” by the searching officer (United States v. Proctor, 1998). A profession of immediate recognition is a baseline for a probable cause determination, and if present the court will continue their analysis of officer testimony. After this initial analysis the courts scan officer testimony for facts that are
objectively verifiable. In *United States v. Campbell* (2008) the searching officer testified that he recognized the identity of the contraband due to his prior experience and training, and officer experience and training represents an objective fact that can be validated by the trial court (*State v. Trine*, 1996). An appellate court can situate this portion of officer testimony within a greater analysis of the totality of the circumstances. The courts also desire that officer testimony contain an in-depth summary of the events leading up to the search. In *State v. Custer* (2001) the Michigan Supreme Court affirmed the legality of a seizure of incriminating evidence mainly because the officer created an in-depth testimony concerning the events that predicated the seizure. The in-depth testimony, which concerned some cartoonish antics by the offender’s companion and some very suspicious behavior, helped the Michigan court analyze the totality of the circumstances surrounding the seizure. Also, in *United States v. Raymond* (1998) the Fourth Circuit upheld the seizure of evidence by validating the officer’s testimony with the “dashcam” footage gained from his patrol car.

These cases show that officer testimony is one component within a probable cause determination. “Good” testimony is testimony that can be checked against objective facts and that helps to establish the totality of the circumstances surrounding a case. However, there were a large number of suppressions based solely on officer testimony, and it may be best to conceptualize officer testimony as the “baseline” within a probable cause examination. Courts often review officer testimony before an examination of the totality of the circumstances, and many courts have suppressed evidence due to what they perceive to be deficiencies within testimony. The “baseline” concept is not a global phenomenon within all these cases, and some courts do allow for uncertainty in officer testimony to be counteracted by a review of the totality of the circumstances. Still, searching officers would be advised to say the “magic words” related
to immediate recognition so the courts are more likely to conduct a full review of the circumstances surrounding the seizure.

**Totality of the Circumstances.** In cases featuring full decision-making the totality of the circumstances approach is the preferred method of the courts. The totality of the circumstances approach is also the most logical method because precedent equates “immediately apparent” with probable cause (*Texas v. Brown*, 1983). The courts routinely examine the totality of the circumstances, and more often than not this approach leads to the admission of evidence at trial. 81.8% of the cases utilizing this approach resulted in the admission of evidence at trial. Most likely the appellate courts’ deference to the judgment of the trial court explains a large portion of this high rate of admission. The totality of the circumstances method is a factual analysis, the trial court occupies the position of fact finder, and the appellate court defers to the factual judgments of the trial court. However, the appellate courts do review the trial courts fact finding for clear error and to ensure that all the legal necessities are present. This section presents the circumstances most commonly examined by the courts as they make their probable cause determinations.

**Officer Experience.** Appellate courts examine officer testimony as one circumstance within a greater determination of probable cause. The appellate courts establish the precedent of checking testimony against the objective facts of the situation. One of the most common objective facts or circumstances examined by the appellate courts and the trial courts is the experience of the officer. In *State v. Trine* (1996) the Connecticut Supreme Court analyzed a case involving the plain touch seizure of crack cocaine. To verify the officer’s testimony the court examined his experience, which included fifteen years of police experience with three years on assignment in a narcotics task force. The court decided that this experience helped
validate his testimony and established probable cause to seize the evidence. In *People v. Champion* (1996) the Michigan Supreme Court allowed the seizure of a rigid container containing drug contraband by citing the officer’s extensive law enforcement experience. In a similar case to *Champion* the Tennessee Supreme Court suppressed evidence at trial because they found that there was no evidentiary record of the officer’s experience, which they felt ruled out a pro-police determination of probable cause (*State v. Bridges*, 1997).

These cases illustrate that an officer’s experience and training help validate their testimony. Prior experience as a police officer helps establish probable cause to seize the evidence, and certain types of experience augment general law enforcement experience. As mentioned in *Trine* (1996) experience in a drug related taskforce helps validate the seizure of drug related evidence. *United States v. Walker* (1999) features similar logic. Also, in *Champion* (1996) the court upheld the seizure of evidence because the officer had previously seized the same type of evidence. *State v. Rushing* (1996) features a similar determination. Any police experience helps establish probable cause, but directly relatable experience sway the courts towards validating the officer’s testimony and admitting the evidence at trial. These precedents undoubtedly influence the fact finding determinations of trial courts, help establish methods to validate officer testimony, and help establish a functional method for examining the totality of the circumstances.

*Location of seizure.* The location of a search or seizure enters into an appellate court’s analysis of a plain touch seizure at several points. A frequent location that features both in probable cause and reasonable suspicion determinations is the presence of an offender in a high crime area. The Supreme Court stated that the presence of a person in a high crime area does not automatically create reasonable suspicion or probable cause (*Brown v. Texas*, 1979), but the
Court has allowed the presence of an individual in a high crime area to enter into an analysis of a totality of the circumstances (Adams v. Williams, 1972; Illinois v. Wardlow, 2000). The appellate courts used this logic to analyze Dickerson seizures. First, the presence of the offender in a high crime area factors into determinations concerning the legality of the initial stop. The presence of an offender in a high crime area then enters into the decisions concerning the seizure of the evidence. In State v. Taylor (2013) the Supreme Court of South Carolina analyzed a case where a police officer seized drug evidence from an offender. The evidence, which was crack cocaine concealed in a tennis ball, was obtained during a seizure that took place in front of a house known to be a location involved in the distribution of narcotics. The court cited this fact within their examination of the totality of the circumstances, and the presence of the offender in a high crime area was a significant reason that justified their finding of reasonable suspicion to stop and frisk and probable cause to seize the evidence. Other cases also feature this sort of decision-making (Griffin v. State, 2006; People v. Champion, 1996; Weaver v. Shadoan, 2003).

The courts also analyze the location of the seizure in other ways. The presence of the offender near the scene of a crime may justify a plain touch seizure. In State v. Collard (1997) the Montana Supreme Court allowed the seizure of incriminating evidence because the offender was found near the scene of a robbery. In State v. McCracken (2012) and State v. Custer (2001) the location of the offender near a reported crime also helped justify a seizure. Plain touch seizures executed during the execution of search warrants also seem to equate to admissions of evidence at trial (State v. Andre W., 1999; United States v. Cowan, 2012). Courts may also examine the historical significance of a location and what kind of people are near the scene of the seizure. In United States v. Hernandez-Mendez (2010) the Fourth Circuit allowed evidence at trial because the seizure took place near the location of a previous stabbing. Also, the court cited
the presence of suspected gang members as justifying the seizure of the evidence. These cases illustrate that an appellate court examines the location of the seizure in several ways, and these examinations factor directly into an analysis of the totality of the circumstances.

*United States v. Hernandez-Mendez* (2010) illustrates this type of analysis. The case involves an investigation into a previous stabbing. The officers also knew this area to be rife with gang activity. While conducting surveillance on the scene the officers spotted a group of males that they knew to be involved in a local gang. A lone female associated with the men, and the officer eventually stopped the female and initiated a plain touch seizure that discovered a weapon. The location of the seizure, a high crime area with known gang activity, entered into the totality of the circumstances analysis used by the court. The court also took note of the fact the evidence was seized near the location of gang members. In this analysis the location alone would not justify the seizure, but the Fourth Circuit also examined several other factors, which then established probable cause.

*Bodily location of evidence.* The courts also examine the bodily location of evidence when determining the legality of plain touch seizures. This specific circumstance refers to the placement of a seized object on the offender’s body. Theoretically, a carefully concealed object may point to a probability of illegality. The courts have cited several bodily locations that would lead a reasonable person or officer to believe that a concealed item was contraband. In *United States v. Ashley* (1994) an officer frisked an offender and felt what he immediately suspected to be drug contraband concealed in the waistband of the offender’s pants. The officer then noticed the offender was wearing two pairs of pants to further conceal the item. A rigorous evidentiary examination by the trial court revealed the officer had probable cause to seize the evidence, and the D.C. Circuit Court agreed. The court took into consideration the concealed nature of the
evidence, which the officer had seen before in his prior experience, as equating to probable presence of contraband.

In *People v. Champion* (1996) the Michigan Supreme Court allowed the seizure of a pill bottle full of narcotics. The officer who conducted the frisk found the bottle hidden in the groin region of the offender, and the Michigan court stated that the concealed location of this otherwise legal object helped establish probable cause. The court also found the location of this evidence to be especially incriminating because the offender was wearing clothing with several pockets, and the court reasoned that a legal pill bottle would have been most likely concealed in a pocket and not in the strange location that it was found. These cases contain commonalities. In each case the court took into consideration the location of the contraband items when considering the totality of the circumstances. As *Champion* (1996) illustrates these odd locations are not sufficient in themselves to supply probable cause, but when considered in the totality of the circumstances the location of the object on the body of the offender does help establish probable cause to seize plain touch evidence.

*Characteristics and actions of the offender.* Appellate courts examine the characteristics and the actions of the offender when making probable cause determinations. The courts have examined several characteristics of the offender when making these determinations. Prior criminal history, when known by the officer, often factors into probable cause determinations. In *United States v. Davis* (2006) the offender’s prior arrest for drug charges was used as a circumstance in the probable cause determination concerning the plain touch seizure of narcotics. Other courts have also used an officer’s knowledge of an offender’s criminal history to establish probable cause to justify a plain touch seizure (*People v. Champion*, 1996; *State v. Guillory*, 2009). The consideration of the criminal history of the offender, which is either overtly known to
the officer or likely known to the officer, helps establish the logical inference that certain items would most probably be contraband. Taken in consideration with other circumstances the knowledge that offender engages in certain criminal activities would point an officer to believe that a felt item was likely to be associated with that illegal activity.

In addition to officer characteristics the actions of the offender also factor into probable cause determinations. Specifically, the courts routinely agree that suspicious movements, which also influence determinations about the legality of the Terry stop and frisk, help create probable cause for seizure. In United States v. Johnson (2000) the searching officer witnessed the offender quickly shove something into his pants. The frisk then led to a plain touch seizure of drug-related contraband in the area that offender had been reaching. In United States v. Adell (1994) the offender reached suddenly for his front pocket as the officers began the frisking process. The officers eventually discovered contraband in this front pocket. Similarly, in Ball v. United States (2002) an offender first tried to cover his groin area with a newspaper and then began making movements as though he was trying to hide something in that area. The officer found contraband in the area of the movements. While this sort of activity does not guarantee a finding of probable cause (Ex Parte James, 2000; State v. Smith, 2010), the appellate courts do use these types of suspicious, furtive movements as a circumstance that can help establish probable cause. If an offender moves his hands towards a certain bodily area and the officer then tactilely finds a suspicious object in that area the courts hold that it stands to reason that the officer would have probable cause to seize that evidence.

The courts also use other types of suspicious behavior to establish probable cause. In United States v. Salvant (1997) an officer witnessed a suspected drug transaction. During the frisk the officer felt something that corresponded to the item, a bag of narcotics, which he had
seen transferred during the drug transaction. In *United States v. Johnson* (2000) officers also witnessed what they thought to be a drug transaction, and this observation led to the plain touch seizure of drug related contraband. In *State v. Rushing* (1996) a police officer was working off reliable information about suspected drug activity, and he seized drug related contraband. The courts held that the witnessed or suspected criminal activity in these situations helped build probable cause to seize evidence because the evidence directly related to the witnessed activity. The courts found that it was logical for an officer to suspect a felt object to be contraband when he had witnessed previous drug activity. In these scenarios the offender is the perpetrator of the suspicious actions, but sometimes the actions of an offender’s compatriots can help form probable cause.

The actions of an offender’s associates, who are present at the scene, can help form probable cause. In *People v. Custer* (2001) an officer was arresting an offender for driving under the influence of alcohol. The offender then yelled to his associate, “Don’t tell them an f&#$in’ thing.” The officers then frisked the associate and found incriminating evidence. The Supreme Court of Michigan held that the driver’s actions helped create probable cause for the seizure of the evidence. In *Mosley v. State* (2000) two undercover officers bought narcotics from an individual who was associating with three other people. A short time later the officers frisked the three associates and seized narcotics from one of them via the plain touch exception. The Supreme Court of Delaware held that the association of the offender with the known narcotics seller helped create probable cause to seize the evidence, which was suspected to be narcotics. These cases show instances where courts analyzed the actions of the associates of an offender as a circumstance that helped create probable cause.
The actions of the offender, the actions of the offender’s associates, and the characteristics of the offender often do not create probable cause alone, but these items do establish a particular circumstance that can help create probable cause. These sorts of circumstances are especially powerful if they have a logical connection to the seized evidence. If an officer witnesses suspected drug activity and then seizes drug evidence the courts are likely to view the activity as establishing probable cause. The logic is clear. Witnessed drug activity increases the chance of drug contraband, and the seizing officer is justified in using this logic when forming the probable cause necessary to seize an item.

Characteristics of evidence. As mentioned in the discussion relating to Focal Concern #1 the courts routinely agree that drug contraband can be recognized through tactile analysis. Other evidentiary characteristics also enter into a totality of the circumstances analysis, and the primary role of probable cause determination is to corroborate an officer’s testimony with the physical characteristics of a piece of evidence. For example in People v. Champion (1996) the seizure of specific piece of evidence was allowed because of the total circumstances. The evidence, a pill bottle of cocaine, was allowed in because the officer’s testimony, the experience of the officer, and the specifics of the search all established probable cause to seize this particular type of evidence, which was not inherently illegal. Therefore, the specific characteristics of evidence enter into probable cause determinations in a summative role.

The probable cause determination seeks to find if a particular type of evidence was constitutionally seized. The courts seek to find if the illegal nature of the seized item could be recognized through plain touch, and the physical characteristics of the evidence have a primacy in the analysis. In United States v. McGlown (2005) the Sixth Circuit analyzed whether or not an officer could seize powder cocaine through plain touch. The court analyzed the specific nature of
this physical evidence and answered in the affirmative. In *United States v. Gibson* (1994) the Circuit Court for the District of Colombia stated that the nature of the seized physical evidence precluded probable cause. The court held that the officer could not recognize the evidence, which was a hard, angular object known as a “crack cookie,” through touch. The court cited the nature of the “crack cookie” as existing outside the knowledge of the officer and verified this assertion through his testimony. These types of analyses ask: “Do the totality of the circumstances establish probable cause to seize evidence with these particular physical characteristics?” If the other circumstances coincide with the nature of the evidence then probable cause is established.

**Sequential decision-making.** A totality of the circumstances approach is the most frequently used method of decision-making in plain touch cases. The other categories of decision-making feature into unusual cases or represent aborted decisions where evidence is suppressed before a full probable cause determination is instituted. The analysis of these methods demonstrates that the courts follow a sequential process of decision-making. First, the court establishes the legality of the initial Terry stop and frisk. Second, the court examines officer testimony, which serves a baseline for probable cause determinations, to ensure that certain key phrases are present. Third, the court then initiates a probable cause determination based upon the totality of the circumstances to determine if a specific officer in a specific situation could seize a specific type of evidence. If the court answers in the affirmative, which is often a deferral to the trial court’s evidentiary fact finding, then evidence is admitted at trial. The sequential approach to decision-making is normative, and this means that the *Dickerson* decision did not result in procedural chaos as the critics feared.
Summary of the Focal Concerns

The results show that Dickerson instituted a criminal justice procedure that functions smoothly and efficiently. In contrast to the fears of the critics, who predicted the plain touch exception would result in procedural chaos and injustice, the appellate courts have instituted precedents that direct trial courts to assess the legality of a seizure through a probable cause determination. Through an examination of the totality of the circumstances the courts instruct trial judges to scrutinize officer testimony, check it against the facts, and ultimately decide if the officer had probable cause to seize a particular type of evidence. The sequential approach to Dickerson decision-making deserves greater analysis. The focal concerns are abstractions, and the nature of abstract concepts sometimes obfuscates the whole. I now present a summary, which I hope will be accessible to either the practitioner or time-crunched academic, of the sequential decision-making used by the courts to determine the admissibility of plain touch evidence.

Sequential Decision-Making

The totality of the circumstances approach to decision-making is the most commonly used method to decide the admissibility of plain touch evidence at trial. The courts use this approach because they doctrinally connect the term “immediately apparent” with the more functional terminology of “probable cause”. The adoption of a probable cause standard allows the courts to view the plain touch seizure as the culmination of a holistic set of events, and this allows the courts to utilize a precedential standard when deciding the legality of plain touch seizures. As is common in legal decision-making the courts have adopted a sequential style of analysis when interpreting these situations, and each sequence is directly related to the jurisprudence of Dickerson. First, the officer must be legally present in the situation where the seizure occurs. Second, the officer must be able to immediately recognize, or have probable
cause, to seize contraband that is felt during a frisk without manipulation of the illegal object. The courts’ sequential decision-making reflects these concerns as the courts first try to establish the legality of the initial Terry stop before moving onto the process of establishing probable cause for the seizure.

The First Step: The Terry Stop

The first step in the decision-making process is an analysis of the legality of the initial Terry stop and frisk. The courts draw on the large amount of precedent concerning Terry to ensure that both the stop and frisk were motivated by a reasonable and articulable suspicion. In the context of Dickerson the analysis of the stop and frisk serve to ensure that officers are not using unjustified Terry stops as a cover to find drug related contraband (People v. Champion, 1996). If the stop and frisk is found to be unreasonable appellate courts will often suppress the plain touch evidence without reviewing any of the other factors of the case. The plain touch exception relies on the legality of the initial frisk. Without this critical first step any further search is illegal.

Courts also examine other factors related to Terry besides the legality of the initial stop and frisk. The courts are sensitive to the duration of the Terry stop. A frisk may raise the suspicions of an officer, but the courts state that an officer cannot prolong a frisk in order to find contraband (United States v. Butler, 2000). Further, the courts also state that an officer cannot perform a second frisk (Hicks v. Delaware, 1993) or return to a body part to seize evidence after the initial frisk produced no evidence of weapons (Ex Parte James, 2000). These cases illustrate that a frisk is designed to find a weapon, and courts will sometimes allow the extended manipulation of a suspicious object to ensure that it is not a weapon. If this extended manipulation produces probable cause to seize other contraband then the plain touch exception
applies (United States v. Yamba, 2007). However, once the officer determines that the object is not a weapon then all tactile manipulation must cease. In summary a Terry determination in the context of plain touch seizures must satisfy three conditions. First, the initial stop must be reasonable at inception. Second, the frisk must be motivated by a reasonable suspicion that weapons are present. Finally, the frisk must not exceed the bounds of Terry. If these three factors are found to be satisfied the courts will cite the Terry stop as legal, and this will allow for a further examination of the plain touch seizure.

The Second Step: Analysis of Testimony

Officer testimony features into probable cause determinations of plain touch seizures. While testimony represents one of the many circumstances examined by the courts the examination of testimony has a primacy in a probable cause determination. Acting as a baseline, faulty officer testimony can result in the suppression of plain touch evidence before the courts address any other circumstances. After the examination of the Terry stop and frisk courts examine officer testimony to ensure that certain key words or phrases are present. Usually, the courts wish to see a profession of immediate recognition. Any uncertainty often leads to a suppression of plain touch evidence. Although some courts will allow for an admission of uncertainty (State v. Craven, 1997; United States v. Rogers, 1997), “good” officer testimony often features an explicit statement regarding the immediate recognition of contraband, which would seemingly justify the fear of an officer utilizing “magic words” to construct a post-hoc justification for a plain touch seizure.

However, courts do not regularly accept “magic words” as the sole justification for a plain touch seizure. Instead, officer testimony situates into a greater determination of probable cause. Officer testimony acts as an important piece of evidence, and an officer’s testimony can
make or break a plain touch seizure. A great portion of a totality of the circumstances analysis seeks to rectify the circumstances surrounding the seizure with the officer’s testimony. If other objectively verifiable circumstances exist and support the officer’s testimony the court is very likely to determine that probable cause exists in favor of the officer. This approach is built upon a large body of precedent concerning probable cause determinations, but once again it is worth stating that poor officer testimony that does not feature certain phrases will often cause the courts to abort this probable cause determination at its inception.

The Third Step: The Totality of the Circumstances

If an officer’s testimony passes muster the courts will then analyze the other circumstances surrounding the seizure. The totality of the circumstances method seeks to establish probable cause by ensuring that a particular officer, who recounts his logical process of seizure through testimony, could have seized a particular piece of contraband, which has certain unique physical characteristics. If the totality of the circumstances establishes probable cause the courts will allow the evidence at trial. The cases in this study feature a variety of circumstances used by the courts to establish probable cause, but a few general categories stand out. It is vital to understand any of these one circumstances alone does not establish probable cause. Most probable cause determinations rely upon an examination of three or more circumstances. While officer testimony does mention these circumstances the courts view these circumstances as facts that can be objectively verified through an evidentiary examination.

The circumstances most commonly analyzed by the court can be divided into six categories. First, the courts review officer testimony. Second, the courts examine the searching officer’s experience and training to determine if the officer had the knowledge necessary to recognize the illegal nature of the evidence. Third, the courts examine the nature of the evidence.
By examining the physical characteristics of the evidence the courts can determine if officers could have recognized the illegal nature of the evidence during a frisk. Fourth, the officers examine the actions and the characteristics of the offender or his compatriots. Suspicious actions, certain traits of appearance and behavior, and a known criminal history all help create probable cause. Fifth, the courts examine the physical location of the search. The courts look at where the stop and frisk occurred to determine if there were any historical or geographical characteristics that help establish probable cause. Sixth, the courts examine the bodily location of the evidence. If the evidence is found in an odd, concealed location on the body a finding of probable cause is more likely.

When viewed holistically these circumstance create probable cause to seize contraband during a frisk. Some people do carry medicine bottles with them, and there is nothing illegal about this everyday item. However, when an officer feels a medicine bottle hidden in the groin area of a known drug offender in a high-crime area and that officer has seen drugs concealed in these types of containers before then probable cause manifests, and the officer can seize this evidence (*People v. Champion*, 1996). None of these circumstances alone justify the seizure, but the totality of these circumstances justifies this seizure. Therefore, the plain touch exception like other probable cause determinations requires the officer to build a narrative, which can be objectively verified, to establish the legality of the search. If the officer can furnish this narrative and elucidate the logic that predicated the search then the courts will allow the evidence at trial.

**The Jurisprudence of Dickerson**

The sequential process of decision-making found in the appellate courts establishes several guidelines for the practitioner and the trial judge. First, the initial stop and frisk must be legal. Second, the officer’s testimony must contain a profession of immediate recognition. If
these two factors are met then a full probable cause examination begins. The probable cause
determination seeks to connect officer testimony with the characteristics of evidence by
examining the totality of the circumstances. Most of the cases in this study feature an affirmation
of the trial court, and most of the affirmations lead to the admission of evidence at trial.
Therefore, if an officer can convince a trial judge that he had probable cause to seize the
evidence then that decision will probably not be overturned. The Dickerson doctrine may indeed
favor law enforcement as most legal precedents do, but the courts have created procedural
requirements that an officer must follow before any plain touch evidence is allowed at trial.

Conclusion

A Typical Case

The doctrinal analysis and statistics gathered from the appellate cases in this study form a
profile of a common Dickerson case where evidence is admitted at trial. A police officer initiates
a Terry stop based upon a reasonable suspicion that criminal activity was afoot, and the citation
of numerous factors of suspicion increases the probability of the stop and seizure being viewed
as legal. The officer then conducts a legal frisk based upon an articulable suspicion that the
offender has a weapon. While completing the frisk the officer feels an object that he immediately
recognizes as contraband, which is statistically most likely to be drug contraband. The officer
does not tactilely manipulate the evidence once he is sure that it is not a weapon. The officer then
seizes the evidence and arrests the offender. Unhappy about the arrest the offender files a motion
to suppress, and the trial judge conducts a hearing based upon this motion. During the hearing
the police officer testifies the he “immediately recognized” the illegal character of the evidence
during the search, and the judge finds several circumstances that reconcile the officer’s testimony
with the nature of the evidence. After examining the totality of the circumstances the judge finds
that the officer had probable cause to seize the evidence, and the offender is convicted. Unhappy once again the offender starts the lengthy appeals process. The appellate court decides to take the case for review, and citing the precedent of deference to the fact finder the appellate court affirms the judgment of the trial court. Ultimately, the legality of the plain touch seizure is affirmed, and the evidence is allowed at trial.

**Dickerson Decision-Making**

The doctrinal analysis reveals that the appellate courts naturally defer to the judgment of the trial court and that most cases involving a full probable cause determination result in the admission of evidence at trial. However, the doctrinal analysis also shows that some courts are reluctant to adopt this probable cause standard, and some state supreme courts have displayed hostility towards the *Dickerson* doctrine. Therefore, the doctrinal analysis also illuminates questions within the *Dickerson* doctrine. The question then becomes: “Why do certain courts seem to institute decisions that result in the suppression of evidence?” The suppression of evidence often correlates to a rejection of the trial courts judgment, which is antithetical to the thrust of most *Dickerson* decisions. A regression analysis that controls for this legal variable may reveal what judicial characteristics result in either the suppression or admission of evidence. It is my hypothesis that the political affiliation of the appellate judges predicts appellate outcome. I now turn to these statistical analyses in *Chapter 7.*
CHAPTER 7
BINARY REGRESSION MODELING

The statistical results of the doctrinal analysis demonstrate several trends in the data. Appellate courts are very likely to defer to the trial court, and most courts use a totality of the circumstances approach to determine the existence of probable cause for plain touch seizures. If a trial court allows drug contraband at trial the appellate judges are very likely to affirm the trial court’s ruling. However, the cases do show some variation. An informed reading of the cases shows that courts sometimes decide in a manner that is resistant to the dominant trends in Dickerson jurisprudence. The appellate courts that decide in this manner construct a rigorous conceptualization of the immediately apparent standard, which is at odds with dominant, precedential trend towards correlating “immediately apparent” with “probable cause.” The hypothesis of this study surmises that political affiliation could be the cause of this type of decision-making, and the results of the binary regression analyses seemingly provide support for this hypothesis. This chapter now presents those results.

Method

Binary regression was used for the statistical analyses in this study. The outcome variable concerns the result of appellate case in terms of whether the evidence was allowed or suppressed at trial. Theoretically, a suppression is a “pro-rights,” Democratic, or left-leaning decision, and the allowance of evidence at trial is a “pro-police,” Republican, or right-leaning decision. The primary independent variable of this study is the political affiliation of the judges, and a variety of control variables also feature into these regression analyses. Originally, the dichotomized order of the outcome variable determined what judicial characteristics predicted an admission of evidence at trial, but most cases feature an admission of evidence at trial. Therefore, an analysis
that reverses the order of the outcome variable and seeks to predict which factors predict a suppression of evidence at trial may be more accurate in revealing causation. I now present both types of analyses.

**Descriptive Statistics**

*Table 7.1* presents the descriptive statistics for the variables of the logistic regressions. There are a total of $N=108$ appellate cases in this study. There are $n=45$ (41.7%) federal cases and $n=63$ (58.3%) state supreme court cases. The majority ($n=68$, 63%) of these cases resulted in a pro-police decision where evidence was allowed at trial. The panels of judges in these cases on average were $M=48.4\%$ Republican. Therefore, most cases featured a panel with a mixture of both Republican and Democratic judges, but the cases were slightly less likely to feature a Republican judge as the author of the opinion ($n=42$, 38.9%). These variables represent the dependent and independent variables of this study, and I now present the statistics related to the control variables.

The courts in this study were very likely to affirm the judgment of the trial court ($n=74$, 68.5%). The year 2000 was the most common year for plain touch decisions in the appellate court, and the majority of decisions were announced under the Rehnquist court ($n=75$, 69.4%). Most of the cases involved a drug offense ($n=100$, 92.6%), and most cases featured drug related evidence ($n=89$, 82.4%). Further, $n=62$ (57.4%) of cases featured “pure” drug evidence, which is drug evidence admitted to trial with full decision-making and no special evidentiary characteristics that predicate suppression. Due to the wide geographic dispersion of these cases *Table 7.1* presents a dichotomized variable related to jurisdictional placement. The variable represents cases decided in the “South,” which I operationalize as any state that was in the
Confederacy, and the statistics show that a minority of cases were decided in this location (n=33, 40.6%).

<table>
<thead>
<tr>
<th>Outcome Variable</th>
<th>Control Variable</th>
</tr>
</thead>
<tbody>
<tr>
<td>Evidence Allowed</td>
<td>Drug Offense</td>
</tr>
<tr>
<td>68 (63%)</td>
<td>100 (92.6%)</td>
</tr>
</tbody>
</table>

**Table 7.1**  
Descriptive Statistics (N=108)

<table>
<thead>
<tr>
<th>Predictor Variable</th>
<th>Control Variable</th>
</tr>
</thead>
<tbody>
<tr>
<td>Drug Evidence</td>
<td></td>
</tr>
<tr>
<td>89 (82.4%)</td>
<td></td>
</tr>
</tbody>
</table>

**Panel Composition:**  
- “Pure” Drug Evidence 62 (57.4%)
- DDD 4 (3.7%)
- DDR 12 (9.3%)
- RRD 23 (19.4%)
- RRR 6 (5.6%)

- Federal 45 (41.7%)
- Geographic: South 33 (40.6%)

<table>
<thead>
<tr>
<th>Percent Republican</th>
<th>Percent Female</th>
</tr>
</thead>
<tbody>
<tr>
<td>M=48.4%</td>
<td>M=21.69%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Republican Author</th>
<th>Percent Minority</th>
</tr>
</thead>
<tbody>
<tr>
<td>42 (38.9%)</td>
<td>M=10.40%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Control Variable</th>
<th>Minority Woman</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>17 (15.7%)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Affirm Lower Court</th>
<th>Prosecutor Experience</th>
</tr>
</thead>
<tbody>
<tr>
<td>25 (23.14%)</td>
<td>M=39.19%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Affirm Trial Court</th>
<th>Judicial Experience</th>
</tr>
</thead>
<tbody>
<tr>
<td>74 (68.5%)</td>
<td>M=63.69%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Year</th>
<th>Top Tier Law School</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mode=2000</td>
<td>M=45.26%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Supreme Court</th>
<th>Harvard or Yale</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rehnquist 75 (69.4%)</td>
<td>M=14.58%</td>
</tr>
<tr>
<td>Roberts 33 (30.6%)</td>
<td>Average Age</td>
</tr>
<tr>
<td></td>
<td>M=62.06 years</td>
</tr>
</tbody>
</table>

The characteristics of the judges are analyzed within the format of individual cases and feature percentages in terms of appellate panels. Panels were on average M=21.69% female and M=10.4% minority. Only n=17 (15.7%) of the cases in study featured a panel that contained at
least one judge that was both minority and female. Panels featured an average M=39.19% of judges with prior prosecutorial experience and M=63.69% of judges with prior judicial experience. Panels on average featured M=45.26% of judges who attended a top-tier law school and M=14.58% of judges who attended either Harvard or Yale. Finally, the average age of a panel of judges was M=62.06 years. The descriptive statistics demonstrate that an average appellate panel featured judges that were white, male, and in their sixties. Further, an average panel was about 50% Republican. Most panels featured some judges who attended a top-tier law school, but a panel was less likely to have a judge who attended Harvard or Yale.

<table>
<thead>
<tr>
<th>Table 7.2</th>
<th>Descriptive Statistics for Federal Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(n=45)</td>
</tr>
<tr>
<td><strong>Outcome Variable</strong></td>
<td><strong>Predictor Variable</strong></td>
</tr>
<tr>
<td>Evidence Allowed</td>
<td>Drug Offense</td>
</tr>
<tr>
<td><strong>Predictor Variable</strong></td>
<td>Drug Evidence</td>
</tr>
<tr>
<td>Panel Composition</td>
<td>“Pure Drug”</td>
</tr>
<tr>
<td>DDD</td>
<td>4 (8.9%)</td>
</tr>
<tr>
<td>DDR</td>
<td>12 (26.7%)</td>
</tr>
<tr>
<td>RRD</td>
<td>23 (51.1%)</td>
</tr>
<tr>
<td>RRR</td>
<td>6 (13.3%)</td>
</tr>
<tr>
<td>Geographic: South</td>
<td>Percent Female</td>
</tr>
<tr>
<td>Percent Republican</td>
<td>M=66.7%</td>
</tr>
<tr>
<td>Percent Minority</td>
<td>M=11.9%</td>
</tr>
<tr>
<td>Republican Author</td>
<td>Minority Woman</td>
</tr>
<tr>
<td>20 (44.4%)</td>
<td></td>
</tr>
<tr>
<td><strong>Control Variable</strong></td>
<td>Prosecutor Experience</td>
</tr>
<tr>
<td>Affirm Trial Court</td>
<td>Judicial Experience</td>
</tr>
<tr>
<td>38 (84.4%)</td>
<td></td>
</tr>
<tr>
<td>Year</td>
<td>Top Tier Law School</td>
</tr>
<tr>
<td>Mode=2001</td>
<td></td>
</tr>
<tr>
<td>Supreme Court</td>
<td>Harvard or Yale</td>
</tr>
<tr>
<td>Rehnquist</td>
<td>32 (71.1%)</td>
</tr>
<tr>
<td>Roberts</td>
<td>Average Age</td>
</tr>
<tr>
<td>13 (28.9%)</td>
<td></td>
</tr>
</tbody>
</table>
Table 7.2 features the descriptive statistics related to the federal cases in this study, and Table 7.3 features the descriptive statistics related to the state supreme court cases in this study. The statistics show that there are some differences between federal and state panels. First, the

<table>
<thead>
<tr>
<th>Table 7.3</th>
<th>Descriptive Statistics for State Supreme Court Cases (n=63)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Outcome Variable</strong></td>
<td><strong>Control Variables</strong></td>
</tr>
<tr>
<td>Evidence Allowed</td>
<td>36 (57.1%)</td>
</tr>
<tr>
<td>Predictor Variables</td>
<td>Drug Evidence</td>
</tr>
<tr>
<td>Percent Republican</td>
<td>M=44.1%</td>
</tr>
<tr>
<td>Republican Author</td>
<td>22 (34.%)</td>
</tr>
<tr>
<td><strong>Control Variables</strong></td>
<td></td>
</tr>
<tr>
<td>Percent Female</td>
<td>M=20.5%</td>
</tr>
<tr>
<td>Affirm Trial Court</td>
<td>36 (57.1%)</td>
</tr>
<tr>
<td>Affirm Lower Court</td>
<td>25 (39.7%)</td>
</tr>
<tr>
<td>Year</td>
<td>Mode=2000</td>
</tr>
<tr>
<td>Supreme Court</td>
<td>Judicial Experience</td>
</tr>
<tr>
<td>Reinhquist</td>
<td>43 (68.3%)</td>
</tr>
<tr>
<td>Roberts</td>
<td>20 (31.7%)</td>
</tr>
<tr>
<td>Average Age</td>
<td>60.45 Years</td>
</tr>
</tbody>
</table>

federal courts were much more likely to allow evidence at trial and affirm the decision of the trial court. Also, federal panels were more likely to have a higher percentage of Republican judges as compared to state supreme courts. Further, federal panels often featured more judges who went to top-tier law schools as compared to the panels of the state supreme courts. Federal panels had an average of 68.1% of judges who had went to a top tier law school as compared to
28.9% in the panels of the state supreme courts. This same trend holds true for the percentage of judges who had attended law school at Harvard or Yale. These results illustrate that state and federal courts have key differences, which manifest in different results within the logistic regression analyses.

**Logistic Regression**

The binary logistic regression analyses reveal several significant results, and these results vary depending on the structure of the particular subsample or primary independent variable. The state and federal jurisdictions consistently differentiate in levels of significance in otherwise identical analyses. This section presents the results of the two hypothesis tests of this study concerning the effect of political affiliation of the panel or the authoring judge. Each section provides a three step analytical process in reference to jurisdiction. First, I present the statistical results concerning the total sample of all the cases. I then present the results of the analyses with subsamples based upon jurisdictions. This method of presentation will serve to highlight the impact of different variables across jurisdictions as well as within specific jurisdictions.

**Analytical Plan**

The model building process in these analyses was straightforward. I first constructed a model containing all of the predictor and associated control variables. Afterwards, I ran a full battery of diagnostic tests to check for problems relating to multicollinearity and other statistical errors. The inclusion of all the variables often resulted in issues of separation, multicollinearity, and high standard errors. I then dropped variables that were statistically non-significant, but I retained variables that were seen as theoretically important. At this point I checked for certain key interactions and retained only the interactions that were seen as statistically significant. I repeated this process for the analyses that featured a reversal in direction of the outcome
variable. The removal of the variables allowed for a more parsimonious regression model and also solved several issues related to multicollinearity and separations within the data.

**Hypothesis #1: Political Affiliation**

**All cases.** Table 7.4 presents the results of the logistic regressions concerning the effect of political affiliation upon outcome. This particular analysis contains an evidentiary variable related to drug evidence without any controls. Further, several variables were removed from the analysis due to problems with multicollinearity and separation. The variables related to judicial experience \((p=.242)\) and top tier law schools \((p=.998)\) do not feature into this analysis. Also, an interaction between the percent of judges that were minority and female was not significant.

<table>
<thead>
<tr>
<th>Variable</th>
<th>Coefficient</th>
<th>SE</th>
<th>Odds</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constant</td>
<td>-215.865</td>
<td>113.460</td>
<td>.000</td>
</tr>
<tr>
<td>% Republican</td>
<td>.017</td>
<td>.011</td>
<td>1.018</td>
</tr>
<tr>
<td>Affirm Trial Court</td>
<td>3.648* ((p&lt;.001))</td>
<td>.7</td>
<td>38.382</td>
</tr>
<tr>
<td>Year</td>
<td>.105** ((p=.064))</td>
<td>.057</td>
<td>1.11</td>
</tr>
<tr>
<td>South</td>
<td>-.258</td>
<td>.678</td>
<td>.772</td>
</tr>
<tr>
<td>Average Age</td>
<td>.029</td>
<td>.064</td>
<td>1.030</td>
</tr>
<tr>
<td>Drug Evidence</td>
<td>.771</td>
<td>.712</td>
<td>2.162</td>
</tr>
<tr>
<td>% Female</td>
<td>.018</td>
<td>.017</td>
<td>1.019</td>
</tr>
<tr>
<td>% Minority</td>
<td>-.004</td>
<td>.022</td>
<td>.996</td>
</tr>
<tr>
<td>% Prosecutor</td>
<td>-.005</td>
<td>.013</td>
<td>.995</td>
</tr>
<tr>
<td>% Harvard Yale</td>
<td>-.028** ((p=.069))</td>
<td>.015</td>
<td>.973</td>
</tr>
</tbody>
</table>

**Model Fit**

- Nagelkerke \(R^2\) .548
- -2 Log Likelihood 86.974

*Note*: Outcome Variable \((0=\text{Suppression of Evidence}, 1=\text{Admission of Evidence})\)

*Note*: Significance of \(p<.05\)

*Note**: Moderate Significance of \(p<.1\)
However, at the expense of parsimony I chose to leave in several variables that I thought were theoretically significant. Appendix 4 presents reduced models containing only significant variables, but the findings of these reduced models do not drastically change any findings presented in this section. The model was significant ($p=.008$) with a Nagelkerke $R^2$ of .548. Only one variable manifests significance in this analysis. The affirmation of a trial court decision was highly significant and increased the odds of the admission of evidence at trial by OR=38.38. Further, the variable “year” was moderately significant and each year increased the odds of an allowance of evidence at trial by 11%. The variable related to the attendance of law school at “Harvard and Yale” was moderately significant and each percentage of judges who attended these schools decreased the odds of admission of evidence by .27%. These statistics show that the affirmation of a trial court decision was the main predictor of the outcome of an appellate case, but when the variable “Pure Drug” is placed within the analysis the results differ.

The variable titled “Pure Drug” relates to the type of evidence that is most commonly analyzed and accepted by the court. The appellate courts in this study routinely agree that this type of evidence can be seized through probable cause. Table 7.5 presents the results of the statistical analysis containing this variable. The addition of the “pure drug” variable resulted in a better model fit as the Nagelkerke $R^2$ increased to .618. Also, the percent of Republican judges on a panel now becomes significant, and each increase in percentage increases the odds of the admission of evidence by 2.9%. The affirmation of a trial court is still highly significant, and the variable “year” becomes significant with each additional year raising the odds of admission by 13%. “Pure drug” is also highly significant with this type of evidence increasing the odds of admission by almost OR=7.916. Finally, the “Harvard and Yale” variable is still moderately significant with each percentage increase resulting in a 3% decrease in odds of admission of
The addition of a control variable concerning “pure drug” evidence, which correlates to a powerful body of legal precedent, pushes the primary predictor variable of political affiliation into significance, and this lends support to the hypothesis of this study.

The high odds ratios in featured in Table 7.5 may stem from the direction of the outcome and predictor variables. The unified direction of variables may be over inflating the effects of the predictors, and a reversal of the outcome variable may better reflect more realistic odds ratios.

<table>
<thead>
<tr>
<th>Variable</th>
<th>Coefficient</th>
<th>SE</th>
<th>Odds</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constant</td>
<td>-249.953</td>
<td>120.84</td>
<td>.000</td>
</tr>
<tr>
<td>% Republican</td>
<td>.028* (p=.029)</td>
<td>.013</td>
<td>1.029</td>
</tr>
<tr>
<td>Affirm Trial Court</td>
<td>3.634* (p&lt;.001)</td>
<td>.755</td>
<td>37.848</td>
</tr>
<tr>
<td>Year</td>
<td>.122* (p=.045)</td>
<td>.061</td>
<td>1.13</td>
</tr>
<tr>
<td>South</td>
<td>-.306</td>
<td>.731</td>
<td>.737</td>
</tr>
<tr>
<td>Average Age</td>
<td>.033</td>
<td>.065</td>
<td>1.033</td>
</tr>
<tr>
<td>“Pure Drug”</td>
<td>2.069* (p=.002)</td>
<td>.679</td>
<td>7.916</td>
</tr>
<tr>
<td>% Female</td>
<td>.025</td>
<td>.018</td>
<td>1.026</td>
</tr>
<tr>
<td>% Minority</td>
<td>.012</td>
<td>.025</td>
<td>1.012</td>
</tr>
<tr>
<td>% Prosecutor</td>
<td>-.015</td>
<td>.014</td>
<td>.985</td>
</tr>
<tr>
<td>% Harvard Yale</td>
<td>-.030** (p=.063)</td>
<td>.015</td>
<td>.970</td>
</tr>
</tbody>
</table>

**Model Fit**

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Nagelkerke $R^2$</td>
<td>.618</td>
</tr>
<tr>
<td>-2 Log Likelihood</td>
<td>77.305</td>
</tr>
</tbody>
</table>

*Note*: Outcome Variable (0=Suppression of Evidence, 1=Admission of Evidence)

*Note*: Significance of p<.05

**Note**: Moderate Significance of p<.1

Table 7.6 provides the result of this regression analysis. The same levels of significance manifest, but the odds ratios may better reflect the reality of appellate decision-making. The
affirmation of a trial court decision now decreases the odds of suppression of evidence at trial by 74%. The variable “pure drug” variable also decreases the odds of suppression by 87%. Also, each additional year decreases the odds of suppression by nearly 13%, and the variable “Harvard and Yale” increases the odds of suppression by 3.1% for each percentage point within the panel. Finally, the primary predictor variable of the hypothesis testing of this study shows that for each percentage of Republican judges in a panel the odds of a suppression of evidence decreases by 2.8%. Therefore, these statistics show that Republican judges are more likely to institute pro-police decisions.

<table>
<thead>
<tr>
<th>Variable</th>
<th>Coefficient</th>
<th>SE</th>
<th>Odds</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constant</td>
<td>249.953</td>
<td>120.84</td>
<td>.000</td>
</tr>
<tr>
<td>% Republican</td>
<td>-.028* (p=.029)</td>
<td>.013</td>
<td>.972</td>
</tr>
<tr>
<td>Affirm Trial Court</td>
<td>-3.634* (p&lt;.001)</td>
<td>.755</td>
<td>.026</td>
</tr>
<tr>
<td>Year</td>
<td>-.122* (p=.045)</td>
<td>.061</td>
<td>.885</td>
</tr>
<tr>
<td>South</td>
<td>.306</td>
<td>.731</td>
<td>1.358</td>
</tr>
<tr>
<td>Average Age</td>
<td>-.033</td>
<td>.065</td>
<td>.968</td>
</tr>
<tr>
<td>“Pure Drug”</td>
<td>-2.069* (p=.002)</td>
<td>.679</td>
<td>.126</td>
</tr>
<tr>
<td>% Female</td>
<td>-.025</td>
<td>.018</td>
<td>.975</td>
</tr>
<tr>
<td>% Minority</td>
<td>-.012</td>
<td>.025</td>
<td>.988</td>
</tr>
<tr>
<td>% Prosecutor</td>
<td>.015</td>
<td>.014</td>
<td>1.015</td>
</tr>
<tr>
<td>% Harvard Yale</td>
<td>.030** (p=.063)</td>
<td>.016</td>
<td>1.031</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Model Fit</th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Nagelkerke $R^2$</td>
<td>.618</td>
<td></td>
<td></td>
</tr>
<tr>
<td>-2 Log Likelihood</td>
<td>77.305</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Note: Outcome Variable (0=Admission of Evidence, 1=Suppression of Evidence)
Note*: Significance of p<.05
Note**: Moderate Significance of p<.1
Federal courts. Table 7.7 presents the results of regression analysis to determine the effect of political affiliation on case outcome with a subsample (n=45) of federal cases. This analysis includes the “pure drug” variable, which had the most impact in the above analyses. The logistic regression was significant (p<.001) with a Nagelkerke $R^2=.734$. These results show that the “federal-only” model was slightly better fitting than the model containing all of the cases. Two variables manifest significance with high odds ratios. These two legal controls, “Affirm Trial Court” and the evidentiary category of “Pure Drug,” increase the odds of a pro-police decision significantly. An affirmation of a trial court decision increases the odds of the admission of evidence at trial by OR=107.109, and the presence of “Pure Drug” evidence increases the

<table>
<thead>
<tr>
<th>Variable</th>
<th>Coefficient</th>
<th>SE</th>
<th>Odds</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constant</td>
<td>-730.490</td>
<td>374.017</td>
<td>.000</td>
</tr>
<tr>
<td>% Republican</td>
<td>-.020</td>
<td>1.609</td>
<td>.980</td>
</tr>
<tr>
<td>Affirm Trial Court</td>
<td>4.674* (p=.038)</td>
<td>2.25</td>
<td>107.109</td>
</tr>
<tr>
<td>Year</td>
<td>.366** (p=.054)</td>
<td>1.90</td>
<td>1.442</td>
</tr>
<tr>
<td>South</td>
<td>1.192</td>
<td>1.609</td>
<td>3.293</td>
</tr>
<tr>
<td>Average Age</td>
<td>-.056</td>
<td>.183</td>
<td>.945</td>
</tr>
<tr>
<td>“Pure Drug”</td>
<td>3.827* (p=.013)</td>
<td>1.535</td>
<td>45.908</td>
</tr>
<tr>
<td>% Female</td>
<td>-.006</td>
<td>.046</td>
<td>.994</td>
</tr>
<tr>
<td>% Minority</td>
<td>-.013</td>
<td>.044</td>
<td>.987</td>
</tr>
<tr>
<td>% Prosecutor</td>
<td>-.008</td>
<td>.026</td>
<td>.992</td>
</tr>
<tr>
<td>% Harvard Yale</td>
<td>-.022</td>
<td>.029</td>
<td>.979</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Model Fit</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Nagelkerke $R^2$</td>
<td>.734</td>
<td></td>
</tr>
<tr>
<td>-2 Log Likelihood</td>
<td>21.659</td>
<td></td>
</tr>
</tbody>
</table>

Note: Outcome Variable (0=Suppression of Evidence, 1=Admission of Evidence)
Note*: Significance of p<.05
Note**: Moderate Significance of p<.1
odds of admission by OR=45.908. Also, “year” was moderately significant with each additional year increasing the odds of a pro-police decision by 44.2%. Also, two variables dropped out of significance in this model. The political affiliation of the judges and the percent of judges who had attended Harvard or Yale law schools do not significantly impact the decisions of the federal courts. Instead, the courts rely primarily on the legal variables included in the analysis, which reflects the current doctrinal trends contained in the discussion in Chapter 6.

Table 7.8 contains the results of the statistical analysis for cases within the federal system when the direction of the outcome variable is reversed. The reversal of the outcome variable may help control for the incredibly high odds ratios contained above. The odds ratios in this

<table>
<thead>
<tr>
<th>Variable</th>
<th>Coefficient</th>
<th>SE</th>
<th>Odds</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constant</td>
<td>730.490</td>
<td>374.017</td>
<td>.000</td>
</tr>
<tr>
<td>% Republican</td>
<td>.020</td>
<td>1.609</td>
<td>1.020</td>
</tr>
<tr>
<td>Affirm Trial Court</td>
<td>-4.674* (p=.038)</td>
<td>2.25</td>
<td>.009</td>
</tr>
<tr>
<td>Year</td>
<td>-.366** (p=.054)</td>
<td>.190</td>
<td>.693</td>
</tr>
<tr>
<td>South</td>
<td>-1.192</td>
<td>1.609</td>
<td>.304</td>
</tr>
<tr>
<td>Average Age</td>
<td>.056</td>
<td>.183</td>
<td>1.058</td>
</tr>
<tr>
<td>“Pure Drug”</td>
<td>-3.827* (p=.013)</td>
<td>1.535</td>
<td>.022</td>
</tr>
<tr>
<td>% Female</td>
<td>.006</td>
<td>.046</td>
<td>1.006</td>
</tr>
<tr>
<td>% Minority</td>
<td>.013</td>
<td>.044</td>
<td>1.013</td>
</tr>
<tr>
<td>% Prosecutor</td>
<td>.008</td>
<td>.026</td>
<td>1.008</td>
</tr>
<tr>
<td>% Harvard Yale</td>
<td>.022</td>
<td>.029</td>
<td>1.022</td>
</tr>
</tbody>
</table>

Model Fit
Nagelkerke $R^2$ .734
-2 Log Likelihood 21.659

Note 1: Outcome Variable (0=Admission of Evidence, 1=Suppression of Evidence)
Note*: Significance of p<.05
Note**: Moderate Significance of p<.1
analysis may be more realistic in practice. An affirmation of a trial court decision decreases the odds of the suppression of evidence by 99.1%, and the presence of evidence classified as “pure drug” decreases the odds of suppression by 97.8%. Also, each additional year decreases the odds of suppression by 30.7%. The results of these analyses confirm that the federal courts seem to give more weight to precedent and other legal factors, which is also found within the doctrinal analysis portion of this study.

State courts. Table 7.9 replicates the above results except the regression model only contains cases coming from the state supreme courts. During the model building portion of this analysis I also included a control variable for the number of judges on the panel (p=.792), the

<table>
<thead>
<tr>
<th>Variable</th>
<th>Coefficient</th>
<th>SE</th>
<th>Odds</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constant</td>
<td>-123.372</td>
<td>175.558</td>
<td>0.000</td>
</tr>
<tr>
<td>% Republican</td>
<td>-.042* (p=.031)</td>
<td>.019</td>
<td>1.043</td>
</tr>
<tr>
<td>Affirm Trial Court</td>
<td>4.004* (p&lt;.001)</td>
<td>1.038</td>
<td>54.826</td>
</tr>
<tr>
<td>Year</td>
<td>.066</td>
<td>.089</td>
<td>1.068</td>
</tr>
<tr>
<td>South</td>
<td>-2.294** (p=.081)</td>
<td>1.316</td>
<td>.101</td>
</tr>
<tr>
<td>Average Age</td>
<td>-.218</td>
<td>.164</td>
<td>.804</td>
</tr>
<tr>
<td>“Pure Drug”</td>
<td>3.827* (p=.013)</td>
<td>1.535</td>
<td>45.908</td>
</tr>
<tr>
<td>% Female</td>
<td>.060</td>
<td>.037</td>
<td>1.061</td>
</tr>
<tr>
<td>% Minority</td>
<td>.059</td>
<td>.055</td>
<td>1.060</td>
</tr>
<tr>
<td>% Prosecutor</td>
<td>-.020</td>
<td>.024</td>
<td>.980</td>
</tr>
<tr>
<td>% Harvard Yale</td>
<td>-.070** (p=.066)</td>
<td>.038</td>
<td>.932</td>
</tr>
</tbody>
</table>

Model Fit
Nagelkerke $R^2$ | .715
-2 Log Likelihood | 38.104

Note 1: Outcome Variable (0=Suppression of Evidence, 1=Admission of Evidence)
Note*: Significance of $p<.05$
Note**: Moderate Significance of $p<.1$
total number of cases decided by each supreme court ($p=.845$), and the method of judicial selection ($p=.634$). None of these controls were significant, and I removed them from the final model. Also, I included a control for the affirmation of any lower appellate court, and it was also not significant ($p=.163$). Therefore, the model contains all the same variables as the above models, which allows for easy comparison.

The model is significant ($p<.001$) with a Nagelkerke $R^2=.715$. The model contains a better fit that the model containing all the cases, but the “federal only” model has the best fit of all the regression analyses in this study. The variables related to the affirmation of a trial court

<table>
<thead>
<tr>
<th>Variable</th>
<th>Coefficient</th>
<th>SE</th>
<th>Odds</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constant</td>
<td>123.372</td>
<td>175.558</td>
<td>.000</td>
</tr>
<tr>
<td>% Republican</td>
<td>-.042* ($p=.031$)</td>
<td>.019</td>
<td>.959</td>
</tr>
<tr>
<td>Affirm Trial Court</td>
<td>-4.004* ($p&lt;.001$)</td>
<td>1.038</td>
<td>.018</td>
</tr>
<tr>
<td>Year</td>
<td>-.066</td>
<td>.089</td>
<td>.936</td>
</tr>
<tr>
<td>South</td>
<td>2.294** ($p=.081$)</td>
<td>1.316</td>
<td>9.916</td>
</tr>
<tr>
<td>Average Age</td>
<td>.218</td>
<td>.164</td>
<td>1.244</td>
</tr>
<tr>
<td>“Pure Drug”</td>
<td>3.827* ($p=.013$)</td>
<td>1.535</td>
<td>.120</td>
</tr>
<tr>
<td>% Female</td>
<td>-.060</td>
<td>.037</td>
<td>.942</td>
</tr>
<tr>
<td>% Minority</td>
<td>-.059</td>
<td>.055</td>
<td>.943</td>
</tr>
<tr>
<td>% Prosecutor</td>
<td>.020</td>
<td>.024</td>
<td>1.020</td>
</tr>
<tr>
<td>% Harvard Yale</td>
<td>.070** ($p=.066$)</td>
<td>.038</td>
<td>1.073</td>
</tr>
</tbody>
</table>

**Model Fit**

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Nagelkerke $R^2$</td>
<td>.715</td>
</tr>
<tr>
<td>-2 Log Likelihood</td>
<td>38.104</td>
</tr>
</tbody>
</table>

*Note*: Outcome Variable (0=Admission of Evidence, 1=Suppression of Evidence)

*Note*: Significance of $p<.05$

*Note**: Moderate Significance of $p<.1$
decision \( (p<.001) \), “pure drug” evidence \( (p=.013) \), and political affiliation \( (p=.031) \) are significant. Also, the variables “south” \( (p=.081) \) and “Harvard and Yale” \( (p=.066) \) are both moderately significant. The state supreme court analyses show that the affirmation of a trial court decision \( (OR=54.826) \) and “pure drug” evidence \( (OR=45.908) \) still drastically increase the odds of the admission of evidence at trial. However, as compared to the federal circuit courts the affirmation of a trial court decision is not as powerful of a predictor in relation to the admission of evidence at trial. The reduced impact of this legal variable increases the influence of the political affiliation of the appellate judges. For every percent increase in the percentage of Republican judges the odds of a pro-police decision increase by 4.3%. Likewise, each percentile

| Table 7.11 |
|-------------------|-------------------|-------------------|--------------|
| **Variable**      | **Coefficient**   | **SE**            | **Odds**     |
| Constant          | 123.372           | 175.558           | .000         |
| % Republican      | -0.042* \( (p=.031) \) | .019              | .959         |
| Affirm Trial Court| -4.004* \( (p<.001) \) | 1.038             | .018         |
| Year              | -.066             | .089              | .936         |
| South             | 2.294** \( (p=.081) \) | 1.316             | 9.916        |
| Average Age       | .218              | .164              | 1.244        |
| “Pure Drug”       | 3.827* \( (p=.013) \) | 1.535             | .120         |
| % Female          | -.060             | .037              | .942         |
| % Minority        | -.059             | .055              | .943         |
| % Prosecutor      | .020              | .024              | 1.020        |
| % Harvard Yale    | .070** \( (p=.066) \) | .038              | 1.073        |

| **Model Fit**     |                   |                   |              |
| Nagelkerke \( R^2 \) | .715              |                   |              |
| -2 Log Likelihood | 38.104            |                   |              |

Note 1: Outcome Variable \( 0=\text{Admission of Evidence}, 1=\text{Suppression of Evidence} \)
Note*: Significance of \( p<.05 \)
Note**: Moderate Significance of \( p<.1 \)
increase of judges who attended Harvard or Yale law school decreased the odds of a pro-police decision by 6.8%. Also, the variable “South” decreases the odds of the admission of evidence at trial by 89.9%.

Table 7.1 presents the results of the regression analysis with a reversal in direction of the outcome variable. These results show the same trends in the decisions of the state supreme courts. The affirmation of a trial court decision decreases the odds of suppression by 98.2%, and the presence of “pure drug” evidence decreases the odds of suppression by 88%. Interestingly, cases within the South have OR=9.92 greater odds of suppression. Also, each percentage increase in the attendance of either the Harvard or Yale law school increases the odd of suppression by 7.3%. Finally, each percentile increase of Republican affiliation on a judicial panel decreases the odds of suppression by 4.1%.

Summary. The results of the binary regression analyses provide support for the hypothesis of this study that political affiliation affects the outcome of plain touch decision-making. The analysis containing both federal and state cases shows that panels with more Republican judges institute more pro-police decisions where evidence is admitted at trial, but this trend does not maintain over jurisdictions. Splitting the analyses by jurisdiction shows that the federal courts are not significantly impacted by judicial political affiliation. Instead, legal variables influence the judicial behavior of federal courts. However, the impact of these legal variables is reduced within the state supreme courts, and the presence of Republican judges again increases the chance of a pro-police decision. These regressions affirm the results of the doctrinal analysis of this study that found the state supreme courts were far more likely to resist the doctrinal trend in Dickerson related decisions. The resistance to this doctrinal trend allows for
the influence of other variables to enter into the decision-making process, and the regression models show that political affiliation may fill this void.

**Hypothesis #2: Political Affiliation of Author**

The second hypothesis of this study examines the effect of the political affiliation of the judge who writes the opinion in a particular case. The judge who authors the opinion may exert a subtle influence on the appellate decision-making process, and political affiliation may influence the behavior of these individual judges. These analyses feature the same variables as the above analyses and were constructed utilizing the same model building process above. I retained all

<table>
<thead>
<tr>
<th>Variable</th>
<th>Coefficient</th>
<th>SE</th>
<th>Odds</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constant</td>
<td>-229.989</td>
<td>117.238</td>
<td>.000</td>
</tr>
<tr>
<td>Republican Author</td>
<td>.417</td>
<td>.461</td>
<td>1.518</td>
</tr>
<tr>
<td>Affirm Trial Court</td>
<td>3.622* (p&lt;.001)</td>
<td>.729</td>
<td>37.42</td>
</tr>
<tr>
<td>Year</td>
<td>.114** (p=.054)</td>
<td>.059</td>
<td>1.12</td>
</tr>
<tr>
<td>South</td>
<td>-2.11</td>
<td>.714</td>
<td>.809</td>
</tr>
<tr>
<td>Average Age</td>
<td>-.002</td>
<td>.059</td>
<td>.998</td>
</tr>
<tr>
<td>“Pure Drug”</td>
<td>1.659* (p=.006)</td>
<td>.602</td>
<td>5.252</td>
</tr>
<tr>
<td>% Female</td>
<td>.015</td>
<td>.017</td>
<td>1.015</td>
</tr>
<tr>
<td>% Minority</td>
<td>.001</td>
<td>.023</td>
<td>1.001</td>
</tr>
<tr>
<td>% Prosecutor</td>
<td>-.008</td>
<td>.013</td>
<td>.992</td>
</tr>
<tr>
<td>% Harvard Yale</td>
<td>-.024</td>
<td>.015</td>
<td>.976</td>
</tr>
</tbody>
</table>

**Model Fit**

Nagelkerke $R^2$   .586
-2 Log Likelihood  81.111

*Note*: Outcome Variable (0=Suppression of Evidence, 1=Admission of Evidence)

*Note*: Significance of $p<.05$

*Note**: Moderate Significance of $p<.1$
significant variables as well as certain controls to reflect the models concerning political affiliation within a panel context. I now present the results of three separate models. The first model contains the entire sample of this analysis, and the following two models contain subsamples separated by federal and state jurisdictions. These results show that the political affiliation of judges within a panel context serves as a better predictor the case outcome, and they also do not lend support for the second hypothesis of this study.

**All cases.** Table 7.12 presents the results of the regression analysis that tests the effect of the political affiliation of the authoring judge on the outcome of the case. This analysis features

<table>
<thead>
<tr>
<th>Variable</th>
<th>Coefficient</th>
<th>SE</th>
<th>Odds</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constant</td>
<td>-766.669</td>
<td>426.766</td>
<td>.000</td>
</tr>
<tr>
<td>Republican Author</td>
<td>-1.879</td>
<td>1.25</td>
<td>.153</td>
</tr>
<tr>
<td>Affirm Trial Court</td>
<td>4.753* (p=.045)</td>
<td>2.367</td>
<td>115.963</td>
</tr>
<tr>
<td>Year</td>
<td>.383** (p=.077)</td>
<td>.216</td>
<td>1.466</td>
</tr>
<tr>
<td>South</td>
<td>1.685</td>
<td>.345</td>
<td>5.393</td>
</tr>
<tr>
<td>Average Age</td>
<td>-.009</td>
<td>.170</td>
<td>.991</td>
</tr>
<tr>
<td>“Pure Drug”</td>
<td>4.579* (p=.011)</td>
<td>1.862</td>
<td>116.58</td>
</tr>
<tr>
<td>% Female</td>
<td>-.005</td>
<td>.043</td>
<td>.995</td>
</tr>
<tr>
<td>% Minority</td>
<td>-.008</td>
<td>.049</td>
<td>.992</td>
</tr>
<tr>
<td>% Prosecutor</td>
<td>.004</td>
<td>.032</td>
<td>1.004</td>
</tr>
<tr>
<td>% Harvard Yale</td>
<td>-.034</td>
<td>.036</td>
<td>.967</td>
</tr>
</tbody>
</table>

**Model Fit**

| Nagelkerke $R^2$ | .771 |
| -2 Log Likelihood | 19.257 |

*Note: Outcome Variable (0=Suppression of Evidence, 1=Admission of Evidence)*

*Note*: Significance of $p<.05$

*Note**: Moderate Significance of $p<.1$

both federal and state cases. The model was significant ($p<.001$) with a Nagelkerke $R^2$=.586. The variable concerning the political affiliation of the authoring judge was not significant, and the
The presence of a Republican author does not affect the outcome of the case. Further, it appears that the inclusion of the variable related to the political affiliation of all the judges is a better predictor. The results in Table 7.5 feature the results of this analysis. These two analyses are comparable except for the variables reflecting the different hypotheses. The model reflecting Hypothesis #1 has a better model fit, and the main predictor variable, “% Republican Judges,” is significant. Therefore, the regression analysis does not provide support for the second hypothesis.

**Federal cases.** Table 7.13 presents the results of the binary regression testing the effect of the political affiliation of the authoring judge on the outcome of the case. The regression analysis contained in this table only contains the cases decided in the federal circuit courts. The model was significant ($p<.001$) with a Nagelkerke $R^2=.771$. Once again the model shows that a Republican author does not affect the outcome of the case, but this “federal-only” model contains a better fit than the comparable model that tests the effect of the political affiliation of the deciding judges on the outcome of the case. The difference in fit most likely does not reflect the strength of this particular model. Instead, it is more likely that the variable of “Republican Author” does not control for the limited influence of politics in federal courts, which allows for the legal variables that primarily predict the outcomes of federal cases to have more influence. Therefore, this model further gives support for the contention that federal courts primarily rely on doctrinal concerns and legal variables.

**State courts.** Table 7.14 presents the results of the regression model testing the effect of the authoring judge within the state cases. The model was significant ($p<.001$) with a Nagelkerke $R^2=.672$. Like the above analyses the presence of a Republican author does not affect the outcome of the case. The model containing the variable related to the political affiliation of all
the deciding justices contained in Table 7.9 is a better fit than the model contained in Table 7.13. Therefore, the political affiliation of all the deciding judges, which is significant in the above analysis, is a better predictor of the case outcome when analyzing the effect of politics on state supreme court decision-making.

**Summary.** The results of these regression analyses show that the political affiliation of the judge who authors the opinion does not affect the outcome of the case. Instead, the political affiliation of all the deciding judges proves a better predictor of the effect of political ideology on judicial decision-making. However, the model ascertaining the effect of the political affiliation of the author was a better fit for the cases within the federal circuit courts. Most likely this stems

<table>
<thead>
<tr>
<th>Table 7.13</th>
<th>Binary Logistic Regression: Political Affiliation of Author and Outcome with “Pure Drug” (n=63)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Variable</strong></td>
<td><strong>Coefficient</strong></td>
</tr>
<tr>
<td>Constant</td>
<td>-130.392</td>
</tr>
<tr>
<td>Republican Author</td>
<td>.877</td>
</tr>
<tr>
<td>Affirm Trial Court</td>
<td>3.988* (p&lt;.001)</td>
</tr>
<tr>
<td>Year</td>
<td>.070</td>
</tr>
<tr>
<td>South</td>
<td>-2.44** (p=.087)</td>
</tr>
<tr>
<td>Average Age</td>
<td>-.205</td>
</tr>
<tr>
<td>“Pure Drug”</td>
<td>1.780</td>
</tr>
<tr>
<td>% Female</td>
<td>.053</td>
</tr>
<tr>
<td>% Minority</td>
<td>.040</td>
</tr>
<tr>
<td>% Prosecutor</td>
<td>-.012</td>
</tr>
<tr>
<td>% Harvard Yale</td>
<td>-.084</td>
</tr>
</tbody>
</table>

**Model Fit**
- Nagelkerke $R^2$ | .672 |
- -2 Log Likelihood | 42.345 |

*Note*1: Outcome Variable (0=Suppression of Evidence, 1=Admission of Evidence)

*Note*2: Significance of $p<.05$

*Note*2: Moderate Significance of $p<.1$
from the enhancement of two variables, “affirm trial court” and “pure drug,” which feature a higher effect within the model. Therefore, this gives further support for the idea that federal courts are less likely influenced by politics and instead rely primarily on legal and doctrinal considerations when deciding a case.

Summary of Results

The results of the binary logistic regression analyses show that political affiliation does impact appellate decision-making in the context of the plain touch exception. The results give support for Hypothesis #1 and demonstrate that Republican judges do institute more pro-police decisions. Higher percentages of Republican judges on appellate panels result in decisions where evidence is allowed at trial. However, this trend does not maintain across all jurisdictions. Political ideology does not affect the federal circuit courts in this study. Instead, the federal appellate judiciary mainly relies upon doctrinal and precedential factors when deciding their cases. Political affiliation does impact the state supreme courts, and the doctrinal variables have less of an impact in these courts. I now address these trends in greater detail by examining them in the light of the doctrinal analysis of this study.

Discussion

The statistical results show that political affiliation does impact plain touch decision-making within the appellate courts. Specifically, the political affiliation of the deciding judges influences the outcome of an appellate case, but the political affiliation of the judge that authors the opinion does not. Higher percentages of Republican judges on an appellate panel increase the chances that the court will institute a pro-police decision and allow evidence at trial. These effects of political affiliation manifest primarily in the state supreme courts, but it is also visible when all of the cases are examined together. However, the political affiliation of federal...
appellate judges does not significantly impact the decisions of the federal circuit courts. Instead, these courts rely on legal or doctrinal considerations when making their decision. The doctrinal analysis shows that the federal courts agree upon a probable cause methodology to determine the legality of plain touch seizures. State supreme courts at times resist the legally sound substitution of “probable cause” for “immediately apparent,” and certain courts reject this interpretation, which often results in the suppression of plain touch evidence. The state supreme courts may be resisting the implementation of a probable cause standard due to an unhappiness with the Dickerson doctrine, and it may be political ideology that spurs this unhappiness.

“A Logical Extension of Terry”

In one of the few “pro-Dickerson” pieces of scholarly literature Hibler (1994) characterized the jurisprudence of Dickerson as a logical extension of the Terry doctrine. The combination of the plain view exception and a lawful Terry search requires a plain feel exception if the courts accept that officers can tactiley identify contraband during a frisk. The Supreme Judicial Court of Massachusetts states: “Once an otherwise lawful search is in progress, the police may inadvertently discover contraband. Requiring an officer who recognizes contraband by "plain feel" to ignore this fact and walk away from the suspect without seizing the object flies in the face of logic.” (Commonwealth v. Wilson, 2004, p. 398). The federal courts are bound by this logic (Minnesota v. Dickerson, 1993), and most state supreme courts enact a similar jurisprudence as that used by the Massachusetts court.

The plain feel exception is a logical extension of Terry, and the accepted path of appellate decision-making, which serves as a model for trial court decision-making, is fully discussed in Chapter 5. However, a short summary of the sequential decision-making process helps contextualize the statistics discussed in this current section. The majority of courts agree that the
term “immediately apparent” correlates to the more workable concept of “probable cause.” The courts base this decision off the precedent provided by the United States Supreme Court in *Texas v. Brown* (1983). Probable cause implies a fluid concept best examined by a “totality of the circumstances” approach, which is a fact finding exercise. The trial court is the primary finder of fact, and the appellate courts defer to the factual determinations of the trial court. The appellate courts do ensure that there are no grievous errors in these factual determinations, and they also examine the decisions of trial courts for legal errors. By clarifying the legal concepts within a trial court’s judgment an appellate court provides direction for other trial courts in plain touch cases.

The appellate courts institute a sequential path of analysis as the model for plain touch decision-making. First, the courts analyze the legality of the *Terry* stop and frisk. Second, the courts ensure that officer testimony contains some profession of “immediate recognition”. Finally, the courts examine the totality of the circumstances to determine if the plain touch seizure was constitutionally sound. While this process does not necessarily guarantee a pro-police decision the totality of the circumstances approach does mostly equate to the admission of plain touch evidence at trial. Resistance to this doctrine is resistance to *Dickerson*, which in reality is a resistance towards the supposed rights-encroachment of the *Terry* doctrine. Exemplified by Scalia’s dissenting opinion in *Dickerson* a resistance to *Terry* often drives the bitterness towards the plain touch exception (*People v. Champion*, 1996).

Certain judges display hostility towards the *Dickerson* doctrine, and this hostility most likely equates to a general ideological perspective about civil rights. The anti-*Terry* streak is also prevalent in the anti-*Dickerson* literature as the plain touch exception is seen as “another” disastrous mile down a road that was paved by *Terry*. Appellate judges can show their hostility
to both the *Terry* and plain touch doctrines by eviscerating the functionality of plain touch or by defying the current trend towards a probable cause analysis. Of course it is also possible that certain “law and order” Republican judges can manifest an opposite trend and discard the doctrine in favor of the police. The doctrinal analysis of this study demonstrates that the state supreme courts are the most likely of the appellate courts to engage in this sort of resistant, or possibly innovative, behavior. The results of the binary regression analyses presented in *Chapter 7* also support the doctrinal evidence.

**Jurisdictional Differences**

The regressions in *Chapter 7* show that different jurisdictions display different statistical results. When all of the cases are considered, which may perhaps show the overall, national direction of the plain touch exception, the results support *Hypothesis #1*. These results show that Republican judges do institute more pro-police decisions. However, the strongest predictors of case outcome are what Cross (2003) conceptualized as “legal controls.” The evidentiary variable relating to drug evidence and the affirmation of a trial court decision are the primary predictors of case outcome. If a trial court allows drug evidence at trial then an appellate court is very likely to affirm the decision of the trial court, allow the evidence at trial, and institute a pro-police decision. The variable related to the year of decision was also significant, and each year further from the 1993 *Dickerson* decision increased the chance of evidence being allowed at trial. These results reflect the doctrinal development outlined in *Chapter 6*.

The clarification and functional development of the *Dickerson* doctrine has manifested in a body of law that naturally favors the police officer and allows evidence at trial. Most likely this is due to the fact that *Dickerson* is a logical extension of the search and seizure law, and most courts accept the *Dickerson* Court’s rationale. However, the political affiliation of the appellate
judges does influence this process. A greater number of Republican judges on a panel increases
the likelihood of a pro-police decision. Statistically, that is all that can be said, but the multi-
method approach of this study may show another trend. The doctrinal analysis shows that certain
state supreme courts are hostile towards the Dickerson doctrine, and these courts often defy the
current trend in plain touch jurisprudence to issue more “pro-rights” decisions. So, in all actuality
it may be that these courts are less likely to allow evidence at trial. Therefore, it may be that
Republican judges are not exactly more “pro-police” they may be just more “pro-doctrine,” and
Democratic judges may be both more “pro-rights” and “anti-Dickerson.”

When the results are analyzed in separate jurisdictions the findings support this
contention. The federal circuit courts were not significantly impacted by the political affiliation
of the deciding judges. Instead, the legal variables were the only significant predictors of case
outcome. An affirmation of a trial court decision, the presence of a commonly accepted type of
evidence, and another year to iron out the plain touch decision-making process were the primary
factors that influenced the outcome of federal cases. These predictors illustrate that the federal
courts routinely cling to the doctrine and decisions issued by the United States Supreme Court.
The federal courts took Dickerson, applied the extensive jurisprudence surrounding plain view
and Terry, and developed a working path of jurisprudence that primarily dictates the outcome of
their cases. Most likely this is a result of a legal culture, which is visible in the appellate cases in
this study, where the federal circuit courts place a primacy on judicial professionalism,
precedence, and functionality.

The state supreme courts may not have this professional legal culture. The opinions of the
state supreme courts were sometimes displayed hostility towards the Dickerson doctrine. The
legal culture of the state supreme courts, which in all actuality is a hodgepodge of several legal
cultures meshed into an analytical whole, may allow for other variables to enter into the process of plain touch decision-making. The legal controls are significant in the regression analysis concerning the state supreme courts, but they are not as significant as compared to the federal circuit courts. As these controls are weakened, as the pull of precedent is decreased, the legal culture of the state supreme courts allow other variables to influence the appellate decision-making process. Specifically, political affiliation displays significance as the presence of Republican judges is shown to increase the likelihood of a pro-police decision. Also, variables related to law school and geographic location enter into moderate significance and also both decrease the chance of a pro-police decision. As precedent loses power and judges engage in judicial activism then other variables, primarily political affiliation, influence the outcome of plain touch cases.

“Law and Order” or Judicial Restraint

The results provide support for Hypothesis #1 and demonstrate that political affiliation does affect appellate decision-making in cases concerning the plain touch exception. Specifically, Republican judges are more likely to institute pro-police decisions. However, this could correlate to one of two concepts. The Republican judges could be engaging in a “law-and-order” style of judicial decision-making where they favor the police, or Republican judges could be practicing judicial restraint by clinging to a body of precedent that has developed in a way to favor the police. The first contention that a Republican judiciary is by nature a punitive judiciary is often found within the literature (Doty, 1994; McInnis, 2008), and undoubtedly some Republican judges are “law and order” judges. However, a reading of the cases doesn’t necessarily support this characterization.
A doctrinal reading of the cases shows that some courts enact decisions that are influenced by ideology, but the majority of these decisions feature an anti-\textit{Terry} or pro-rights ideology. The decisions of the Democratic majority of the Supreme Court of Pennsylvania, the odd rationale of the Democrat-dominated Vermont Supreme Court, and the opinions of the Democratic majorities of the Supreme Court of Virginia stand out as decisions that resist the current trend in the \textit{Dickerson} doctrine. These are just overt examples, and it could be that Democrat judges seek to hamstring the \textit{Terry} doctrine by engaging in judicial activism and resisting precedent. It could be that Republican judges are pro-precedent instead of “law and order.” Perhaps, it is truly impossible to separate out these different concepts. After all, the \textit{Dickerson} doctrine and the plain touch exception do favor the police, which is probably the kind of precedent that a “law and order” judge would like to maintain.

What we can say for sure is that Republican judges are more likely to enact pro-police decisions in plain touch cases. Increases in the number of GOP judges on a panel increases the likelihood that an appellate court will institute a decision that favors the police and allows evidence at trial. The influence of political affiliation only manifests in state supreme courts or when both state and federal courts are analyzed together. The federal circuit courts are not influenced by the political affiliation of the judges. Instead, these courts mainly follow the precedential development of doctrine. However, when precedent weakens politics enter into play, and the state supreme courts are swayed by judicial politics.

\textbf{What Does This Mean?}

These statistical results show that political affiliation can influence judicial decision-making. It may be impossible to say if Republican or Democratic judges, or perhaps it is both, are to blame for the impact of politics in the context of political decision-making, but it does
show that politics influence the judiciary. Depending on who one asks this may either be a good or bad phenomenon. Political influence is primarily an effect in the state supreme courts, and this most likely correlates to their legal culture, which in the end may be the result of the judicial selection processes in the state courts. The common critique of the federal judiciary is that the federal courts are, at least theoretically, apolitical and unaffected by electoral influence. The states introduced several judicial selection methods into their court systems to increase judicial accountability, and it appears that state supreme courts are more politically accountable. If one accepts that political affiliation is related to popular control then the states have instituted a system that is at least somewhat responsive to the will of the people.

However, political influence, popular accountability, and electoral control do come with a price. The doctrine of state supreme courts is unclear as a whole, and divisive battles are present in the plain touch cases analyzed within this study. Weber (1968) once wrote that modern society requires a legal system that is guided by precedent and rationality, and legal formalists spurn reforms that increase political influence or popular control and weaken legal precedent. Others would state that the judiciary should be politically accountable, but this will naturally weaken the pull of precedent. Perhaps there is a middle ground, as the states also rely on precedential and evidentiary factors in decision-making, but it is clear that doctrine and precedent in state supreme courts is weaker when compared to the federal courts.

The results of this study, which show that political affiliation influences the judicial decision-making of appellate courts in plain touch cases, establish that politics affect the judiciary. It may affect some courts more than others, but the impact of politics on judicial decision-making is undeniable. This finding replicates those of Goldman (1975) and Cross (2003). At least in the state supreme courts the idea of a politically neutral judiciary is unlikely,
and the above authors also find political effects in the Federal judiciary. Whether one favors more or less judicial accountability the pull of politics in the judiciary seems to be present in certain types of cases or in different areas of constitutional procedure.

**Limitations**

1) The results of the doctrinal analysis show that appellate courts defer to the fact-finding judgment of the trial court. The fact that this study focuses on appellate courts leaves a great portion of plain touch decision-making unclear. If disparities are visible in trial court decision-making then the appellate courts could routinely promulgate these disparities. Analyzing trial court decision-making is no easy task, and piercing the black box of trial court procedures is a truly daunting task. However, a study in this area would further increase the understanding plain touch decision-making.

2) The results show jurisdictional differences in the state and federal systems. This analysis only utilized the decision of the state supreme courts, which are similar in operation to the federal circuit courts, but an analysis of specific state jurisdictions may reveal further trends in the data. These future analyses will require an analysis of the decisions of lower level state appellate courts. An analysis of these cases will further develop the understanding of local legal contexts and cultures.

3) There are two primary methods for analyzing the effects of judicial characteristics on appellate decision-making. The method utilized in this study focuses on the “institutional context” of panel decision-making, and all variables were operationalized in a manner to reflect group decision-making. In the current analysis the case was the unit of analysis. The other method analyzes the decision-making processes of individual judges. Future research should test the effects of political affiliation on judicial decision-making in a methodology where the judge
is the unit of analysis. A strict examination of plain touch decision-making may be impossible as there are not enough cases to adequately develop this methodology, but it may be possible to expand plain touch into either “plain view” or “Terry” to gather the necessary sample for this future analysis.

4) This paper utilizes a two-party operationalization to determine the effect of political affiliation on judicial decision-making. The binary nature of this schema undoubtedly obfuscates the ideological differences of intraparty factions, and certain individual judges may make decisions that are at odds with the dominant ideology of their party. This study demonstrates that federal appellate judges are not affected by political ideology when deciding plain touch cases and instead rely mainly on legal variables related to precedent. However, it is possible that political affiliation displays no affect in this setting because Republican and Democratic federal judges may be ideologically aligned, at least in questions related to plain touch seizures, within the federal circuit courts. Likewise, it could be that Republican and Democratic judges within the states supreme courts are more ideologically polarized, which would increase the effects of political parties within this setting. It could also be possible that factions within the political parties are skewing the effects of the statistical analyses of this study. Further research should develop a more in-depth operationalization of political ideology to determine the exact effect of political affiliation on judicial decision-making. A more nuanced operationalization of ideology may reveal that political affiliation does impact the federal circuit courts or that the effect of political affiliation within the state supreme courts, which this study revealed to be significant, may be magnified or suppressed by the influence of judges who have ideologies that run counter to the traditional liberalism of the Democratic party or the conservatism of the Republican party.
CHAPTER 8
CONCLUSION

Scholars and critics prophesized that the plain touch exception would lead to procedural chaos and further erode civil rights. The critics characterized the decision of *Dickerson v. Minnesota* (1993) as a further extension of the *Terry* doctrine that would result in an unconstitutional police intrusion upon society. Critics characterized *Dickerson* as “bad” law, and they feared numerous governmental abuses that would manifest due to the plain touch exception. However, these fears have not come to pass. Instead, the courts view the *Dickerson* decision as a necessary combination of the *Terry* doctrine and plain view exception, and they have developed a body of jurisprudence that establishes working procedures and precedents for deciding plain touch cases. As with any law there remains ambiguity, and this research hypothesized that political ideology would fill the blank spaces left by *Dickerson*. The data of this study show that in certain courts political ideology does influence plain touch decision-making.

**Doctrinal**

Although there is variation within the appellate courts the *Dickerson* decision resulted in a functional body of jurisprudence. Appellate courts have set precedents that allow courts to analyze the legality of plain touch seizures. Two factors guide the plain touch decision making of the appellate courts, which in turn serves as a model for trial court decision-making. First, the courts follow the precedent of *Texas v. Brown* (1983) and equate “immediately apparent” with the more workable concept of probable cause. The adoption of a probable cause standard allows the courts to utilize a totality of the circumstances approach to analyze plain touch cases. The precedent associated with probable cause determinations gives the courts a large body of
jurisprudence to apply to these cases, and over time appellate courts have established a sequential analytical process for determining probable cause in plain touch cases.

The courts begin by analyzing the legality of the initial *Terry* stop and frisk. The courts then examine officer testimony for an assurance that the illegal nature of the felt object was immediately apparent. Finally, the courts examine the rest of the circumstances surrounding the seizure. Probable cause determinations are fact finding in nature, and the appellate courts in this study often defer to the judgment of the trial court. Therefore, if a trial court allowed evidence at trial and this evidence was of a type commonly accepted by courts then an appellate court will often affirm the legality of the plain touch seizure. In summary an appellate court will most likely uphold a denial of a motion to suppress in a case involving drug contraband. This is due to the legal culture of appellate court, precedent, and the development of the plain touch doctrine. These concepts unite to fashion a workable jurisprudence, protect against police intrusion, and provide direction for the police officer and trial judge. However, certain courts or judges are not happy with the development of this doctrine.

A great portion of the judicial antagonism against *Dickerson* is found within the state supreme courts, and most of this antagonism stems from an unhappiness with the *Terry* doctrine. Drawing upon Justice Scalia’s dissenting opinion in *Dickerson* judges attack or hamstring the *Dickerson* doctrine as a way to resist the current state of search and seizure law. The most overt display of this phenomenon is a resistance to the probable cause standard that dominates *Dickerson* jurisprudence. By instating a more rigorous interpretation of “immediately apparent” a court can hamstring *Dickerson* to the point of denying its application. A failure to implement a probable cause standard resists the current trend of plain touch jurisprudence and is found in some state supreme courts. The doctrinal analysis doesn’t necessarily demonstrate what forces or
judicial characteristics drive this resistance, but the results of the hypothesis testing of this study finds that political affiliation contributes to this process.

**Political Affiliation and Decision-Making**

I hypothesized that judicial political affiliation would influence appellate decision-making, and the binary regression analyses of this study provide support for this hypothesis. Republican judges are associated with an increased chance of a pro-police decision. The association could be the result of conservative, “law-and-order” judges who favor the police in the court system. However, the resistance of certain judges to the current doctrine of *Dickerson*, which favors the admission of evidence at trial, may be the true force behind this association. It could be that critics of *Dickerson* are Democratic and more likely to institute pro-rights decisions, and Republican judges may favor precedent and restraint over innovation despite their “law-and-order” nature. Regardless of specific causation it is clear that the presence of Republican judges on appellate panels does increase the chance of a pro-police decision, and this association is primarily visible in the state supreme courts.

The federal circuit courts primarily cling to precedential and legal factors when making plain touch decisions, but the legal controls of precedent and doctrine have a reduced impact in the state supreme courts. The reduced power of precedent in the states allows other judicial characteristics to enter into significance, and in these courts political affiliation starts to impact appellate decision-making. Therefore, a legal culture that eschews precedent allows for political influence. Many states have instituted judicial selection processes to increase political accountability, and the increase of political influence may be the result of these reforms and seen as beneficial. However, if one believes that the judiciary should be politically neutral then the influence of politics in state supreme courts is a blow to judicial legitimacy.
Conclusion

The decision of *Minnesota v. Dickerson* (1993) did not result in a confusing legal doctrine that automatically favors the police. The fears of general warrants remain unfounded, and the courts have instead instituted a body of legal precedent that protects individual rights and allows for a functional system of judicial decision-making. However, some state supreme courts resist this precedent, and the reduced power of precedent has allowed political influences to enter into judicial decision-making in these settings. Political ideology did not manifest significance in the federal judiciary, and this might stem from the legal culture of the federal courts. If political affiliation affects the decisions of our court system what steps should we take to limit this influence? Or is political influence, which correlates to electoral accountability, a necessary component of our judicial system? This study raises questions about judicial accountability and judicial activism, and while it does not answer these questions it does show that these questions impact the criminal justice system.
BIBLIOGRAPHY


Cases cited:


*Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523 (1967).


*Chambers v. Maroney*, 1970


*Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).


APPENDIX 1

Federal Appellate Cases

1. United States v. Brooks (1993), 2 F.3d 838. A armed robber occurred in Missouri, and the police investigated. During the robbery one of the three suspects had stolen a van. Later, the police spotted the license plates from the stolen van on a car in Juan Brooks’ driveway. The officers surveilled the house. At this time another officer found the stolen van at another location, and the van had license plates that were registered to Brooks. Officers then knocked on Brooks’ door and asked to come in. Brooks agreed, and the officers entered. The officers noticed a large bulge in Brook’s waistline, and they frisked Brooks. They found an illegal handgun. The officers then continued the frisk. They felt a lump in Brooks’ pocket and seized it before identifying it through touch. The lump turned out to be narcotics. The officers then arrested Brooks on charges related to the gun and the narcotics. Brooks moved to suppress the evidence at trial, and the district court denied his motion. Brooks then appealed his conviction. The Eighth Circuit affirmed the lower courts decision. However, the court stated that the plain touch doctrine did not justify the seizure of the cocaine. The seizure of the weapon was justified under Terry. The officer did satisfy the immediately apparent standard for the seizure of the narcotics, But the continuation of the frisk was justified under Terry. The court did allow the evidence, but they justified the seizure under the exception related to a search incident to a lawful arrest.

Decision: Pro-Rights, Evidence Suppressed at Trial
Affirmed Lower Court Decision

Concerns: None
Offense: Drug
Evidence: Small Bag of Cocaine
Circuit: Eighth
Judges: Fagg, George Gardner (Appointed by Reagan)
Wollman, Roger Leland (Appointed by Reagan)
Hansen, David R. (Appointed by G.H.W. Bush)

Opinion: Fagg
Method: None

2. Ponce v. United States (1993), 8 F.3d 989. In November, 1990 a police officer in Austin, TX witnessed a vehicle swerving and driving recklessly. The officer initiated a traffic stop and asked the driver, Michael Ponce, for identification. The driver produced identification, stated he was unemployed, and identified the car as a rental. Another officer arrived at the scene and decided to frisk Ponce due to the fact that they were in a high-crime area. Ponce gave consent to the search, and the officer first frisked the offender’s jacket. The officer asked Ponce for permission to search his pants, and Ponce agreed. The officer frisked Ponce, felt an unusual lump, manipulated the lump, thought that it might be a wad of money, and removed the lump from Ponce’s pocket. The officer identified that it was a large wad of money and continued the frisk. The officer then “felt something that rattled like paper” in Ponce’s other pocket. He suspected it to be a razor blade concealed in several dollar bills, but he was unsure. The officer seized the substance, without knowing what it was, and discovered it to be heroin. Ponce stated, “Dang. I forgot that was in there.” The officers arrested Ponce on charges related to possession of heroin, and Ponce moved to suppress the evidence at trial. The district court denied his motion, and Ponce
appealed. Ponce stated that he didn’t consent to the search and that it was unlawful. The government tried to justify the seizure under the recently formed *Dickerson* doctrine. The court denied the government’s claims. The court stated that the officer’s testimony established that the seizures went well beyond a *Terry* frisk and did not satisfy the immediately apparent standard. The fact that the officer mentioned only a suspicion of the item’s incriminating nature precluded immediate appearance. However, the evidence was allowed at trial due to the offender’s consent to be searched.

**Decision:** Pro-Rights, Evidence Suppressed at Trial
**Concerns:**
1. Incriminating Evidence
2. Officer Testimony
3. Terry Stop

**Offense:** Drug
**Evidence:** Wad of money
Small bag of heroin

**Circuit:** Fifth
**Judges:** Garza, Reynaldo Guerra (Appointed by Carter)
Demoss, Harold R., Jr. (Appointed by G.H.W. Bush)
Zagel, James Block (Appointed by Reagan)

**Opinion:** Zagel
**Method:** Officer Testimony

3. *United States v. Taylor* (1993), 997 F.2d 1551. Police officers with the Metropolitan Police Department of Washington D.C. received a tip that two individuals were selling illegal drugs. During surveillance the officers witnessed a buyer, Michael Joe Taylor, purchase drugs from the two individuals. Taylor then left the scene, and a nearby officer stopped Taylor. The officer searched inside the coat pockets of Taylor but found no evidence. The officer then received information that the evidence was hidden inside the watch pocket of Taylor’s jeans. The officer then reached into the pocket and seized a small bag of cocaine. The officer arrested Taylor. At trial Taylor moved to suppress the evidence. The district court denied his motion. Taylor was convicted on charges related to possession of narcotics, and he appealed his conviction. The Circuit Court for the District of Columbia affirmed the lower court’s decision. However, the court dismissed the government’s argument that the seizure was allowed by the newly instated *Dickerson* doctrine. The court held that the seizure and search were not instituted for the purpose of finding weapons. Therefore, the plain touch exception did not apply. The court did admit the evidence due to the search incident to a lawful arrest exception.

**Decision:** Pro-Rights, Evidence Suppressed at Trial
**Concerns:**
3. Terry Stop

**Offense:** Drug
**Evidence:** Small Bag of Cocaine

**Circuit:** D.C.
**Judges:** Sentelle, David B. (Appointed by Reagan)
Henderson, Karen L. (Appointed by G.H.W. Bush)
Randolph, A. Raymond (Appointed by G.H.W. Bush)

**Opinion:** Sentelle
**Method:** None
4. United States v. Ashley (1994), 37 F.3d 678. A police detective for the Metropolitan Police Department of Washington, D.C. witnessed Ian Moses Ashley disembark from a bus at a Greyhound terminal. The detective suspected that Ashley was transporting drugs. The detective stopped Ashley and asked him if he was carrying drugs. Ashley answered in the negative, and the officer asked Ashley if he would consent to a frisk. Ashley consented to the frisk. The detective frisked Ashley. During the frisk the detective felt a hard substance concealed in the waistband of Ashley’s pants. The detective knew at once that it was narcotics and asked Ashley to open his pants. Ashley complied. The detective noticed that the offender was wearing two pairs of pants. The detective then unbuckled Ashley’s pants, retrieved the object, and found that it was indeed crack cocaine. The detective arrested Ashley on charges related to the narcotics, and Ashley filed a motion to suppress. The district court denied his motion, and Ashley appealed. During the appeals process the Supreme Court decided Dickerson, and the Court of Appeals for the District of Columbia Circuit remanded the case back to the district court for consideration in light of the plain touch doctrine. The district court then conducted an in-depth evidentiary analysis and still denied the motion to suppress. Ashley again appealed, and the District of Columbia Circuit affirmed the lower court’s decision. The court stated that the initial stop was motivated by reasonable suspicion and offender consent. The court ruled that the detective clearly stated that the evidence was immediately apparent, and the judges agreed that the detective’s experience in narcotics enforcement made this possible. Further, the court ruled that Dickerson seizures do not allow a gross violation of personal privacy, but the detective’s unbuckling of the offender’s pants was reasonable in this specific circumstance.

Decision: Pro-Police, Evidence Allowed At Trial
Affirmed Lower Court Decision

Concerns: #4: Officer Testimony

Offense: Drug

Evidence: Bag of Crack Cocaine

Circuit: D.C.

Judges: Wald, Patricia (Appointed by Carter)
SILberman, Laurence H. (Appointed by Reagan)
Mikva, Abner J. (Appointed by Carter)

Opinion: Wald

Method: Totality of the Circumstances

5. United States v. Craft (1994), 30 F.3d 1044. Police officers witnessed Kareem Sakou Craft disembark from an airplane at the St. Louis, MO airport. The officers asked Craft if he would consent to a frisk. During the frisk the officer conducting the frisk felt a bulge under the pant leg of Craft. The officer at once realized it was narcotics and seized the evidence. Craft was arrested and charged with crimes related to the distribution of cocaine. The offender filed a motion to suppress the evidence. The district court rejected his motion, and Craft appealed. The Eighth Circuit affirmed the lower court’s judgment. The court ruled that the officer’s experience, testimony, and the totality of the circumstances established that the seizure satisfied the immediately apparent standard. Further, the court ruled that the plain touch doctrine extended to consensual searches.

Decision: Pro-Police, Evidence Allowed
6. United States v. Gibson (1994), 19 F.3d 1449. In August, 1992 a police officer employed by the “AMTRAK” train service suspected that drugs were being transported on a train to Washington, D.C. The officer suspected that a passenger, Stephen R. Gibson, was participating in this criminal activity. The officer identified several suspicious characteristics of Gibson including his method for purchasing his ticket, his demeanor, and his contact information. Before the train arrived the AMTRAK officer contacted a fellow officer and an officer with Metropolitan Police Department of Washington, D.C. The officers stopped Gibson before he exited the train and asked for consent to search his luggage. Gibson agreed, and the officers found nothing. The officers then frisked Gibson. During the frisk the AMTRAK officer felt a “hard, angular, flat” object in Gibson’s pants. The officer did not know the identity of the object, and Gibson stated that it was just the second pair of pants that he happened to be wearing. Unhappy with Gibson’s answer, the officer transported Gibson to a restroom and opened his pants to find the object. It was then that the officer identified the object as narcotics. The officers arrested Gibson, and during the subsequent search they found another pack of narcotics. Gibson moved to suppress the evidence at trial, and the district court refused his motion. Gibson appealed, and the Circuit Court for D.C. reversed the lower court’s decision. The government tried to justify the search and seizure under the search incident to a lawful arrest exception, but the court dismissed the claim. The court also stated that the seizure was not allowed under the plain touch doctrine because the officer’s testimony made it obvious that it was not immediately apparent as contraband. Further, the court cited the totality of the circumstances, including the officer’s experience, the nature of the seizure, and the nature of the evidence when determining that the seizure was illegal under the Dickerson doctrine.

Decision: Pro-Rights, Evidence Suppressed at Trial
Reversed Lower Court Decision

Concerns: #4: Officer Testimony
Offense: Drug
Evidence: “Disk” of Cocaine
Circuit: D.C.
Judges: Edwards, Harry T. (Appointed by Carter)
Silberman, Laurence H. (Appointed by Reagan)
Randolph, A. Raymond (Appointed by G.H.W. Bush)
Opinion: Randolph
Method: Totality of the Circumstances
7. United States v. Hughes (1994), 15 F.3d 798. On September 24, 1992 police in Brooklyn Park, MN received information that Lonnie Eugene Hughes was involved in the manufacturing and distribution of crack cocaine. A detective arranged for a confidential informant to buy crack cocaine from Hughes. The detective used this transaction to get a search warrant for Hughes residence. The informant also told the detective that Hughes was known to drive a white Cadillac and carry a handgun. The police went to serve the warrant, and they observed Hughes leave in a white Cadillac. The police performed a traffic stop on Hughes, and knowing that he often carried a firearm the officer conducted a frisk. During the frisk the police officer felt what he “thought would be” nine small lumps of crack cocaine and a wad of money. The officer then seized the evidence, verified its identity, and used this and other factors to form probable cause to search the Cadillac. The officers then found a large quantity of crack cocaine in the trunk of the car. The officers arrested Hughes on charges related to the distribution of crack cocaine, and Hughes filed a motion to suppress the evidence at trial. The district court denied his motion. Hughes was convicted, and he appealed. The Eight Circuit affirmed the lower court’s decision. First, the court verified that the initial stop and frisk was based upon reasonable suspicion. The court then stated that the plain touch seizure of the money and crack cocaine was constitutional because the officer seized the evidence without any additional manipulation beyond a frisk.

Decision: Pro-Police, Evidence Allowed at Trial
Affirmed Lower Court Decision

Concerns:
#1: Incriminating Evidence
#4: Officer Testimony

Offense: Drug
Evidence: Wad of Money
Nine Small Lumps of Crack Cocaine

Circuit: Eighth
Judges: Arnold, Morris Sheppard (Appointed by G.H.W. Bush)
Heaney, Gerald William (Appointed by Johnson)
Ross, Donald Roe (Appointed by Nixon)

Opinion: Ross
Method: Officer Testimony

8. United States v. Schiavo (1994), 29 F.3d 6. The Massachusetts state police and federal agents conducted a narcotics investigation on three individuals. The state police officers arranged for a confidential informant to buy narcotics from one of the individuals, Howard Winter, with $9,000 of government money. The officers placed the money in a white “New Balance” bag and recorded all of the serial numbers. The informant gave the money to Winter as a down payment. Officers then followed Winter to a Sutton, MA pub. Winter entered the pub, stayed for twenty minutes, and left. Kenneth Schiavo, another of the individuals under investigation, exited the pub shortly after, and the officers followed both Winter and Schiavo. The officers believed the Schiavo was the source of narcotics and suspected that Winter had given him the government money. The officers performed a traffic stop on Schiavo. The officers asked Schiavo to exit the vehicle. At this point an officer noticed a large bulge in Schiavo’s front jacket pocket, and fearing that it was a weapon the officer conducted a frisk. Schiavo opened his jacket pocket and reached inside in an effort to show the officer that the bulge was not a weapon. The officer ordered Schiavo to place his hands upon his head. The officer retrieved the brown paper bag, and Schiavo told him that it contained $11,000. The officer then opened the bag, saw the government
money, and arrested Schiavo on charges related to cocaine distribution. Schiavo moved to suppress the evidence. The district court ruled in Schiavo’s favor and suppressed the evidence from trial. The district court repeatedly cited the seizing officer’s testimony as reason for the suppression of evidence. During the suppression hearing the officer stated that he had no idea what was in the bag until he opened it. The government filed an interlocutory appeal, and the First Circuit affirmed the lower court’s decision. The court cited the officer’s testimony as an admission that the seizure did not satisfy the immediately apparent standard. The court stated that the officer did not know of the incriminating nature of the evidence until he opened the bag.

**Decision:** Pro-Rights, Evidence Suppressed
**Affirmed Lower Court Decision**

**Concerns:**
#1: Incriminating Evidence
#4: Officer Testimony

**Offense:** Drug
**Evidence:** $11,000 ($9,000 in government money)
**Circuit:** First
**Judges:** Torruela, Juan R. (Appointed by Reagan)
            Bownes, Hugh Henry (Appointed by Carter)
            Selya, Bruce M. (Appointed by Reagan)

**Opinion:** Torruela
**Method:** Officer Testimony

9. **United States v. Maldonado (1995), 42 F.3d 906.** In August, 1993 deputies with the Duval County, TX sheriff’s department initiated a traffic stop on a truck driven by Donato Maldonado. The deputies inquired about the truck’s ownership, but Maldonado would not answer their inquiries. Fearing that the truck might be stolen the deputies radioed dispatch for more information. During this time Maldonado began to act nervous and fidgety. One of the deputies decided to frisk Maldonado. During the frisk the deputy felt a large bulge in Maldonado’s boot. The deputy feared that it might be a weapon, and he removed the bulge. He saw that it was a small ball wrapped in duct tape, and his prior experience and knowledge led him to believe that it was drugs. The deputies opened the ball and discovered heroin. They arrested Maldonado on charged related to the possession of heroin, and Maldonado moved to suppress the evidence at trial. Maldonado held that the deputies did not have probable cause to open the ball, but he did not raise the issue about the initial seizure during the frisk. The district court denied his motion, and Maldonado appealed. The Fifth Circuit affirmed the lower courts decision. They held that the deputies did have probable cause to open the duct-tape ball. During his appeal Maldonado also protested the initial seizure under *Dickerson*. The court addressed the issue but only looked for plain error since it was not raised during the initial suppression hearing.

**Decision:** Pro-Police, Evidence Allowed at Trial
**Affirmed Lower Court Decision**

**Concerns:**
#1: Container
#4: Officer Testimony

**Offense:** Drug
**Evidence:** Bag of Heroin in Duct-Tape Ball
**Circuit:** Fifth
**Judges:** White, Byron R. (Appointed by Kennedy)
           Barksdale, Rhesa Hawkins (Appointed by G.H.W. Bush)
Parker, Robert Manley (Appointed by Clinton)

Opinion: Barksdale
Method: Totality of the Circumstances

10. United States v. Maqueira (1995), 1995 U.S. App. LEXIS 33979. David Maqueira appealed his conviction for the distribution of cocaine. Maqueira argued that the seizure of the evidence used to convict him was unconstitutional. Police had originally seized the evidence during a Terry frisk. The district court denied his motion to suppress, and the Ninth Circuit affirmed the lower court’s decision. The court stated that the Terry frisk was justified by a reasonable and articulable suspicion, and the court then stated that the seizure of the evidence, a large bag of cocaine, was justified under the Dickerson doctrine. The court cited the officer’s prior experience and training when determining if the seizure satisfied the standard of immediately apparent.

Decision: Pro-Police, Evidence Allowed at Trial
Affirmed Lower Court Decision

Concerns: None
Offense: Drug
Evidence: Bag of Cocaine
Circuit: Ninth
Judges: Hug, Procter Ralph, Jr. (Appointed by Carter)
Thompson, David R. (Appointed by Reagan)
O’Scannlain, Diarmuid Fionntain (Appointed by Reagan)

Opinion: Memorandum (Not for Publication)
Method: Totality of the Circumstances

11. Dickerson v. United States (1996), 677 A.2d 509. In September, 1994 an anonymous citizen flagged down two officers on patrol for the Metropolitan Police Department of Washington, D.C. The citizen informed the officers that an individual was selling drugs in a particular area. The officers responded to the area and found an individual, Kenneth Dickerson, who matched the description given by the informant. The officers frisked Dickerson. During the frisk the officer felt a large, hard object in Dickerson’s crotch area. The officer instantly recognized the hard, moveable object as narcotics. The officer then opened Dickerson’s pants, reached into his underwear, and pulled a clear bag containing crack cocaine into plain sight. The officers arrested Dickerson on charges related to the distribution of narcotics, and Dickerson moved to suppress the evidence at trial. The trial court denied the motion, and Dickerson appealed. The Appellate Court for the District of Colombia affirmed the lower court’s decision. The court stated that the officer’s testimony and experience and the situation of the search in a high crime area allowed this sort of seizure. The court also recommended a totality of the circumstances approach to determine the legality of a plain touch seizure. The court compared this to United States v. Adell (1996) and stated the seizure in the earlier case was suppressed due to the lack of evidence.

Decision: Pro-Police, Evidence Allowed at Trial
Affirmed Lower Court Decision

Concerns: #4: Officer Testimony
Offense: Drug
Evidence: Bag of Crack Cocaine
Circuit: D.C.
Judges: Ferren, John M. (Democrat)
        Steadman, John M. (Republican)
        Ferrell, Michael W. (Republican)
Opinion: Ferren
Method: Totality of the Circumstances

12. Speight v. United States (1996), 671 A.2d 442. In February, 1993 the Metropolitan Police Department of Washington D.C. received an anonymous tip that two individuals possessed both drugs and firearms. The tip was highly detailed about the appearance and location of the individuals. Within minutes two officers responded to the location and spotted individuals that matched the description provided by the anonymous caller. The officers frisked the individuals but found no weapons. However, the frisk of one individual, Herman R. Speight, did produce a set of car keys. The officers asked Speight if he carried car keys, and Speight replied in the negative. The officer then reached into Speight’s pocket and secured the keys. The officers walked to a nearby car and smelled the odor of PCP. The keys seized from Speight opened the car, and the officers seized several packages of PCP-laced marijuana, a jar of PCP, and two handguns. The officers arrested Speight on charges related to the distribution of a controlled substance and the possession of illegal weapons. Speight moved to suppress the evidence at trial by arguing that the initial seizure of the keys was illegal. The trial court denied his motion, and Speight appealed. The Court of Appeals for the District of Columbia affirmed the lower court’s decision. However, the court took a different path in reaching this decision. The court said that the seizure of the keys was illegal under Dickerson. The court stated that initial stop and frisk was legal but the seizure of the keys was unconstitutional because they were not immediately apparent as illegal contraband. The court did allow the evidence seized from the car due to the motor vehicle exception. The court stated the odor of PCP established probable cause for the officers to perform a warrantless search on the car. Further, the evidence found in the car provided probable cause for arrest, and this would have allowed the officers to seize the keys during a search incident to a lawful arrest.

Decision: Pro-Rights, Evidence Suppressed at Trial
          Affirmed Lower Court Decision
Concerns: #1: Incriminating Evidence
Offense: Drug
Evidence: Car Keys
Circuit: D.C.
Judges: Ferren, John M. (Democrat)
        Ferrell, Michael W. (Republican)
        Reid, Inez S. (Democrat)
Opinion: Ferren
Method: None

13. United States v. Adell (1996), 676 A.2d 446. In June, 1994 the police in Washington, D.C. initiated a stop on a vehicle driven by James E. Adell. The officers noticed that Adell was acting nervously, and the officers asked Adell to step out of the car in fear that he might have weapons. The officers asked Adell if he would consent to a patdown search for weapons. Adell answered in the affirmative. As the officers conducted the frisk Adell put his hand in his front pocket. The
officer instructed him to stop, but he continued to place his hand in his front pocket. The officer then reached into Adell’s pocket in fear he might be reaching for a weapon. The officer felt a plastic bag filled with a rock-like substance that she thought might be crack cocaine. The officer pulled the bag into open view and found that it was a plastic bag filled with rice. The officer then shook the bag around until she observed several packets of cocaine hidden in the rice. The officers arrested Adell, and a further search of the Adell’s vehicle produced several packets of heroin. Adell moved to suppress the evidence at trial, and the trial court granted his motion. The state then appealed, and the Court of Appeals for the District of Columbia affirmed the lower court’s judgment. The court stated that the officer was justified in frisking Adell and reaching into his pocket. However, the seized contraband was not immediately determined to not be a weapon. Therefore, the officer’s further manipulation of the bag to find the cocaine was not allowed. The court stated that the officer’s testimony demonstrated that the seizure involved further manipulation, which precluded the satisfaction the immediately apparent standard.

Decision: Pro-Rights, Evidence Suppressed at Trial
Affirmed Lower Court Decision

Concerns:
#1: Container
#4: Officer Testimony

Offense: Drug
Evidence: Plastic Bags of Cocaine Hidden in Larger Bag of Rice
Circuit: D.C.
Judges: Terry, John A. (Republican)
Schwelb, Frank E. (Republican)
Ruiz, Vanessa (Democrat)

Opinion: Terry
Method: Officer Testimony

14. United States v. Rivers (1997), 121 F.3d 1043. The police in Peoria, IL were in the process of serving a search warrant on a residence in order to find an individual, Felton Bush, who was wanted for the crime of domestic battery. Upon arriving at the scene the officers witnessed Bush drive away. The officers stopped Bush and arrested him due to the outstanding warrant for domestic violence. The search incident to the arrest produced a bag of cocaine, which had been hidden on Bush’s body. The officers then turned their attention to the passenger of the car, Reggie Rivers. The officer decided to frisk Rivers. During the frisk the officer felt what he immediately recognized to be a bag of crack cocaine. The officer asked Rivers about the identity of the bulge, and Rivers replied that it was money. The officer decided to seize the bag, found that it was crack cocaine, and arrested Rivers. Rivers moved to suppress the evidence at trial, and the trial court denied his motion. Rivers was convicted, and he appealed. The Seventh Circuit affirmed the lower court’s judgment. The court held that the stop and frisk were both motivated by a reasonable suspicion of criminal activity and possible weapons. Further, the court held that the officer’s testimony and experience as well as the nature of the seizure satisfied the immediately apparent standard.

Decision: Pro-Police, Evidence Allowed at Trial
Affirmed Lower Court Decision

Concerns:
#4: Officer Testimony

Offense: Drug
Evidence: Bag of Crack Cocaine
15. United States v. Rogers (1997), 129 F.3d 76. In November, 1995 two New York City police officers were patrolling in an unmarked patrol car. The officers noticed a cab driver trying to signal them. The officers performed a traffic stop on the cab, and the cab driver informed the officers that he believed his passengers were going to rob him. The officers ordered the passengers out of the cab. Upon exiting a female passenger, Shilon Rogers, turned away from the officers as though trying to hide something. The officers frisked Rogers. During the frisk the officers felt an unusual object in Rogers’ left jacket pocket, which was the area she had been trying to hide. The frisking officer ascertained that the object was both hard and soft, but he couldn’t determine its exact identity. The officer continued to manipulate the object and determined that it was most likely drugs. The officer seized the evidence, determined that it was in fact cocaine, and arrested Rogers. Rogers moved to suppress the evidence at trial, but the court denied her claim. The state convicted Rogers on charges related to the possession of cocaine, and Rogers appealed. The Second Circuit affirmed the lower courts decisions. The court held that Terry allows the manipulation of an object to determine if it is a weapon. If during this manipulation the officer determines the evidence to be contraband then the officer can seize it under Dickerson.

Decision: Pro-Police, Evidence Allowed at Trial
Affirmed Lower Court Decision

Concerns: #4: Officer Testimony
Offense: Drug
Evidence: Small Bag of Cocaine Contained Within Paper Bag

16. United States v. Salvant (1997), 1997 U.S. App. LEXIS 6312. In December, 1994 two police officers patrolled a high crime area of Memphis, TN. The officers observed two individuals engaging in what they believed to be a drug sale. The officers witnessed one individual hand another individual, Marvel Salvant, a large white bag. Salvant then stuffed the bag down his pants. The officers approached the individuals who promptly fled the scene. The officers pursued the individuals and eventually found Salvant hiding underneath a house. The officers handcuffed Salvant and led him to the street where they placed him facedown. The officers frisked Salvant. During the frisk the officer felt a bulge in Salvant’s pants that corresponded to the bag he received during the drug transaction. The officer felt another lump in Salvant’s right front pocket, and the officer immediately identified the rock like substance as crack cocaine. The officers arrested Salvant on charges related to the possession of narcotics, and
Salvant moved to suppress the evidence at trial. The district court denied his motion, and Salvant appealed. The Sixth Circuit affirmed the lower court’s decision. The court first verified that the search of Salvant occurred under a *Terry* stop and not an arrest. The court then cited the officer’s testimony as establishing the seizures legality under the *Dickerson* doctrine.

**Decision:** Pro-Police, Evidence Admitted at Trial  
**Concerns:** #4: Officer Testimony

**Offense:** Drug  
**Evidence:** Small Bag of Crack Cocaine  
**Circuit:** Sixth  
**Judges:**  
Jones, Nathaniel R. (Appointed by Carter)  
Suhrheinrich, Richard Fred (Appointed by G.H.W. Bush)  
Siler, Eugene Edward, Jr. (Appointed by G.H.W. Bush)  

**Opinion:** Per Curium  
**Method:** Officer Testimony

---

17. United States v. Nicholson (1998), 144 F.3d 632. In September, 1996 three police officers with the Oklahoma City Police Department were monitoring Greyhound bus traffic from the west coast. Citing their knowledge that west coast busses often contained drug contraband the officers asked Greyhound officials if they could examine the luggage of a bus en route from San Diego, CA to New York, NY. The officials agreed. One officer searched the carry on luggage in the passenger compartment. He squeezed and manipulated a black bag where he felt large hard lumps. The officer knew at once the lumps were drugs, and he opened the bag and verified that it was cocaine. Another officer examined the luggage stored under the bus, and after squeezing and manipulating a bag he felt what he recognized to be bags of marijuana. The officers eventually located the owner of the bag, Eugene Nicholson Jr., and they arrested him on charges related to the possession of the marijuana and cocaine. Nicholson moved to suppress the evidence at trial, and the district court denied his motion. Nicholson appealed, and the Tenth Circuit reversed the lower courts decision. The government tried to justify the seizure on various claims related to expectations of privacy and plain view, and the court dismissed all of these claims. Further, the government tried to justify the seizure based on the plain view doctrine, and the court denied this claim. The court stated that the officers went beyond a casual examination of the bags and instituted a warrantless search. At this point the officers were not legally allowed to be engaging in this activity, and the plain touch exception was unable to justify their activities. The court compared this to other cases where the officers had accidentally felt something during innocuous or mundane activities. The purposefulness of the search precluded *Dickerson* from activating. To justify this the court relied primarily on the officer’s testimony concerning the nature of the search.

**Decision:** Pro-Rights, Evidence Suppressed at Trial  
**Concerns:** #3: *Terry* Stop  
#4: Used officer testimony  
**Offense:** Drug  
**Evidence:** Bags of Cocaine  
Bags of Marijuana  
**Circuit:** Tenth
18. United States v. Proctor (1998), 148 F.3d 39. In September, 1993 the police in Camden, ME and Tuscon, AZ were conducting an cooperative investigation in order to stop interstate drug trafficking. The Camden police received information that Patricia and Todd Proctor were involved in the transportation of marijuana from Camden to Tuscon. The police received a warrant to search the Proctor residence. Three officers arrived to execute the warrant. Upon their arrival they witnessed an individual flee from the residence. Two officers pursued, and one officer stayed behind to secure the scene. The officer at the scene observed two individuals approach the house from the street, a two hundred step climb, and the officer noticed that one of the individuals, Clifford Proctor, who was the son of the residents, had a large bulge in his front pocket. Fearing the bulge was a weapon the officer frisked Proctor and at once realized the bulge was a “glassine bag filled with a leafy substance”. The officer knew at once this was marijuana and seized the evidence. The officer arrested Clifford Proctor, and the state convicted him on charges related to the marijuana evidence. During his trial Proctor moved to suppress the evidence, but the district court denied his motion. Proctor then appealed his conviction. The First Circuit affirmed the legality of the initial frisk the court cited Dickerson as allowing for plain touch seizures based upon an immediate recognition of incriminating evidence. The court held that the seizure of the marijuana was well within the bounds of the plain touch doctrine.

Decision: Pro-Police, Evidence Allowed
Affirmed Lower Court Decision

Concerns: #4: Court quotes officer testimony verbatim to affirm evidence was immediately apparent.

Offense: Drug
Evidence: Bag of Marijuana
Circuit: First
Judges: Torreula, Jaun R. (Appointed by Reagan)
        Bownes, Hugh Henry (Appointed by Carter)
        Stahl, Norman H. (Appointed by G.H.W. Bush)

Opinion: Stahl
Method: Officer Testimony

19. United States v. Raymond (1998), 152 F.3d 309. State troopers in South Carolina initiated a traffic stop on Interstate 95. The car they stopped was going eighty-five mph in a sixty-five mph zone, and when the troopers approached the car the driver began speaking very rapidly and nonsensically. The troopers were members of a task force designed to apprehend and arrest drug offenders, and they ordered the driver and two passengers out of the car in order to conduct a Terry frisk. One of the passengers, Jean Raymond, exited the car while clutching his stomach. Raymond then leaned awkwardly against the car as though trying to keep something secure under his shirt. A trooper frisked Raymond and felt a hard, metallic object hidden under his shirt by his stomach. The trooper at first thought it was a weapon, but as he felt the length of the
object he realized it was a “crack cookie”. The trooper removed the object, verified that it was crack cocaine hidden in a pie tin, and arrested Raymond. Raymond moved to suppress the crack cocaine as evidence at trial, and the district court refused his motion. Raymond appealed. The Fourth Circuit upheld the district court’s decision. The court first cited that the Terry stop was constitutionally based upon reasonable suspicion, and the court then stated that the seizure of the evidence was within the bounds of the Dickerson doctrine. The court held that the trooper’s initial suspicion that the object was a weapon was dispelled as he completed the search. However, the officer then at once realized the object was a “crack cookie”.

Decision: Pro-Police, Evidence Allowed
Affirmed Lower Court Decision

Concerns: #4: Officer Testimony
Offense: Drug
Evidence: “Crack Cookie”
Circuit: Fourth
Judges: Ervin, Samuel James III (Appointed by Carter)
Butzner, John D. Jr (Appointed by Johnson)
Stamp, Frederick Pfarr, Jr. (Appointed by G.H.W. Bush)

Opinion: Per Curium
Method: Officer Testimony

20. United States v. Walker (1999), 181 F.3d 774. In August, 1995 police officers in Memphis, TN executed a search warrant on a residence. To secure the setting the officers frisked the individuals at the location. As an officer frisked one of the individuals, Keith Walker, the officer noticed that Walker had large bulge in the back of his pants. The officer touched the bag, instantly recognized it as a large bag of narcotics, and pulled down Walker’s pants to seize the bag. The officer verified the identity of the substance and arrested Walker. The police then went to Walker’s residence where his father gave them permission to search his room. The police found a large amount of crack cocaine, a substantial amount of money, and a scale commonly used to measure narcotics. The state charged Walker with crimes related to the distribution and possession of narcotics, and Walker moved to suppress the evidence due to the illegal nature of the frisk-related seizure. The district court denied the offenders motion. Walker was convicted, and he appealed his charge. The Sixth Circuit affirmed the lower court’s decision. The court stated that the evidence was admissible under the Dickerson doctrine. They affirmed the legality of the initial search, and they cited the officer’s testimony, officer experience, and situational factors when affirming that the initial seizure was motivated by probable cause.

Decision: Pro-Police, Evidence Allowed
Affirmed Lower Court Decision

Concerns: #4: Officer Testimony
Offense: Drug
Evidence: Bag of Crack Cocaine
Circuit: Sixth
Judges: Keith, Damon J. (Appointed by Carter)
Contie, Leroy John, Jr. (Appointed by Reagan)
Suhrheinrich, Richard Fred (Appointed by G.H.W. Bush)

Opinion: Contie
Method: Totality of the Circumstances
On January 9, 1998 a police detective in Southfield, MI witnessed an individual, Oge Ukoha, disembark from a bus that had arrived from Houston, TX. The detective, who was part of a federally funded task force charged with combating narcotics activity, suspected that Ukoha was engaged in the transportation of drugs, and the detective asked Ukoha about his activities. Ukoha stated he was in town to visit a friend for one day and repeat the thirty-hour bus ride and go home. The detective suspected Ukoha was dishonest, learned where Ukoha was staying, and started surveillance on Ukoha’s hotel. The surveilling officers noticed Ukoha meet with two individuals. One of the individuals, Rosyln Butler, left Ukoha’s hotel with a white plastic bag. The detective then contacted his fellow officers and had them initiate a traffic stop on Butler and her comrade in order to search for drug activity. The officers then asked Butler and the driver to step out of the vehicle in order to conduct a Terry frisk. The officers found nothing during the frisk. They then noticed the white bag, felt the exterior, and asked for permission to look inside. Butler consented, and the officers opened the bag to find only a Yahtzee board game. At this point the frisk of the individuals, the plain touch examination of the bag, the visual inspection of the bag, or the visual inspection of the automobile failed to reveal any evidence of drug activity. The officers asked Butler to sit in the backseat of their patrol car, and she agreed. They then asked the driver to join her in the backseat, but he resisted. The officers then had to use force to secure the driver in the backseat. The officers transported Butler and the driver to their station where they again questioned the pair. At this time the detectives searched Ukoha’s room, and they found cocaine hidden in a backgammon game. The detectives contacted officers at the station, and they decided to search the Yahtzee game. At this point Butler and the driver had been secured in separate interview rooms for questioning, but the officers did allow Butler to give the white bag containing the Yahtzee game to her niece. The niece secured the game in her car. After the officers learned that the game may contain contraband they ordered the niece to open the car, and they retrieved the game. They discovered two bricks of cocaine hidden in the game. Also, the officers discovered a brick of cocaine hidden under the seat of the patrol car where Butler had sat. The officers arrested Butler on charges related to possession and distribution of cocaine, and Butler filed a motion to suppress the evidence. The district court denied her motion, and she was then convicted. Butler appealed her conviction, and the Sixth Circuit took the case. The court ruled that the district court erred in denying the motion to suppress. The court stated that a Terry or Dickerson stop must end when the initial frisk reveals no evidence. The court stated that officers initiated an unjustified warrantless search when they detained and continued to search the individuals after the initial frisk failed to reveal any contraband. The court then vacated Butler’s conviction.

Decision: Pro-Rights, Evidence Suppressed
Reversed Lower Court Decision

Concerns: #3: Terry Stop
Offense: Drug
Evidence: Bricks of Cocaine
Circuit: Sixth
Judges: Merritt, Gilbert Stroud, Jr. (Dissent) (Appointed by Carter)
Jones, Nathaniel R. (Appointed by Carter)
Clay, Eric L. (Appointed by Clinton)

Opinion: Clay
22. United States v. Campa (2000), 234 F.3d 733. The United States Postal Inspection Service conducted a yearlong investigation into suspicious postal deliveries at a residence in Revere, MA. In March, 1999 an inspector posed as a mailman to deliver one of these suspicious packages. An individual, Jose Bullon, accepted the package by signing an alias. The inspector summoned backup and asked for permission to open the package. Bullon gave them permission, and the inspectors found that the package contained blank “green cards” commonly used to forge immigration documents. Bullon stated that he merely accepted the packages for an individual known as “Gorrito”. Bullon also characterized “Gorrito” as dangerous. Working with Bullon the inspectors intercepted “Gorrito”, who was later identified as Andres Campa, at Bullon’s residence. The inspectors decided to frisk Campa. During the frisk the inspectors pulled out whatever they felt in Campa’s pockets and ultimately seized a set of keys, a wallet, and a beeper. Battling through a language barrier the officer’s ultimately succeeded in ordering Campa to produce identification. The produced identification card, which was immediately recognizable as counterfeit, led to the arrest of Campa and the discovery of his residence. At the residence the inspectors found further evidence of fraudulent activities related to immigration. The officers arrested Campa, who moved to suppress the evidence at trial. The district court agreed the frisk and plain touch seizure was illegal but ultimately allowed the evidence at trial since Campa voluntarily gave up his identification. Campa appealed, and the First Circuit affirmed the lower court’s decision. The court held that evidence seized during the frisk was by nature not immediately apparent as contraband, and the court further cited the nature of the seizure and the officer’s testimony as justifying this assertion. However, the court ultimately allowed the evidence due to the rationale of the district court.

Decision: Pro-Rights, Evidence Suppressed at Trial
Concerns: #1: Incriminating Evidence
#4: Officer Testimony
Offense: Immigration Fraud
Evidence: Wallet, Keys, Pager
Circuit: First
Judges: Selya, Bruce M. (Appointed by Reagan)
        Coffin, Frank M. (Appointed by Johnson)
        Bownes, Hugh Henry (Appointed by Carter)
Opinion: Coffin
Method: Totality of the Circumstances

23. United States v. Johnson (2000), 212 F.3d 1313. Police officers with the Metropolitan Police Department of Washington, D.C. observed a possible drug transaction in a “high narcotics area”. The officers observed two people sitting in a parked car. A young woman approached the car and handed something through the window to the passenger, Robert Lee Johnson. The officers approached the car and observed Johnson reach into his pants and make shoving motions. Fearing that he had a weapon the officers pulled their firearms and ordered Johnson to show his hands. Johnson continued to make shoving motions for a moment and then raised his hands. The officer then reached into the car and conducted a frisk on the area that Johnson was reaching. The officer felt several lumps that he knew to be crack cocaine, and the officer seized
the evidence and arrested Johnson. Johnson moved to suppress the evidence, and the district
court denied his claim. The court first affirmed the validity of the initial stop and frisk before
finally affirming the validity of the seizure.

**Decision:**  Pro-Police, Evidence Allowed at Trial
               Affirmed Lower Court Decision

**Concerns:** #4: Officer Testimony

**Offense:** Drug

**Evidence:** Nine Small Bags of Crack Cocaine

**Circuit:** D.C.

**Judges:** Silberman, Laurence H. (Appointed by Reagan)
              Sentelle, David B. (Appointed by Reagan)
              Rogers, Judith Ann (Appointed by Clinton)

**Opinion:** Silberman

**Method:** Officer Testimony

24. United States v. Mattarolo (2000), 209 F.3d 1153. In April, 2006 a police officer with the
Sacramento County, CA sheriff’s department was patrolling a secluded road in his marked squad
car. The officer noticed a pickup truck parked in front of the locked gate of closed construction
business. The officer watched the truck reverse into the driveway and noticed a suspicious
looking crate in the back of the truck. The officer knew from prior experience that the
construction business was closed and kept crates similar to this in its lot. Further, the officer had
previously arrested offenders on burglary charges in this area. The officer initiated a stop on the
truck. The driver, Richard Mattarolo, instantly exited his vehicle and walked towards the patrol
car. The officer ordered Mattarolo to stop, noticed his nervous demeanor, and asked him if he
could frisk him. Mattarolo consented. During the frisk the officer felt a pack of cigarettes which
he thought might contain a gun. He also felt a hard lump which he noticed was the size of a
pocketknife. The officer squeeze and manipulated the lump to determine if it was a pocket knife,
and during that process he realized it was actually a small bag of rocklike drugs. The officer then
radioed for backup. When backup arrived the officer asked Mattarolo if he could search his
pockets. The offender agreed, but when the officer reached to retrieve the drugs Mattarolo
moved away. The officer then handcuffed Mattarolo, seized the contraband, and arrested the
offender. A further search of the vehicle produced a larger amount of methamphetamine and
ephedrine. Mattarolo moved to suppress this evidence at trial, and the district court denied his
motion. A jury found Mattarolo guilty on charges related to the drug evidence, and he appealed.
The Ninth Circuit affirmed the lower court’s decision. The court first verified the legality of the
initial stop. The court stated that the Terry doctrine allows an officer to manipulate an object
until he is sure that it is not a weapon. Any further manipulation beyond this point violates
Dickerson. The court held that the officer’s actions were within the bounds of Terry and that the
manipulation of the object was necessary to determine if it was a knife. The court then held that
the manipulation produced evidence that satisfied the immediately apparent standard. The Court
cited the officer’s experience, the nature of the stop, and the officer’s testimony in reaching this
decision.

**Decision:**  Pro-Police, Evidence Allowed at Trial
               Affirmed Lower Court Decision

**Concerns:** #4: Officer Testimony

**Offense:** Drug
Evidence: Bag of Methamphetamine
Circuit: Ninth
Judges: Wood, Harlington, Jr. (Appointed by Ford)
        Kozinski, Alex (Appointed by Reagan)
        Rymer, Pamela Ann (Appointed by G.H.W. Bush)
Opinion: Wood
Method: Totality of the Circumstances

25. United States v. Miles (2001), 247 F.3d 1009. In December, 1997 police in Portland, OR received a report that an unidentified male had fired a pistol at a residence. The report stated that the male was wearing an oversized jacket and had fled the scene on bicycle. Two police officers responded to the vicinity and began investigating. The officers spotted an individual, Mark Miles, who matched the description and was standing in a yard near a bicycle. The officers approached Miles and frisked him due to the concern that he might be carrying a weapon. During the frisk the officer felt a small box that was approximately half the size of a pack of cigarettes. Unable to determine what was in the box the officer then shook it back and forth and heard what he thought was bullets. The officer withdrew the box and verified that it contained .22 caliber bullets. The officers then arrested Miles as the shooter and charged him with felony possession of ammunition. A search of the yard produced a handgun that matched the bullets retrieved from Miles. Miles proved to suppress the evidence at trial, and the district court denied his motion. Miles then entered a conditional guilty plea and appealed his charges. The Ninth Circuit reversed the lower court’s decision. The court stated that the initial frisk was justified under Terry, but the manipulation of the evidence overstepped the Dickerson doctrine. The court stated that an officer could manipulate an object to determine if it was a weapon as in Mattarolo (2000). However, in this circumstance it was clear that the officer’s initial frisk clearly verified that it was not a weapon. Therefore, all further manipulation was illegal. The court cited officer testimony and the nature of the evidence when making this determination.
Decision: Pro-Rights, Evidence Suppressed at Trial
Reversed Lower Court Decision
Concerns: #1: Container
         #4: Officer Testimony
Offense: Weapon
Evidence: .22 Caliber Bullets
Circuit: Ninth
Judges: McKeown, M. Margret (Appointed by Clinton)
        Fletcher, Betty Binns (Appointed by Carter)
        Rawlinson, Johnnie B. (Appointed by Clinton)
Opinion: McKeown
Method: Totality of the Circumstances

26. United States v. Moore (2001), 8 Fed. Appx. 354. In January of 1999 two deputy sheriffs with the Laurel County Sheriffs Department of Kentucky instituted a traffic stop on a suspicious vehicle. The deputies approached the vehicle, noticed several small plastic baggies on the front seat, and spoke with the driver. The driver, William R. Moore, started to thrust his hand in the left front pocket of his jeans, and the deputy ordered the driver out of the vehicle to conduct a Terry frisk in fear that Moore was reaching for a weapon. As the deputy conducted the frisk
Moore thrust his hand into his left front pocket, and the deputy placed his hand over Moore’s. The deputy felt a large and bulky object, and when Moore finally removed his hand from his pocket the deputy felt a “hard and bulky” substance. The deputy was unsure if the item was a weapon or not, and he removed the substance from the pocket. It was a large packet of methamphetamine, and the deputies arrested Moore. Moore moved to suppress the evidence, but the district court denied the motion. Moore was convicted and appealed. The Sixth Circuit affirmed the district court’s decision and stated that Dickerson allows seizures of non-weapons contraband in these scenarios. The deputy was unsure, but reasonably suspected, that the substance was a weapon, and he was justified in removing it from the pocket. When the incriminating nature of the evidence became immediately apparent the deputy was then justified in seizing the evidence under Dickerson.

**Decision:** Pro-Police, Evidence Allowed at Trial  
Affirmed Lower Court Decision

**Concerns:** None  
**Offense:** Drug  
**Evidence:** Bag of Methamphetamine  
**Circuit:** Sixth  
**Judges:**  
Guy, Ralph B. (Appointed by Reagan)  
Norris, Allen Eugene (Appointed by Reagan)  
Siler, Eugene Edward, Jr. (Appointed by G.H.W. Bush)  
**Opinion:** Per Curium  
**Method:** Totality of the Circumstances

27. Ball vs. United States (2002), 803 A.2d 971. During a night in March, 1997 an officer with the Metropolitan Police Department of Washington, D.C. instituted a traffic stop on a car travelling without a front license plate. When the officer approached the car he witnessed a passenger, Mark Ball, make furtive movements and try to cover his lap with a newspaper. The officer questioned the driver, who at once began to perspire and became nervous, and asked for consent to search the car. The driver agreed, and the officer frisked him. He then began to frisk Ball. During the frisk Ball continually reached towards his right front pocket, which was the area he tried to cover with the newspaper, and the officer frisked the area in fear that it might contain a weapon. Upon touching the pocket the officer felt a cylindrical object that he at once recognized to be a pill or medicine bottle. Due to his training and experience the officer knew that offenders often transported drugs in bottles like this, and he opened the bottle to find crack cocaine. Ball grabbed the bottle from the officer, threw it, struck the officer, and tried to escape. The officer detained Ball and arrested him on charges related to the possession of narcotics. Ball moved to suppress the evidence at trial, and the trial court denied him motion. Ball then appealed. The District of Columbia Court of Appeals affirmed the lower court’s decision. The court held that the officer was justified in seizing and opening the bottle. The court held that the officer’s training and experience as well as the totality of the circumstances justified this decision. Further, the court held that the medicine bottle, although a rigid container, was immediately apparent as contraband. The court admitted that other appellate courts have struggled with the plain touch seizure of rigid containers, but the court held that the officer’s experience justified this sort of seizure although tactile manipulation could not determine the exact specifics of the contraband in the container. The court cited Dickerson v. United States (1996), People v. Champion (1996), and State v. Rushing (1996) as support for this logic.
Decision: Pro-Police, Evidence Allowed at Trial
Affirmed Lower Court Decision
Concerns: #4: Officer Testimony
Offense: Drug
Evidence: Pill Bottle of Crack
Circuit: D.C.
Judges: Farrell, Michael W. (Republican)
Ruiz, Vanessa (Democrat)
Glickman, Stephen H. (Democrat)
Opinion: Ruiz
Method: Totality of the Circumstance.

28. United States v. Hernandez-Rivas (2003), 348 F. 3d 595. Police officers in Walworth County, WI conducted surveillance on a group of Hispanic men suspected of trafficking narcotics. The surveillance lasted for eighteen months, and the DEA assisted the officers. The officers received information that one of the suspects, Gerardo Hernandez-Rivas, was going to flee the country. The officers witnessed Hernandez-Rivas leave the area in a vehicle. The officers performed a traffic stop on the vehicle for driving over the speed limit. The officers asked for permission to search the vehicle and found three bullets and $25,000 in cashier’s checks. The officers then frisked Hernandez-Rivas. During the frisk the officer felt a bulge in the shirt pocket of Hernandez-Rivas, and the officer at once recognized it to be a large wad of money. The officer then retrieved the offender’s wallet to check for identification and found another large sum of money. The government used this evidence along with other incriminating materials to arrest Hernandez-Rivas on charges related to the trafficking of narcotics. Hernandez-Rivas moved to suppress the evidence at trial, and a magistrate judge denied his motion. At this time Hernandez-Rivas did not object to this decision. Hernandez-Rivas was convicted, and he appealed his charges. The Seventh Circuit affirmed the lower courts decision. The court stated that Hernandez-Rivas didn’t have grounds to appeal his conviction due to his earlier failure to object, but the court further stated that Dickerson clearly allowed this sort of seizure. The court stated that the money was essentially in plain view during the frisk.

Decision: Pro-Police, Evidence Allowed at Trial
Affirmed Lower Court Decision
Concerns: #4: Officer Testimony
Offense: Drug
Evidence: Wad of Money ($10,000)
Circuit: Seventh
Judges: Bauer, William Joseph (Appointed by Ford)
Kanne, Michael Stephen (Appointed by Reagan)
Evans, Terence T. (Appointed by Clinton)
Opinion: Bauer
Method: None

29. United States v. Majors (2003), 328 F.3d 791. In March, 2000 officers assigned to a drug task force unit executed a search warrant on a residence in Waco, TX. During the search an officer frisked an offender, David Earl Majors, who had prior convictions for charges related to
weapons, theft, and drugs. During the frisk the officer felt a large bulge that was “between hard and soft” in Major’s pants. The officer then could not determine if it was a weapon and continued to manipulate the item. Still unable to determine if it was a weapon the officer reached into the Major’s pocket and pulled the object into view. The officer saw that it was narcotics, but he did not seize the evidence at that time. The officer informed an investigator with the drug unit about the narcotics, and the investigator then seized the evidence and arrested Majors. Majors moved to suppress the evidence at trial, and the district court denied his motion. A jury found Majors guilty, and Majors appealed his conviction. The Fifth Circuit affirmed the lower courts decisions by stating that \textit{Dickey} activates after a \textit{Terry} frisk. Therefore, a plain touch seizure only activates after an officer has determined if an object is a weapon or not. If an officer is unsure whether or not an object is a weapon then that officer may continue to manipulate the object. However, once the officer is sure that an object is not a weapon the immediately apparent standard activates and all further manipulation must stop. The court cites \textit{Maldonado} (1995) and \textit{Campbell} (1999) as justification for this logic.

\textbf{Decision:} Pro-Police, Evidence Allowed at Trial  
\textbf{Affirmed Lower Court Decision}

\textbf{Concerns:} #4: Officer Testimony

\textbf{Offense:} Drug

\textbf{Evidence:} Bag of Heroin

\textbf{Circuit:} Fifth

\textbf{Judges:} Reavely, Thomas Morrow (Appointed by Carter)  
Jolly, E. Grady (Appointed by Reagan)  
Jones, Edith H. (Appointed by Reagan)

\textbf{Opinion:} Per Curium

\textbf{Method:} Officer Testimony

\textbf{30. United States v. Thomson} (2003), 354 F.3d 1197. Police officers responded to a complaint concerning a dangerous person at local Salt Lake City, Utah business. The workers at the business informed them that Kevin Thomson, a former employee who had been recently fired, had made threats of violence. The workers informed the officers that Thomson was a drug user who carried a handgun in a green canvas bag. The officers located Thomson and instituted a \textit{Terry} frisk. During the frisk they saw the green bag sitting in reach of Thomson, and they asked him if the bag contained a weapon. He responded in the affirmative, and the officers seized and opened the bag. The officers found a handgun, seized the weapon, and arrested Thomson on federal charges related to the possession of the firearm. Thompson moved to suppress the firearm as evidence by arguing that the officers had no probable cause to seize the evidence. The district court denied his motion, and he was convicted. Thomson appealed, and the Tenth Circuit affirmed the district court’s decision. The court stated that the \textit{Dickerson} doctrine allows the seizure of all incriminating evidence if found during a \textit{Terry} frisk if discovered by plain touch.

\textbf{Decision:} Pro-Police, Evidence Allowed at Trial  
\textbf{Affirmed Lower Court Decision}

\textbf{Concerns:} None

\textbf{Offense:} Weapon

\textbf{Evidence:} Firearm (Handgun)

\textbf{Circuit:} Tenth

\textbf{Judges:} Tacha, Deanell Reece (Appointed by Reagan)
31. **Weaver v. Shadoan (2003), 340 F.3d 398.** In October, 1997 Stephen Weaver died while in police custody. The events started when an officer, Warren Shadoan, noticed a suspicious vehicle sitting in a driveway. The officer knew that the owner of the house did not own the vehicle. The officer investigated and noticed that the car had temporary license plates that he thought were expired. The vehicle left, and the officer followed. The officer initiated a traffic stop on the vehicle. The driver, Weaver, exited the vehicle and met the officer at the back of the car. Weaver pointed out that the license plate was not actually expired. At this time Weaver displayed several suspicious characteristics including a restless demeanor, nervous movements with his hands, and stammering speech. Citing that they had just come from a high crime area the officer decided to conduct frisk Weaver. The frisk revealed several small lumps that the officer knew at once to be crack cocaine. The officer instructed Weaver to empty his pockets, and Weaver fled. The officer apprehended Weaver, found that the lumps of crack were missing, and noticed that Weaver had apparently just eaten something. The officer asked Weaver if he ingested drugs. Weaver answered in the negative, but a search of the area did not reveal the previously discovered contraband. The officers arrested Weaver and transported him to the jail. At this point Weaver began to have seizures but still insisted that he did not ingest any drugs. The officers called paramedics, but Weaver continued to insist that he did not ingest any drugs. Later, Weaver would die from an overdose of narcotics. His mother sued the police department and cited a whole host of issues. She contested that the initial arrest was not based on probable cause because there was no evidence justifying the arrest. The officers involved in the arrest applied for a summary judgment based upon qualified immunity. The district court denied their motion. The officers appealed, and the Sixth Circuit reversed the lower courts decision. The court cited that *Dickerson* allows the seizure of evidence discovered during an otherwise lawful frisk. The court held that the officer’s testimony and the defendant’s behavior as demonstration that the plain touch search created probable cause for the arrest. The court also answered the plaintiff’s other complaints in a similar manner, and the case was remanded to the lower court to readdress the issue of qualified immunity.

**Decision:** Pro-Police, Evidence Allowed at Trial  
Reversed Lower Court Decision

**Concerns:** #4: Officer Testimony

**Offense:** Drug

**Evidence:** Nine Small Lumps of Crack-Cocaine

**Circuit:** Sixth

**Judges:** Siler, Eugene Edward, Jr. (Appointed by G.H.W. Bush)  
Daughtrey, Martha Craig (Appointed by Clinton)  
Aldrich, Ann (Appointed by Carter)

**Opinion:** Siler

**Method:** Totality of the Circumstances

32. **United States v. Hale (2004), 108 Fed. Appx. 488.** In this opinion the Ninth Circuit addressed an interlocutory appeal based upon motion to suppress stemming from a *Dickerson*
The seizure in question involved a firearm located within a bag. Police officers in California had previously arrested Luther Adria Hale on other charges. Officers located a bag during a search of the trunk of his vehicle. When they picked up the bag officers then felt what they immediately recognized as a pistol. Hale filed a motion to suppress the handgun from trial, and the district court agreed. The government appealed, and the Ninth Circuit affirmed the lower court’s decision by stating that the incriminating nature of the seized firearm was not immediately apparent. The court cited the police officer’s lack of knowledge concerning whether or not Hale could legally own a firearm as precluding the fulfillment of the immediately apparent standard. The court held that the firearm could not be immediately apparent unless the officers had specific knowledge of its illegality.

**Decision:** Pro-Rights, Evidence Suppressed
Affirmed Lower Court Decision

**Concerns:** #1: The court suppressed incriminating evidence.

**Evidence:** Firearm (Handgun)

**Circuit:** Ninth

**Judges:** Hug, Proctor Ralph, Jr. (Appointed by Carter)
Gibson, John R. (Appointed by Reagan)
Fisher, Raymond C. (Appointed by Clinton)

**Opinion:** Memorandum (Not for Publication)

**Method:** Totality of the Circumstances

---

**33. United States v Bustos-Torres (2005), 396 F.3d 935.** On October 16, 2002 a Ramsey County Sheriff’s Deputy was surveilling a bar in St. Paul, MN. The deputy was a veteran of a task force designed to pursue narcotics and other drug related offenses, and he was watching this particular bar in order to locate a specific fugitive. During the course of his surveillance the deputy observed an individual conducting what he suspected to be drug sales. On the second drug sale the deputy witnessed the individual get into an automobile and then reappear in several minutes. At this time the deputy received information that his fugitive was not going to appear at this particular bar, and he decided to pursue the automobile. He initiated a traffic stop, waited for back up, and then spoke with the individuals in the car. The deputies ordered the individuals out of the car in order to conduct a Terry frisk. During the frisk the officers felt two large lumps in each of Jaime Bustos-Torres’s pockets. The officer at once recognized these lumps as large wads of money, and he seized the evidence. The officers then arrested the individuals by using the money as probable cause of drug activity, and they searched the interior of the car. They found a small container that contained methamphetamine, and they also found a room key to a local motel. Upon searching the motel room they found over 500 grams of methamphetamine. Bustos-Torres was charged with crimes related to methamphetamine distribution. Bustos-Torres moved to suppress evidence seized during the frisk at trial, but the district court denied his motion. The state convicted Bustos-Torres, and he appealed. The Eighth Circuit affirmed the district courts decision, and they stated that the deputy was justified in seizing the wads of money. Citing an earlier case, United States v. Hernandez-Rivas (2003), the court held that the Dickerson doctrine allowed both the seizure of contraband and the evidence of criminal activity. By examining the totality of the circumstances the court affirmed that the deputy was justified in initiating a Terry stop. Therefore, the seizure of the money, which was evidence of criminal activity, was constitutional.
34. United States v. McGlown (2005), No. 04-2433. In July, 2003 two police officers were conducting surveillance on a bar in Flint, MI. The police officers heard several gunshots and investigated. One officer approached a large group of people. One of the individuals in the group, Jermaine Demetris McGlown, moved away from the officer while placing something dark and black into the rear of his pants. The officer ordered McGlown to stop, but McGlown refused. McGlown moved behind a vehicle and bent to the ground as though hiding something. The other officer then arrived at the scene and frisked McGlown in fear that he might have a weapon. During the frisk the officer felt a soft bulge that he at once recognized to be a bag of cocaine. The officer seized the evidence and arrested McGlown. The officer then discovered a 9mm pistol concealed behind the rear tire of the nearby vehicle. The officer deduced that this was the object that McGlown had been attempting to conceal. He seized this evidence also. McGlown moved to suppress the narcotics evidence from trial, and the district court denied his motion. McGlown then plead guilty to charges related to possession of the firearm and narcotics but retained his right to appeal. The Sixth Circuit affirmed the lower courts decisions. First, the court stated the frisk was reasonable. The court then examined the facts around the plain touch seizure and determined its legality by examining trial testimony, officer testimony, the nature of the seizure, and the officer’s past experience. Also, the court addressed McGlown’s contention that the incriminating nature of powdered cocaine would not be immediately apparent during a plain touch frisk. The court dismissed this claim.

Decision: Pro-Police, Evidence Allowed at Trial
Affirmed Lower Court Decision

Concerns: #1: Incriminating Evidence
#4: Officer Testimony

Offense: Drug
Evidence: Two “Wads” of Money ($10,000)
Circuit: Eighth
Judges: Wollman, Roger Leland (Appointed by Reagan)
Hamilton, Clyde H. (Appointed by G.W.H. Bush)
Bye, Kermit Edward (Appointed by Clinton)

Opinion: Bye
Method: Totality of the Circumstances

35. United States v. Davis (2006), 457 F.3d 817. In October, 2001 a police officer in Omaha, NE initiated a traffic stop on a vehicle for a failure to signal while turning. As the officer...
approached he noticed a passenger in the backseat, Billy D. Davis, make furtive movements with his hands as though he was trying to conceal something behind him. Further, the officer knew Davis as someone who had previously been involved in drug activity. Fearing that Davis may have a weapon the officer asked him if he would consent to a search of his person. Davis agreed. The officer frisked Davis, felt what he knew to be small packages of crack cocaine in the waistline of Davis’ pants, and placed Davis under arrest. The officer then transported Davis to the police station where Davis became combative. During the struggle Davis’ pants fell to the ground and exposed a small bag of narcotics. At trial Davis moved to suppress the evidence, and the district court denied his motion. Davis was convicted and appealed. The Eighth Circuit affirmed the lower court’s decision. The court stated that Dickerson allows plain touch seizures, and the officer’s testimony and the nature of the stop satisfied the standard of immediately apparent. Further, the court stated that the plain touch search, even without sight verification, gave enough probable cause to arrest Davis. The court cited Bustos-Torres (2005), Williams (1998), Craft (1994), and Hughes (1994) to justify this logic.

**Decision:** Pro-Police, Evidence Allowed at Trial

**Concerns:**

#4: Used Officer Testimony

**Offense:** Drug

**Evidence:** Small Bag of Crack Cocaine

**Circuit:** Eighth

**Judges:** Bye, Kermit Edward (Dissent) (Appointed by Clinton)

Lay, Donald P. (Appointed by Johnson)

Riley, William J. (Appointed by G.H.W. Bush)

**Opinion:** Lay

**Method:** Totality of the Circumstances

**36. United States v. Garcia (2007), 496 F.3d 495.** Appellant Nicholas Garcia was involved in a large scale operation involving the sale of marijuana and cocaine. The police of Birch Run, MI arrested Garcia on charges related to these activities. During the arrest the police frisked Garcia based upon reasonable suspicion that the offender might have a weapon. The police did not find a weapon, but the frisking officer did seize a pager that was later used as evidence by the state. The state convicted Garcia based upon a multitude of evidence, and the district court did not suppress the pager as evidence. The state appealed this decision, and the Sixth Circuit agreed that the district court was right to allow most of the evidence. However, the Sixth Circuit stated that the pager was seized in violation of Dickerson, but they allowed the evidence to be admitted under the inevitable discovery exception due to the lawful arrest of Garcia.

**Decision:** Pro-Rights, Evidence Suppressed

**Concerns:**

#1: Incriminating Evidence

**Offense:** Drug

**Evidence:** Pager

**Circuit:** Sixth

**Judges:** Batchelder, Alice M. (Appointed by G.H.W. Bush)

Moore, Karen Nelson (Appointed by Clinton)

Hood, Joseph Martin (Appointed by G.H.W. Bush)

**Opinion:** Batchelder
37. United States v. Yamba (2007), 506 F. 3d 251. In March, 2004 a Pennsylvania police officer noticed that a “U-Haul” truck was precariously parked in a local gas station. The truck blocked an entrance, and the police officer drove up to investigate. Upon approaching the truck he noticed two individuals in the truck make quick and furtive movements under the dash of the vehicle. The officer frisked the driver, who was fueling the vehicle. The officer learned from dispatch that the driver had an outstanding warrant, and he arrested the driver and put the offender in his patrol car. The officer then asked the other two individuals to step out of the truck. He frisked a passenger, Vikram Yamba, and felt what he immediately recognized to be a bag of marijuana. He arrested Yamba. The officer then investigated the back of the truck and found that it was full of new furniture. At the police station an inventory search produced several slips of paper from Yamba’s person. The papers had numbers written upon them as well as the word “credit card”. The state used this evidence to charge Yamba with wire fraud for using stolen credit card information to buy the furniture. At trial Yamba moved to suppress the marijuana seized during the frisk as well as the slips of paper under the “fruit of the poisonous tree” doctrine. The court denied his motion. Yamba was convicted, and he appealed his conviction. The Third Circuit affirmed the lower courts judgment. The court gave a detailed examination of the plain touch doctrine, and they concluded that the standard of immediate appearance, as well as Dickerson seizures, activate after an officer determines if an object is a weapon or not. The court cited the decision in Mattarolo (2000) and Rogers (1997) as justifying this logic. The court stated that during the process of frisking to determine if the bag of marijuana was a weapon the officer determined that it was a bag of illegal drugs. This sort of seizure satisfies Dickerson, and the court ruled it legal. The court also stated that the officer may have been lying during his testimony, which detailed the immediately apparent nature of the contraband, but the judges affirmed that appellate courts were not designed to be fact finders. Therefore, they had to rely on the lower court record.

**Decision:** Pro-Police, Evidence Allowed

Affirmed Lower Court Decision

**Concerns:** #4: Officer Testimony

**Offense:** Drug

**Evidence:** Bag of Marijuana

**Circuit:** Third

**Judges:** McKee, Theodore A. (Appointed by Clinton)

Ambro, Thomas L. (Appointed by Clinton)

Ackerman, Harold A. (Appointed by Carter)

**Opinion:** Ambro

**Method:** Officer Testimony

38. United States v. Campbell (2008), 549 F.3d 364. In February, 2005 a police officer in Memphis, TN noticed a suspicious vehicle parked on private railroad property. The officer approached the vehicle and turned on her spotlights. The officer called the license plate number into her dispatch, and the dispatcher informed her that the plates were not on file. The officer feared the plates were stolen. The vehicle tried to leave, but the officer turned on her siren. The vehicle stopped, and the officer called for backup. The officer approached the vehicle and found a female driver and male passenger. The female driver stated that they were co-workers and were
talking, but the male driver stated that he was there for a sexual favor. The officer frisked the driver and transported her back to the patrol car. Backup officers arrived. One of these officers asked the passenger, Donnell Campbell, for identification. Campbell replied that he had none. At this time the officer noticed that Campbell was slumping forward as though trying to hide something. The officer asked Campbell to get out of the car. The officer frisked Campbell. The officer felt a bulge in Campbell’s pocket, which he at once knew to be marijuana, and he seized the evidence. The officer placed Campbell under arrest and transported him to a patrol car. At this time another officer conducted a plain view search of the vehicle’s passenger compartment and found a handgun. The state charged Campbell with charges related to the possession of a handgun and marijuana. At trial Campbell moved to suppress the evidence, and the district court denied his motion. Campbell appealed. The Sixth Circuit affirmed the lower court’s decision. First, the court affirmed the validity of the initial frisk. Second, the court then affirmed the legality of the plain touch seizure by using the officer’s testimony, his prior experience, and the totality of the circumstances. Finally, the court upheld the plain view seizure.

Decision: Pro-Police, Evidence Allowed
Affirmed Lower Court Decision

Concerns:
#4: Officer Testimony

Offense: Drug
Evidence: Bag of Marijuana
Circuit: Sixth
Judges: Boggs, Danny Julian (Appointed by Reagan)
Batchelder, Alice M. (Appointed by G.H.W. Bush)
Griffin, Richard Allen (Appointed by G.H.W. Bush)

Opinion: Griffin
Method: Totality of the Circumstances

39. United States v. Works (2009), 338 Fed. Appx. 295. The police in Huntington, WV received a tip concerning the sale of out of state drugs at a local apartment building whose owner was on house arrest. Officers surveilled the apartment. Upon determining that illegal activity was afoot the officers searched the residence with the assistance of the home detention unit. An individual in the apartment, Barry Works, exited the back door as the officers entered the room. As an officer approached Works he noticed that the offender was trying to conceal a plastic grocery bag from view. The officer frisked Works and felt the bag. Works advised the officer that the bag contained flour. Another officer then frisked Works and felt the bag. Works again stated it was flour, but the officer determined via touch that the contents of the bag were not flour. He looked inside the bag and discovered cocaine. Works moved to suppress the seized evidence at trial, and the district court denied his motion. The state convicted Works on charges relating to the possession of cocaine, and Works appealed his conviction on Fourth Amendment grounds. The Fourth Circuit affirmed the lower courts ruling by stating that the search was reasonable due to the totality of the circumstances and the officer’s testimony.

Decision: Pro-Police, Evidence Allowed
Affirmed Lower Court Decision

Concerns:
#4: Officer Testimony

Offense: Drug
Evidence: Bag of Cocaine
Circuit: Fourth
40. United States v. Hernandez-Mendez (2010), 626 F. 3d 203. In September, 2008 deputies with the Montgomery County Sheriff Department were conducting gang related surveillance in Silver Spring, MD. The deputies were members of a gang unit who chose to deploy at a local high school in response to a gang-related stabbing that had taken place during the previous day. The deputies observed a group of young men conversing near the school. Some of the men were of school age, but a few, including what appeared to be a leader, were older. A young woman, Edith Hernandez-Mendez, arrived, sat apart from the group for a moment, and then approached the group to speak one of the men. Hernandez-Mendez left the group and walked out of the area in the same direction from which she had arrived. A deputy followed the woman, noticed that she sat down at a seemingly random location, and remained there with no obvious purpose. The deputies on the scene approached the men, some of who fled. At the same time another deputy approached Hernandez-Mendez. The deputy asked for her identification, and the young woman produced several credit cards with name “Hernandez” on them. The deputy noticed that the young woman produced these cards from a wallet. However, she also carried a purse. The deputy stated that these forms of identification were unacceptable. Here reached out, touched the purse, and asked if she had another form of identification in here. Upon touching the purse the deputy immediately felt what he knew to be the barrel of a handgun. The deputy seized the evidence and arrested Hernandez-Mendez on charges related to possession of an illegal firearm. Hernandez-Mendez moved to suppress the evidence from trial, and the district court denied her motion. The state convicted Hernandez-Mendez, and she appealed. The Fourth Circuit affirmed the lower courts decision. The court stated that the officers initial touching of the purse was allowed under Terry, and the court then stated that plain touch doctrine allowed the seizure of the weapon. To justify this assertion the court relied on the officer’s testimony, his prior experience, and his practical knowledge related to gang activity.

Decision: Pro-Police, Evidence Allowed
Affirmed Lower Court Decision
Concerns: #4: Officer Testimony
Offense: Weapon
Evidence: Handgun
Circuit: Fourth
Judges: Wilkinson, J. Harvie, III (Appointed by Reagan)
Agee, G. Steven (Appointed by G.H.W. Bush)
Davis, Andre M. (Appointed by Obama)
Opinion: Wilkinson
Method: Totality of the Circumstances

41. United States v. Johnson (2011), No. 10-3171 (3d Cir. Nov. 22, 2011). In August, 2007 a police officer in Aliquippa, PA initiated a traffic stop on a vehicle with illegal tinted windows. The officer witnessed the driver, Anthony Johnson, Jr., lean over into the passenger seat and make furtive movements. The officer also noticed a box of plastic sandwich baggies that were in
plain view. The officer knew from his experience and training that these type of bags were often used to package narcotics. The officer decided to frisk Johnson for weapons. During the frisk the officer felt what he immediately recognized to be a bag of crack cocaine. The officer seized the evidence and arrested Johnson. Johnson moved to suppress the evidence at trial, and the district court denied his motion. Johnson was convicted, and he appealed. The Third Circuit affirmed the lower court’s decision. The court first stated that the stop and frisk were legal. The court then stated that the officer’s experience and testimony, the nature of the evidence, and the totality of the circumstances justified the plain touch seizure.

**Decision:** Pro-Police, Evidence Allowed  
Affirmed Lower Court Decision

**Concerns:** #4: Officer Testimony

**Offense:** Drug

**Evidence:** Bag of Crack Cocaine

**Circuit:** Third

**Judges:** Fisher, D. Michael (Appointed by G.W. Bush)  
Vanaskie, Thomas I. (Appointed by Obama)  
Roth, Jane Richards (Appointed by G.H.W. Bush)

**Opinion:** Vanaskie

**Method:** Totality of the Circumstances

42. United States v. White (2011), No. 08-2688 (3d Cir. May 2, 2011). In August, 2006 two plainclothes police detectives with the Philadelphia Police Department noticed two cars engaging in suspicious activity. The detectives followed the cars to a storage locker. Taking a higher vantage point the officers observed one driver give the other driver, Clifford White, a large, black plastic bag. The detectives entered the facility and approached the individuals. The detectives asked the individuals if they had weapons. A detective then reached out to touch the bag, and upon touching he immediately felt what he at once recognized to be bags of narcotics. The detective then opened the bag, verified the contents, and arrested White and his accomplice. A further search of the car and storage locker produced more narcotics. White moved to suppress the seized narcotics at trial, but the District Court denied his motion. A jury convicted White, and he appealed his charges. The Third Circuit affirmed the lower court’s decision. The court stated that the *Terry* stop was reasonable, and they then affirmed that the seizure was allowed under *Dickerson* by citing the detective’s testimony and prior experience. The court cited *Yamba* (2007) to justify their reasoning.

**Decision:** Pro-Police, Evidence Allowed  
Affirmed Lower Court Decision

**Concerns:** #4: Officer Testimony

**Offense:** Drug

**Evidence:** Large Bags of Cocaine

**Circuit:** Third

**Judges:** Barry, Maryanne Trump (Appointed by Clinton)  
Hardiman, Thomas M. (Appointed by G. W. Bush)  
Tashima, A. Wallace (Appointed by Clinton)

**Opinion:** Barry

**Method:** Totality of the Circumstances
43. United States v. Cowan (2012), 674 F.3d 94. In Davenport, IA police officers received a tip about the sale of crack cocaine. The officers obtained a search warrant for the location of the dealing and any cars associated with the location. The officers served the search warrant and found several individuals at the location. The officers frisked one of these individuals, Mauriosantana Cowan, and asked him how he had arrived at the location. Cowan told the officers he had taken the bus, but the officer felt a set of car keys in the offender’s pocket. The officer seized the keys and used the fob to identify the car. After using a canine search the officers searched the car and found crack cocaine. Cowan filed a motion to suppress the evidence found via the fob, and the district court ruled the evidence inadmissible. The state then appealed. The Fourth Circuit reversed the decision of the trial court. The court ruled that the officer was allowed to seize the keys under Dickerson due to the nature of the search warrant. However, the court declined to rule as to whether or not the nature of the keys were immediately apparent, and they instead focused on the officer’s testimony. Further, the court cited United States v. Bustos-Torres (2005) and stated that the plain touch seizures can seize evidence of criminal activity and not just overt contraband. J. Bye authored a dissent that questioned the immediately apparent nature of the keys as contraband.

**Decision:** Pro-Police, Evidence Allowed

**Concerns:**

1: Incriminating Evidence

4: Officer Testimony

**Offense:** Drug

**Evidence:** Key Fob

**Circuit:** Eighth

**Judges:** Riley, William J. (Appointed by G.W. Bush)

Beam, C. Arlen (Appointed by Reagan)

Bye, Kermit Edward (Appointed by Clinton) (Dissent)

**Opinion:** Riley

**Method:** Officer Testimony

44. United States v. Goode (2012), No. 11-1692 (3d Cir. July 2, 2012). In March, 2010 police officers in Pennsylvania utilized a confidential informant to purchase an illegal handgun. The informant met the individuals selling the gun while the officers surveilled the scene. The informant approached a vehicle with two men, and when he saw the weapon he gave the officers a prearranged “takedown” signal. The officers approached the car, and the driver tried to escape. In the process the driver struck two officers. The officers finally stopped the car and removed the driver. The officers then ordered the passenger, Richard Goode, out of the car, but Goode refused. The officers used physical force to remove Goode from the vehicle and secured him on the ground. An officer then frisked Goode and felt “sliding packages” he at once recognized to be narcotics. The officers verified the identity of the narcotics and arrested Goode. Goode moved to suppress the evidence at trial, and the district court denied his motion. Goode was convicted of charges relating to the distribution of narcotics, and he appealed his conviction. The Third Circuit affirmed the lower court’s decision. They cited Yamba (2007) in their opinion, and they held that the officer’s testimony and experience satisfied the tenants of Dickerson.

**Decision:** Pro-Police, Evidence Allowed

**Concerns:**

4: Officer testimony

**Method:** Officer Testimony

---

216
Offense: Drug
Evidence: Several large bags of cocaine and heroin
Circuit: Third
Judges: Ambro, Thomas L. (Appointed by Clinton)
        Vanaskie, Thomas I. (Appointed by Obama)
        Aldisert, Ruggero (Appointed by Johnson)
Opinion: Aldisert
Method: Totality of Circumstances

45. United States v. Roach (2012). 477 Fed. Appx. 993. North Charleston, S.C. police received a tip that the appellant, Koorosh Dashtianpoor Roach, was selling heroin. The officers watched Roach for several minutes and observed the offender engaging in several questionable activities. Roach left the scene as a passenger in a vehicle, and the officers followed. The officers observed someone throw a cigarette out of the car, and they then initiated a traffic stop. Roach at once began to reach repeatedly into the rear waistline of his pants. The officers instituted a Terry frisk on the offenders, and they noticed a bulge in Roach’s rear waistline. The officers asked Roach if the bulge was illegal, and Roach answered in the affirmative. The officers seized the bulge and found it to be heroin. As they escorted Roach back to the squad car a 9mm pistol fell out of the offender’s pants. Roach appealed on several issues, and the offender claimed that they officers lacked probable cause to seize the heroin. In a per curium opinion the Fourth Circuit stated that the seizure was constitutional and allowed under Dickerson. The court cited the officer’s testimony that the illegal nature of the contraband was immediately apparent, and they also used the totality of the circumstances to determine the constitutionality of the officer’s actions.

Decision: Pro-Police, Evidence Allowed
          Affirmed Lower Court
Concerns: #4: Officer Testimony
Offense: Drug
Evidence: Bag of Heroin
Circuit: Fourth
        Traxler, Wiliam Bird, Jr. (Appointed by Clinton).
        Shedd, Dennis (Appointed by G.W. Bush).
Opinion: Per Curium
Method: Totality of the Circumstances
APPENDIX 2

State Supreme Court Cases

Supreme Court of Alabama:

46. Ex Parte Warren (2000), 783 So. 2d 86. In August, 1994 the police in Opelika, AL received information about a drug transaction. An informant testified that he had witnessed several males participating in illicit commerce while standing around a white car. The informant provided a partial license plate number but gave no physical descriptions of the alleged perpetrators. Detectives arrived at the scene and began questioning the men. The officers began frisking the individuals for weapons. During the frisk of one of the individuals, George Ester Warren, Jr., a deputy felt a small plastic box in Warren’s front pocket. The detective recognized it as a “Tic Tac” container. The deputy had found narcotics in containers like these in the past. The detective seized the evidence and found that it did indeed contain crack cocaine. The detectives arrested Warren on charges related to possession of crack cocaine, and Warren filed a motion to suppress the evidence. The trial court denied his motion, and Warren was sentenced to eight years of imprisonment. Warren appealed, and the Criminal Court of Appeals affirmed his conviction. Warren appealed to the Alabama Supreme Court, and the court reversed the lower courts’ decisions. The court cited a variety of cases in affirming their logic, but in the end the court believed that the dominant trend in Dickerson jurisdiction disallowed seizures of containers with hard, non-malleable exteriors. The court held that the hardness of the container in this situation naturally precluded a satisfaction of the standard of immediately apparent. Further, the court did this in defiance of officer testimony, which they essentially ignored.

Decision: Pro-Rights, Evidence Suppressed
Reversed Lower Court Decision

Concerns:
#1: Container

Offense: Drug
Evidence: “Tic Tac” Container of Crack Cocaine
Circuit: Eleventh
Judges: Lyons, Champ (Republican)
        Houston, J. Gorman, Jr. (Republican)
        Cook, Ralph D. (Democrat)
        See, Harold (Republican)
        England, John H. (Democrat)
        Johnstone, Douglas I. (Democrat)
        Brown, Jean (Republican)
        Hopper, Perry O. (Republican) Dissent
        Maddox, Alva Hugh (Democrat) Dissent

Opinion: Lyons
Method: None

47. Ex Parte Charles Delwyn James (2000), 797 So. 2d 413. In February, 1995 a police officer was patrolling a high crime neighborhood in Mobile, AL. The officer spotted a white van parked along the side of the road. The officer noticed that “two or three” individuals were leaning against the van and speaking to the driver. The officer later stated that he could not discern what
the individuals were doing. The officer approached the vehicle in his patrol car, and the individuals outside of the vehicle walked away. The driver of the van then drove away from the scene. The officer instituted a traffic stop on the vehicle. As the officer exited his patrol car the driver of the van, Charles Delwyn James, exited the van and approached the officer. The officer ordered James to stop and frisked James for weapons. The officer felt nothing suspicious, but as the frisk ended James reached suddenly into his pocket. The officer then grabbed James’ hand. The officer pulled the hand out of James’ pocket and reached in to retrieve several marijuana cigarettes. The officer did not frisk the exterior of the pocket before reaching inside the pocket. The officer arrested James on charges related to the possession of marijuana. James moved to suppress the evidence from trial, and the trial court denied his motion. The state convicted James, and he appealed. The Court of Criminal Appeals affirmed the conviction. James appealed, and the Supreme Court reversed the lower courts’ decisions. The court first challenged the legitimacy of the initial stop. The court cited Brown v. Texas (1979) and Illinois v. Wardlow (2000) and held that James displayed no overtly suspicious behavior like headlong flight. Therefore, the initial frisk was illegal. The court further stated that the seizure was not allowed under Dickerson due to the fact that the officer testified that he was satisfied that the individual did not have weapons after the initial frisk. However, the court stated that if the officer had frisked the outside of the pocket a second time the seizure might have been allowed.

Decision: Pro-Rights, Evidence Suppressed
Reversed Lower Court Decision

Concerns:
#3: Terry Stop
#4: Officer Testimony

Offense: Drug
Evidence: Marijuana Cigarettes
Circuit: Eleventh
Judges: Johnstone, Douglas H. (Democrat)
        Cook, Ralph D. (Democrat)
        England, John H. (Democrat)
        Houston, J. Gorman, Jr. (Republican)
        Lyons, Champ (Republican)
        Brown, Jean (Republican)
        Hooper, Perry O. (Republican) Dissent
        Maddox, Alva Hugh (Republican) Dissent

Opinion: Johnstone
Method: Officer Testimony

Colorado:

48. The People of the State of Colorado v. Corpany (1993), 859 P.2d 865. In March, 1992 an officer with the Colorado Springs Police Department observed a car change lanes without signaling. The officer also noticed that the car was weaving between traffic lanes. The officer instituted a traffic stop on the car and observed three individuals in the car. During the stop the officer witnessed the individuals in the front seat bend over and place something underneath the driver’s seat. The officer asked the individuals to exit the vehicle, and he frisked them due to concerns that they might be carrying weapons. The officer found nothing on their persons, and he instituted a Terry search of the car for weapons. He found a fanny pack and a purse
underneath the front seat of the vehicle. He tactically searched them and felt nothing that resembled a weapon. He also felt nothing that was immediately apparent as contraband. The officer then opened the fanny pack, found methamphetamine, and arrested the owner of the pack, John Frederick Corpany, who was also the driver. A further search of Corpany produced a small handgun and a knife. Corpany moved to suppress the evidence at trial. The trial suppressed the evidence noting the illegality of the seizure from the fanny pack. The court then suppressed the other evidence due to the “fruit of the poisonous tree” doctrine. The state filed an interlocutory appeal, and the Colorado Supreme Court affirmed the lower court’s decision. The court noted that the frisk and vehicle search was legal, but they held that the officer lacked probable cause in opening up the fanny pack. The court cited the recent Dickerson decision and stated that the officer’s testimony demonstrated that nothing was immediately apparent during the tactile search of the fanny pack.

**Decision:** Pro-Rights, Evidence Suppressed

**Concerns:** #4: Officer Testimony

**Offense:** Drug

**Evidence:** Small Packets of Methamphetamine

**Circuit:** Tenth

**Judges:**
- Rovira, Luis D. (Democrat)
- Erickson, William H. (Republican)
- Kirshbaum, Howard M. (Democrat)
- Lohr, George E. (Democrat)
- Mullarkey, Mary J. (Democrat)
- Scott, Gregory K. (Democrat)
- Vollack, Anthony F. (Democrat)

**Opinion:** Erickson

**Method:** Officer Testimony

49. The People of the State of Colorado v. Brant (2011), 252 P.3d 459. In January, 2010 a police officer in Greeley, CO witnessed a car engage in suspected drug related activity. The officer saw that the car had a broken taillight, instituted a traffic stop, and radioed for backup. The officer retrieved the driver’s license, noticed that it was expired, and approached the driver to arrest her. At this time the driver, Violet Brant, leaned over and placed something between the driver’s seat and the door of the car. The officer frisked Brant and conducted a protective search of the interior of the vehicle. The officer found a glove hidden by the driver’s seat, and she touched the glove to determine if it contained a weapon. The officer at once recognized that it contained a pipe along with a bag of suspected narcotics. The officer placed Brant under arrest and during a further search found another bag of suspected narcotics in Brant’s pocket. Brant move to suppress the evidence at trial, and the trial court granted her motion. The state then appealed the decision, and the Supreme Court of Colorado granted certiorari. The court reversed the lower court’s decision. First, the court held that the defendant’s behavior justified the initial Terry frisk and vehicle search. Second, the court held that the officer was justified in tactically searching the glove. Finally, the court cited in the officer’s testimony in satisfying the immediately apparent standard.

**Decision:** Pro-Police, Evidence Allowed

**Reversed Lower Court Decision**
Connecticut:

50. State of Connecticut v. Trine (1996), 236 Conn. 216. In March, 1993 the police in East Lyme, CT served a search warrant on a residence registered to Marybeth Montesi. The police had previously received information that the residence contained a cocaine distribution operation and weapons. The officers served the warrant and found several individuals in the residence. One officer, who had over fifteen years of police experience, frisked Terrence Trine. During the frisk the officer failed to find weapons, but he did feel what he recognized to be crack cocaine in the pocket of Trine. The officer finished the frisk, seized the crack cocaine, and arrested Trine. Trine moved to suppress the evidence at trial. The trial court conducted a lengthy evidentiary hearing and decided that the evidence proved the legality of the search. The state convicted Trine, and he appealed. The Appellate Court of Connecticut reversed the trial courts decision and held that touch was unreliable as compared to sight. The state then appealed, and the Supreme Court of Connecticut reversed the decision of the appellate court. First, the court stated that the factual determinations made by the trial court were correct. Second, the court applied the plain touch exception of Dickerson (1993) to Connecticut practice by rectifying it with the state constitution. The court held that touch is as reliable as the other senses, and the court recommended a totality of the circumstances approach to determine if specific seizures were legal. The court recommended that trial courts examine the officer’s testimony, the officer’s experience, the actual physical nature of the evidence, and other situational variables when determining the legality of plain touch seizures.

Decision: Pro-Police, Evidence Allowed
Reversed Lower Court Decision

Concerns: #2: Unreliability of Touch (Dissent)
#4: Officer testimony

Offense: Drug
Evidence: Bag of crack cocaine
Circuit: Second
Judges: Peters, Ellen A. (Democrat)
         Callahan, Robert J. (Democrat)
         Borden, David M. (Democrat)
         Berdon, Robert I. (Republican) Dissent
51. State of Connecticut v. Clark (2001), 255 Conn. 268. In May, 1998 police officers in Torrington, CN received information that a woman was involved in the distribution of narcotics. The officers received word that the woman received her cocaine from a black male who drove a black Chevrolet Blazer. The officers used a confidential informant to verify that the woman was selling crack cocaine. The officers procured a search warrant and entered the apartment. The officers found no crack cocaine, but they did find paraphernalia. As they were in the apartment the officers received word from another officer that a black male, who had recently arrived in a black SUV, was entering the apartment building. Mark Clark, the black male, then entered the apartment without knocking. The officers decided to frisk Clark for weapons. During the frisk of Clark the officer felt a bulge in the offender’s sock. The officer at once recognized the bulge to be a plastic bag that contained crack cocaine. The officer arrested Clark, and Clark moved to suppress the evidence at trial. The trial court denied his motion, and Clark entered a conditional plea of nolo contendere. Clark appealed the trial court’s decision. The Supreme Court of Connecticut affirmed the lower court’s decision. The court first verified the legitimacy of the Terry stop. The court then held that Dickerson (2013) and State v. Trine (1996) allowed a plain touch seizure based upon immediate recognition of contraband during a frisk. The court cited the testimony of the officer, the nature of the evidence, and the experience of the officer when determining if the seizure satisfied the immediately apparent standard.

Decision: Pro-Police, Evidence Allowed a
Affirmed Lower Court Decision

Concerns: #4: Officer Testimony
Offense: Drug
Evidence: Bag of Crack Cocaine
Circuit: Second
Judges: McDonald, Francis M., Jr. (Republican)
Borden, David M. (Democrat)
Palmer, Richard N. (Republican)
Sullivan, William J. (Republican)
Vertefeuille, Christine S. (Republican)

Opinion: Sullivan
Method: Totality of the Circumstances

Delaware:

52. Hicks v. State of Delaware (1993), 631 A.2d 6. A police officer in Frankfort, DE was patrolling a high crime area when he witnessed a suspicious white car stopped in the middle of a busy street. The officer decided to investigate the car. As he approached the car drove away and entered into a private drive. A female driver exited the vehicle, and the officer questioned her about her actions. At this time an individual, James E. Hicks, approached the officer and began interfering in the investigation. The officer asked Hicks why he was showing interest in this situation. Hicks did not answer but continued to make agitated gestures. A crowd started to develop around the scene, and the officer decided to frisk Hicks for weapons. The officer felt a
suspicious bulge in Hicks’ jacket, and fearing that it was a weapon the officer seized the bulge. It was a green bag. The officer, still unsure as to whether the bag contained a weapon, opened the green bag and found that it contained a wad of money and a sandwich bag that contained an indeterminable substance. The officer felt that the gathering crowd to be a threat, and he moved Hicks to a nearby location. During the move the officer kept control of the bag. In the new location the officer opened the bag, searched its contents, and found that the sandwich bag contained crack cocaine. The officer arrested Hicks on charges related to the distribution of crack cocaine, and Hicks moved to suppress the evidence at trial. The trial court denied his motion, and Hicks was convicted. Hicks appealed, and the Supreme Court of Delaware reversed the decision of the lower court. The court held that the initial stop and frisk were illegal. However, the transport of the offender to the new location and the second search of the bag were unconstitutional. The court held that the officer was justified in opening the bag after the initial seizure to determine if the bag contained a weapon. The second search was illegal due to the fact that the officer had full knowledge that the bag contained no weapon, and the search was conducted in order to find evidence. The court held that then newly decided case of Dickerson barred this kind of extended search process. The court primarily relied on the officer’s testimony in reaching this decision.

Decision: Pro-Rights, Evidence Suppressed
Reversed Lower Court Decision

Concerns: #4: Officer Testimony

Offense: Drug

Evidence: Bag of Crack Cocaine

Circuit: Third

Judges: Veasey, E. Norman (Republican)
Horsey, Henry R. (Republican)
Moore, Andrew G. T.. II (Republican)
Walsh, Joseph T. (Republican)
Holland, Randy J. (Republican)

Opinion: Moore

Method: Officer Testimony

53. Mosley v. State of Delaware (2000), 748 A.2d 407. In August, 1996 two undercover officers purchased cocaine from an individual in Wilmington, DE. During the purchase the seller was associated with a group of three individuals on a street corner. The undercover officers drove away and directed their uniformed backup to detain the four individuals. The uniformed officers frisked the individuals. During the frisking process the officers noticed the corner of a plastic bag protruding from the bra of Latise Mosley. The officer frisking Mosley then felt the bra, instantly recognized that the plastic bag contained crack cocaine, and seized the evidence. The officers arrested Mosley on charges related to the possession of narcotics, and Mosley moved to suppress the evidence at trial. The trial court denied the motion, and Mosley appealed. The Supreme Court of Delaware affirmed the lower court’s decision. The court cited officer testimony, the nature of the seizure, and the officer’s experience when determining the legality of the search.

Decision: Pro-Police, Evidence Allowed
Affirmed Lower Court Decision

Concerns: #4: Officer Testimony

Offense: Drug
Evidence: Bag of Crack Cocaine
Circuit: Third
Judges: Veasey, E. Norman (Republican)
        Hartnett, Maurice A., III (Democrat)
        Berger, Carolyn (Democrat)
Opinion: Veasey
Method: Totality of the Circumstances

54. Hubbard v. State of Delaware (2001), 782 A.2d 264. In May, 1999 an unidentified black male robbed two banks in Wilmington, DE. Through a prolonged investigation the Wilmington police and agents with the Federal Bureau of Investigation managed to identify the suspect as Gregory Hubbard. A detective located Hubbard in order to photograph him for identification purposes. Upon locating Hubbard a detective ordered him to stop, and Hubbard immediately reached into the front pocket of his pants. The detective feared that Hubbard was reaching for a weapon, and the detective seized his hand. Upon seizing Hubbard’s hand the detective felt what he instantly recognized as a “crack pipe” in the pocket. He seized the evidence and arrested Hubbard on charges related to the possession of drug paraphernalia as well as probation violation. The bank tellers, or the victims of the robberies, identified Hubbard as the individual that robbed them. Hubbard was then arrested on charges related to the bank robberies. During his trial Hubbard moved to suppress the evidence that was seized during the frisk. The trial court denied his motion, and Hubbard, who for some unknown reason decided to represent himself, appealed the trial court’s decision. The Supreme Court of Delaware affirmed the trial court’s decision. The court cited Mosley (2000) as a precedential opinion that justified their denial of Hubbard’s motion to suppress. The court further cited the officer’s testimony and experience as satisfying the immediately apparent standard of Dickerson. The court also addressed many other issues during the appeal, and they ultimately affirmed the conviction of Hubbard.

Decision: Pro-Police, Evidence Allowed
           Affirmed Lower Court’s Decision
Concerns: #4: Officer Testimony
Offense: Drug
Evidence: Crack Pipe
Circuit: Third
Judges: Veasey, E. Norman (Republican)
        Walsh, Joseph T. (Republican)
        Holland, Randy J. (Republican)
Opinion: Walsh
Method: Totality of the Circumstances

55. Hunter v. State of Delaware (2001), 783 A.2d 558. In April, 2000 a detective in Wilmington, DE located a federal fugitive. The detective witnessed the fugitive, Daniel Hunter, leave a residence with another individual and proceed to a restaurant. The detective followed the individuals inside, located them as they exited a bathroom, and ordered them to place their hands on the wall. The detective suspected them to be involved in the drug trade, and his prior experience led him to believe they might be dangerous. Hunter reached towards the front pocket of his pants. The detective ordered him to stop. The detective frisked the pocket due to his concern that it might contain a weapon. Upon touching the pocket the detective heard a crinkling
sound and felt rock-like objects. The detective knew at once that it was cocaine in a baggy. The detective seized the evidence and arrested Hunter. Hunter moved to suppress the evidence, but trial court denied his motion. A bench trial found Hunter guilty, and he appealed his charges. The Supreme Court of Delaware affirmed the lower court’s decision. The court first stated that the burden of proof fell to the state to show the legality of Fourth Amendment seizure or search, and the court held that the state satisfied the preponderance of evidence threshold in this instance. The court cited the officer’s testimony, experience, and the totality of the circumstances in justifying this decision.

Decision: Pro-Police, Evidence Allowed
Affirmed Lower Court Decision

Concerns: #4: Officer Testimony
Offense: Drug
Evidence: Bag of Cocaine
Circuit: Third
Judges: Veasey, Norman E. (Republican)
Holland, Randy J. (Republican)
Steele, Myron T. (Democrat)

Opinion: Steele
Method: Totality of the Circumstances

56. Purnell v. State of Delaware (2002), 832 A.2d 714. In November, 2001 the police in Wilmington, DE received a tip from a confidential informant about a possible drug sale. The informant had previously proven himself reliable, and he gave the police a detailed description of the individuals involved in the criminal activity. Officers responded to the area but failed to immediately find the identified suspects. The officers continued to search the area, and they located an individual, Phillip Purnell, who matched the description given by the informant. The officers stopped Purnell and frisked him due to the concern that he might have a weapon. The frisk produced no evidence of weapons, and the officer asked Purnell how he had arrived in the area. Purnell informed the officer that he had arrived by bus, but the officer recalled having felt a set of car keys in Purnell’s pocket. The officer then conducted a second frisk and seized the car keys. Purnell informed the officers that he had control of the car, and the detectives called for a K-9 unit to examine the car. The K-9 produced a hit. The detectives towed the car to the police station and detained Purnell. At the station the officers ordered Purnell to remove his jacket. Upon removal a small bag of marijuana fell out of Purnell’s jacket sleeve. A further search of the jacket revealed several more small bags of marijuana. The detectives procured a search warrant for Purnell’s car and found more marijuana in the trunk of the car. The officers arrested Purnell on charges related to the sale of marijuana, and Purnell moved to suppress the evidence at trial. The court denied his motion, and Purnell plead guilty while retaining the right to appeal. The Supreme Court of Delaware reversed the trial court’s judgment. The court stated the initial frisk was constitutional. However, the court held the second frisk, which was aimed at finding the keys or incriminating evidence, to be illegal at conception. Since the first frisk produced no evidence of weapons the detective had no constitutional provision for instituting the second frisk to find the key fob or incriminating evidence even though he suspected that the evidence was in the area he frisked. The court cited Hicks v. State (1993) in instituting this decision. The court also used the testimony of the officer and the nature of the evidence when determining if the seizure satisfied the immediately apparent standard of Dickerson.
Decision: Pro-Rights, Evidence Suppressed
Reversed Lower Court Decision

Concerns: #1: Incriminating Evidence
#3: Terry Stop
#4: Officer Testimony

Offense: Drug
Evidence: Key Fob
Circuit: Third
Judges: Veasey, E. Norman (Republican)
Berger, Carolyn (Democrat)
Steele, Myron T. (Democrat)

Opinion: Veasey
Method: Totality of the Circumstances

57. Hunter v. State of Delaware (2008), 945 A.2d 594. In August, 2006 the police in Wilmington, DE received information from a reliable informant that an individual with the alias of “Sticky” was going to conduct a heroin sale. Officers set up surveillance in the area of the drug transaction. A vehicle approached the site, and the driver, Elwood Hunter, matched the description of “Sticky”. The vehicle remained in the area without further activity, and the officers decided to institute a traffic stop. The officers, relying on the informant’s information that Hunter sometimes carried a handgun, frisked Hunter. During the frisk the officer felt what he immediately recognized to be bundles of heroin in Hunter’s front pocket. The officer seized the evidence and arrested Hunter. Hunter moved to suppress the evidence at trial, and the trial court denied his motion. Hunter appealed the decision, and the Supreme Court of Delaware affirmed the lower court’s decision. The court cited the officer’s in-depth testimony, the nature of the evidence, and the officer’s experience when determining that the seizure was allowed under the plain touch exception.

Decision: Pro-Police, Evidence Allowed
Affirmed Lower Court Decision

Concerns: #4: Officer Testimony

Offense: Drug
Evidence: “Bundles” of Heroin
Circuit: Third
Judges: Steele, Myron T. (Democrat)
Holland, Randy J. (Republican)
Jacobs, Jack B. (Democrat)

Opinion: Steele
Method: Totality of the Circumstances

Supreme Court of Georgia:

58. Johnson v. The State (2009), 285 Ga. 571. In March, 2005 the police in Lavonia, GA were contacted by the manager of a local hotel. The manager informed the police about a large party at the hotel that caused the employees and guests to question their safety. Two officers arrived at the hotel and questioned two individuals in the parking lot. The individuals informed the officers that they were going to the party to purchase marijuana. Acting under hotel policy the manager
informed the officers that she wished to evict the guests. The manager asked the officers to assist her in this process to ensure her safety. The manager knocked on the door of the room, and upon receiving no answer she opened the door. She asked the officers to enter the room, and they did. The officers observed a large bag of marijuana in plain sight. Fearing that someone was hiding in the room the officers conducted security sweep of the apartment. During the sweep the officers found another package of marijuana under the bed. The officers noticed the bathroom door was closed, and they suspected that someone might be hiding in the room. The officers approached the door and noticed a large jacket hanging by the door. There was a suspicious bulge in the pocket of the jacket, and the officers decided to tactilely search the bulge in fear that it might be a weapon. The officer felt what he immediately recognized to be a bag of marijuana and seized the evidence. The officers later arrested Joshua Johnson, the individual who had rented the room, and Johnson moved to suppress all of the evidence at trial. The trial court denied his motion, and Johnson was convicted on charges related to the distribution of marijuana. Johnson appealed. The Court of Appeals affirmed most of the lower court’s decisions, but they did reverse the decision to allow the evidence from the jacket at trial. The state then appealed, and the Supreme Court of Georgia reversed the decision of the Court of Appeals concerning the jacket. The court held that the seizures of the marijuana evidence were justified under the plain view and plain touch exceptions. First, the court held that the officers were legally allowed in the room due to the eviction process. Second, the court held that the officers could legally frisk the jacket pocket due concerns that it might contain a weapon, which someone hiding in the bathroom could access. Finally, the court cited the officers testimony when determining if the marijuana evidence in the jacket was immediately apparent as contraband.

**Decision:** Pro-Police, Evidence Allowed

**Concerns:** #4: Used officer testimony

**Offense:** Drug

**Evidence:** Bag of Marijuana in Unworn Jacket

**Circuit:** Eleventh

**Judges:**
- Benham, Robert (Democrat)
- Hunstein, Carol W. (Democrat)
- Thompson, Hugh P. (Democrat)
- Hines, P. Harris (Democrat)
- Melton, Harold (Republican)
- Sears, Leah Ward (Democrat)
- Carley, George H. (Democrat)

**Opinion:** Sears

**Method:** Officer Testimony

**Illinois Supreme Court:**

59. The People of the State of Illinois v. Mitchell (1995), 165 Ill. 2d 21. In July, 1992 a police officer in Chicago, IL observed a suspicious looking vehicle driving without lights and with an obscured license plate. The officer initiated a traffic stop in fear that the vehicle might be stolen. The driver, Curtis Mitchell, exited the car and met the officer before the officer could reach the passenger compartment of the car. The officer escorted Mitchell back to the car and noticed that
the car’s steering column showed signs of tampering. The officer also noticed a “crack pipe” in
the floorboard of the car. The officer frisked Mitchell “primarily” for weapons. During the frisk
of Mitchell’s shirt pocket he felt a small rock-like substance in a plastic baggie. The officer at
once knew this to be crack cocaine, and he arrested Mitchell. Mitchell moved to suppress the
evidence at trial, and the trial court granted his motion. The state appealed, and the Appellate
Court for Illinois reversed the lower court’s judgment. Mitchell appealed again. The Illinois
Supreme Court affirmed the Appellate Court’s decision and allowed the evidence at trial. The
court cited the newly decided Dickerson in justifying this decision. The court denied the
defendant’s claim that Dickerson violated the Constitution of Illinois. The court held that “plain
touch” is analogous to “plain view” and that any of the five senses can be used to satisfy the
probable cause standard, which is how the court interpreted the standard of immediately
apparent. Justice Heiple issued a dissent, and he stated that touch is by nature more unreliable
than sight. However, the Illinois Supreme Court contended that touch can be used to gain
information for probable cause, and the court held that in determining the legality of plain touch
seizures judges should use a totality of the circumstances methodology that examines the nature
of the evidence, the experience of the officer, the nature of the seizure, and the testimony of the
officer.

Decision: Pro-Police, Evidence Allowed
Affirmed Lower Court Decision

Concerns: #2: Unreliability of Touch (Dissent)
#4: Officer Testimony

Offense: Drug
Evidence: Bag of Crack Cocaine
Circuit: Seventh

Judges: Miller, Benjamin K. (Republican)
Blandic, Michael A. (Democrat)
Heiple, James D. (Republican) Dissent
Harrison, Moses W., III (Democrat)
McMorrow, Mary Ann G. (Democrat)
Nickels, John L. (Republican)
Freeman, Charles E. (Democrat)

Opinion: Freeman

Method: Totality of the Circumstances

Supreme Court of Kansas:

60. State of Kansas v. Wonders (1998), 263 Kan. 582. In March, 1994 a deputy with the
Sheriff’s Department of Harvey County, KS stopped a vehicle for failure to use a turn signal.
Upon approaching the vehicle the officer smelled a strong odor of alcohol. The deputy had the
driver exit the vehicle to perform field sobriety tests. The driver passed the test and displayed no
signs of intoxication. The driver consented to a search of the car, and the deputy found
paraphernalia related to marijuana. The deputy decided to frisk the driver and the two passengers
in fear that they might have a weapon. During the search of a passenger, Vernon Wonders, the
deputy felt what he immediately recognized to be a bag of marijuana. The deputy finished the
search, asked Wonders about the identity of the bag, and seized the marijuana as evidence. The
deputy arrested Wonders, and a later search of Wonders also produced a small quantity of crack cocaine. Wonders moved to suppress the evidence at trial, and the trial court conducted an evidentiary hearing where they determined that the seizure was legal. Wonders was convicted, and he appealed. The Court of Appeals for Kansas reversed the lower court’s decision by reexamining the trial evidence. The state appealed, and the Supreme Court of Kansas reversed the decision of the Court of Appeals. The Supreme Court of Kansas stated that the court defers to the evidentiary examination of the trial court if there exists substantial and competent evidence to justify the earlier decision. The court held that the Court of Appeals erred in reinterpreting the evidence presented during trial. The court then examined the legality of the plain touch doctrine in Kansas. The court held that plain touch was a natural extension of plain view and applied the three prong test of plain view legality to plain touch. The court held that the plain touch seizures are legal if the officer has the legal ability to search, if the discovery of the evidence is inadvertent during a frisk for weapons, and if the illegal nature of the evidence is immediately apparent. The court interpreted the “immediately apparent” standard under the auspices of Texas v. Brown (1983) and established that immediately apparent is synonymous with probable cause. The court cited the experience of the officer and the officer’s testimony when determining if the search was legal and mentioned that this approach was best. However, the court did state that plain touch seizures can be abused by officers if they speak “magic words”, but the court stated that evidentiary hearings in trial courts would decrease the frequency of this abusive practice.

Decision: Pro-Police, Evidence Allowed
Reversed Lower Court Decision

Concerns: #4: Officer Testimony
Offense: Drug
Evidence: Bag of Marijuana
Circuit: Tenth
Judges: Davis, Robert E. (Democrat)
McFarland, Kay (Republican)
Alegrucci, Donald (Republican)
Abbott, Bob (Republican)
Six, Frederick N. (Republican)
Lockett, Tyler C. (Democrat)
Larson, Edward (Republican)

Opinion: Larson
Method: Totality of the Circumstances

61. In the Matter of L.A., D.O.B.:6-8-81 (2001). 270 Kan. 879. In August, 1998 the police in Haysville, KS received information that two individuals were trying to illegally enter a parked car. Two police officers responded to the scene. A witness informed the officer that he had chased two young, white males away from the scene. The officers followed the trail of the suspects, which led them to a tent. The officers ordered the four individuals within the tent to exit, and the officers frisked them. During the frisk of one of the individuals, a juvenile designated as “L.A”, the officer felt what he immediately recognized to be a bag of marijuana. The officers arrested L.A., and he moved to suppress the evidence at trial. The trial court denied his motion, and L.A. was adjudicated as delinquent. L.A. appealed, and the Supreme Court of Kansas affirmed the lower court’s decision. The court held that the officers had reasonable
suspicion to frisk L.A. Further, the court held that the officer’s testimony and experience satisfied the immediately apparent requirement of plain touch seizure.

**Decision:** Pro-Police, Evidence Allowed
Affirmed Lower Court Decision

**Concerns:** #4: Officer Testimony

**Offense:** Drug

**Evidence:** Bag of Marijuana

**Circuit:** Tenth

**Judges:**
- Davis, Robert E. (Democrat)
- McFarland, Kay (Republican)
- Alegrucci, Donald L. (Republican)
- Abbott, Bob (Republican)
- Six, Frederick N. (Republican)
- Lockett, Tyler C. (Democrat)
- Larson, Edward (Republican)

**Opinion:** Lockett

**Method:** Totality of the Circumstances

62. **State of Kansas v. Payne (2002), 273 Kan. 466.** In March, 2000 the police of Leavenworth, KS discovered the body of Eddie Harris. The officers learned that Harris had been murdered, and they responded to his house. At the house they found the murder weapon, a bloody knife wrapped in cloth, and also discovered that Harris’ wallet, car keys, and car were missing. The police issued a broad command for officers to seize anybody seen driving Harris’ car. Two officers received word that the car was at a specific location. The officers responded to the scene and pulled an individual, Alrick Eugene Payne, Sr. from the vehicle at gunpoint. The officers forced Payne to the ground. An officer then frisked Payne for weapons and felt what he immediately recognized to be a crack pipe. The officer then arrested Payne, and a further search of Payne produced more crack cocaine as well as Harris’ credit card. During the process of arrest Payne made several incriminating remarks, but the officers had not Mirandized him. Later, another individual was implicated in the murder of Harris, but Payne was tried and convicted for his involvement. Payne moved to suppress the physical and verbal evidence at trial. The trial court denied his motion, holding that the search was incident to a lawful arrest, and Payne appealed. The Supreme Court of Kansas affirmed the trial court’s decision. The court affirmed that the officers affected an arrest when removing Payne from the car. However, the court did not address the scope of this type of search. Instead, the court held that the officer was justified in seizing the evidence under the plain feel exception. The court contended that the officers had a legitimate interest in conducting a frisk for weapons. Further, the officer testified that he immediately recognized the incriminating nature of the crack pipe, and the court held that this justified the seizure. The court also upheld the legality of the verbal evidence and affirmed Payne’s conviction.

**Decision:** Pro-Police, Evidence Allowed
Affirmed Lower Court Decision

**Concerns:** #4: Officer Testimony

**Offense:** Drug

**Evidence:** Crack Pipe

**Circuit:** Tenth
63. State of Kansas v. Lee (2008), 283 Kan. 771. In July, 2005 the police in Salina, KS received a report about an odd figure at a local park. Two officers responded to the scene and found an individual, Daniel Lee, walking around the park and poking the ground with a stick. The officers noted his odd behavior, which was made even stranger due to the late hour, and asked him what he was doing. Lee stated that he was looking for his wallet, ignored the officers, and continued to poke at the ground. One officer helped Lee examine the area with a flashlight. During this time the officers continued to note Lee’s odd and unfocused behavior. The officers asked Lee if he had any weapons. Lee answered in the affirmative and produced two legal knives. The officers asked Lee if they could frisk him for weapons, and he consented. The officer felt no weapons during the frisk, but he did feel an odd bulge in the coin pocket of Lee’s pants. The officer did not know the object’s identity. He suspected that it might be contraband, and he brought the evidence into open sight where he discovered that it was methamphetamine. The officers arrested Lee, and a further search of Lee’s duffle bag produced evidence of marijuana. Lee moved to suppress the evidence at trial, and the trial court granted his motion. The state then appealed, and the Court of Appeals reversed the lower court’s decision. Lee appealed, and the Supreme Court of Kansas reversed the decision of the Court of Appeals. The court began by affirming the legality of the frisk, but the court did state that a frisk for weapons is not a general search. The officers were limited by Lee’s consent which only authorized a frisk for weapons. Therefore, the plain touch exception applied to any of the evidence that was seized during the frisk. The court held that the first two prongs of the plain touch jurisprudence of Kansas were satisfied. First, the officer had legal access to frisk the person. Second, the discovery of the evidence was inadvertent. However, the court stated that the officers testimony and the nature of evidence demonstrated that the seizure did not satisfy the standard of immediate appearance.
Opinion: Rosenberg
Method: Totality of the Circumstances

Supreme Court of Kentucky:

64. Commonwealth of Kentucky v. Crowder (1994), 884 S.W.2d. In May, 1991 a police officer in Louisville, KY received word that an individual, whom he had previously arrested for drug charges, would be selling drugs once again in a high crime area. Along with backup officer the police officer responded to the area and observed the individual, Arthur Crowder, standing in the reported area. The officer stopped Crowder, performed a frisk for weapons, and felt a small lump that he suspected might be a bag of narcotics. The officer seized the evidence and arrested Crowder. Crowder appealed, and the Court of Appeals for Kentucky reversed the lower court’s decision. The state appealed, and the Supreme Court of Kentucky affirmed the decision of the appellate court. The court stated that plain touch seizure were allowed under the Kentucky constitution, but the court applied the logic of Dickerson (1993) and required a standard of immediate appearance. The court then determined that the officer’s testimony, which stated that he only suspected or believed that the felt item might be narcotics, demonstrated that the immediately apparent standard was not fulfilled. The court stated that probable cause was the true determinant in plain touch seizures, but Justice Wintersheimer lambasted this view in a dissent where he stated that the court was utilizing a more rigorous requirement of immediately apparent that went well beyond the bounds of probable cause.

Decision: Pro-Rights, Evidence Suppressed
Affirmed Lower Court Decision

Concerns: #4: Officer Testimony
Offense: Drug
Evidence: Bag of Cocaine
Circuit: Sixth
Judges: Rosenberg, John M. (Democrat)
Stephens, Robert F. (Democrat)
Liebson, Charles M. (Democrat)
Lambert, Joseph E. (Democrat)
Reynolds, Charles H. (Democrat)
Wintersheimer, Donald C. (Democrat) Dissent
Spain, Thomas B. (Democrat) Dissent

Opinion: Rosenberg
Method: Officer Testimony

65. Commonwealth of Kentucky v. Banks (2001), 68 S.W.3d 347. In September, 1996 two police officers were patrolling a high crime area in Lexington, KY. The officers observed an individual walking through a lot of an apartment building. The lot had a posted “no trespassing” sign, and the officers, who were familiar with most of the residents of the apartment building, did not recognize the individual. The individual, Leon Banks, moved away from the officers as they approached. The officers stopped banks, who had his hands in his pockets. Fearing that Banks had a weapon the officers ordered him to remove his hands from his pockets. The officers noticed a bulge in one of the pockets, and they performed a frisk. The officer felt what he
immediately recognized to be a “crack pipe”. The officer asked Banks if he could search the pocket, and Banks agreed. The officers seized the evidence, and a further search revealed that Banks also had crack cocaine and other drug paraphernalia. The officers arrested Banks on charges related to the possession of paraphernalia and narcotics, and Banks moved to suppress the evidence at trial. The trial court denied his motion, and Banks entered a conditional guilty plea with the right to appeal. The Kentucky Court of Appeals remanded the case back to the trial court for further factual determinations, and the trial court continued to affirm the legality of the stop and seizure. The Court of Appeals reversed the lower court’s decision, and the state appealed. The Supreme Court of Kentucky reversed the decision of the appellate court. The Supreme Court first established that the initial stop was legal. The court then cited the officer’s testimony as satisfying the requirements of Dickerson (1993) and the immediately apparent requirement. The court stated that the seizure was also allowed due to Banks giving consent.

Decision: Pro-Police, Evidence Allowed
Reversed Lower Court Decision

Concerns: #4: Officer Testimony

Offense: Drug
Evidence: Crack Pipe
Circuit: Sixth
Judges: Graves, William (Democrat)
Lambert, Joseph E. (Democrat)
Wintersheimer, Donald C. (Democrat)
Stumbo, Janet (Democrat)
Johnstone, Martin E. (Democrat)
Cooper, William S. (Democrat)
Keller, James E. (Democrat)

Opinion: Graves
Method: Officer Testimony

66. Commonwealth of Kentucky v. Whitmore (2002), 92 S.W.3d 76. The police in Louisville, KY went to serve an arrest warrant at residence in a high crime area with a history of drug and weapons-related activity. The police entered the residence, observed an individual, Raymond Whitmore, who matched the description of the individual on the warrant, and asked Whitmore to identify himself. Whitmore gave a false name. At this point an officer noticed that Whitmore was fidgety and kept reaching into his jacket pocket. Fearing that Whitmore had a weapon the officer frisked him. During the frisk the officer felt what she immediately knew to be crack cocaine and seized the evidence. The officer arrested Whitmore on charges related to the distribution of crack cocaine, and he moved to suppress the evidence at trial. The trial court denied his motion, and Whitworth was convicted. Whitmore appealed, and the Kentucky Court of Appeals reversed the trial court’s judgment. The state then appealed, and the Supreme Court of Kentucky reversed the decision of the lower appellate court. The court held that officer’s testimony, nature of the evidence, and the officer’s experience all justified a plain touch seizure and satisfied the requirement of immediate appearance. However, the court remanded the case to the trial level for a rehearing based upon an unrelated issue involving jury instructions.

Decision: Pro-Police, Evidence Allowed
Reversed Lower Court Decision

Concerns: #4: Officer Testimony
Offense: Drug
Evidence: Bag of Crack Cocaine
Circuit: Sixth
Judges: Cooper, William S. (Democrat)
       Graves, William (Democrat)
       Johnstone, Martin E. (Democrat)
       Stumbo, Janet (Democrat)
       Keller, James E. (Democrat)
       Wintersheimer, Donald C. (Democrat)
       Lambert, Joseph E. (Democrat)
Opinion: Cooper
Method: Totality of the Circumstances

67. Commonwealth of Kentucky v. Jones (2006), 217 S.W.3d 190. An officer in Harlan County, KY served an “emergency protective order” on Charles Jones. The officer approached the residence of Jones and observed an individual who began to walk away from the officer. The officer stopped the individual, who verified himself as Jones. The officer noticed a large bulge in the front pocket of Jones’ pants. Fearing that the bulge was a weapon the officer decided to frisk Jones. The officer felt what he recognized to be a prescription medicine bottle. The officer seized the bottle, which Jones immediately grasped and threw into a nearby ditch. Jones tried to abscond from the scene. The officer restrained and arrested Jones on a bevy of charges. Jones moved to suppress the evidence at trial, and the trial court denied his motion. Jones appealed, and the Kentucky Court of Appeals reversed the lower court’s decision. The state appealed, and the Supreme Court of Kentucky affirmed the decision of the Court of Appeals and ruled the evidence inadmissible. The court first chastised the Harlan County trial court for not conducting an evidentiary hearing. The court then ruled that the medicine bottle could not have been immediately apparent as contraband. The court did state that more evidence could have changed this decision. The court cited a lack of officer testimony, examination of the officer’s experience, and an analysis of the situational variables as precluding a finding for the police in this case.

Decision: Pro-Rights, Evidence Suppressed
          Affirmed Lower Court Decision
Concerns: #1: Container
          #4: Officer Testimony
Offense: Drug
Evidence: Medicine Bottle Containing Oxycontin
Circuit: Sixth
Judges: Minton, John D., Jr. (Republican)
        Lambert, Joseph E. (Democrat)
        McAnulty, William E., Jr. (Democrat)
        Roach, John C. (Republican)
        Scott, Will T. (Republican) Dissent
        Graves, William (Democrat) Dissent
        Wintersheimer, Donald C. (Democrat) Dissent
Opinion: Minton
Method: Totality of the Circumstances
68. Commonwealth of Kentucky v. Marshall (2010), 319 S.W.3d 352. In January, 2007 a police officer in Lexington, KY spotted an individual, Nabryan Marshall, whom they believed had an outstanding warrant. The officer radioed for backup, but by the time assistance arrived Marshall had left the scene. The officers tracked Marshall to an apartment building where they heard a commotion. They spotted two women fleeing out the windows of an apartment, and the women informed the officers that there was altercation within the apartment. The officers entered and spotted Marshall arguing with another man. Marshall shoved his hands down the front of his pants, and the other participant in the argument shouted, “It’s in his pants!” The officers, who had knowledge that Marshall participated in drug trafficking and often carried a weapon, decided to frisk Marshall. During the frisk the officer felt what he at once recognized to be crack cocaine in Marshall’s groin area. The officer moved Marshall to a private location in the apartment and performed a strip search to seize the evidence. The officers arrested Marshall on charges related to narcotics possession, and Marshall moved to suppress the evidence at trial. The trial court denied his motion, and Marshall appealed. The Kentucky Court of Appeals reversed the decision of the trial court, and the state appealed. The Supreme Court of Kentucky reversed the decision of the Court of Appeals. First, the court affirmed the legality of the initial stop and frisk. Second, the court affirmed the legality of the plain touch seizure by examining the testimony of the officer, the nature of the search, and the experience of the officer. Finally, the court affirmed the validity of the strip search. The court stated that a plain touch seizure is justified through probable cause. Further, this same level of probable cause can also justify a lawful arrest. Due to the probable cause furnished by a plain touch search based on immediate recognition an officer can perform a strip search as long as the search is conducted in a proper manner and location.

**Decision:** Pro-Police, Evidence Allowed
**Reversed Lower Court Decision**

**Concerns:** #4: Officer testimony

**Offense:** Drug

**Evidence:** Bag of Crack Cocaine

**Circuit:** Sixth

**Judges:**
- Scott, Will T. (Republican)
- Minton, John D., Jr. (Republican)
- Cunningham, Bill (Republican)
- Venters, Daniel J. (Democrat)
- Abramson, Lisbeth Hughes (Republican)
- Noble, Mary C. (Republican)
- Schroder, Wilfrid (Republican)

**Opinion:** Scott

**Method:** Totality of the Circumstances

69. Frazier v. Commonwealth of Kentucky (2013), 406 S.W.3d 448. In June, 2008 two deputies with the Sheriff’s Department of Boone County, KY observed a passenger in a vehicle litter. The deputies followed the vehicle, observed it perform a left turn without signaling, and initiated a traffic stop on the vehicle. The officers asked the driver, Thomas Frazier, about the identity of the passengers. He refused to answer the question. The officers felt that Frazier was acting nervous and would later state that he was acting “belligerent” although they could not explain what led them to this conclusion. The officers performed a frisk on Frazier, and during the frisk the officer felt what he described as a “long, course, and suspicious” object. However,
the officer did know the identity of the object. The officer seized the object, which turned out to be marijuana, and conducted a search of the vehicle. The officer found a “tire thumper”, a club-like instrument used by commercial truck drivers to check the pressure of tires, and they charged Frazier with the possession of a deadly weapon. Frazier moved to suppress the evidence at trial, and the trial court denied his motion. Frazier was convicted, and he appealed the decision. The Kentucky Court of Appeals affirmed the lower court’s decision, and Frazier once again appealed. The Supreme Court of Kentucky reversed the lower courts’ decisions. The court held that the traffic stop was legal, but the court defined the frisk as unreasonable. Specifically, the court held that the officers lacked specific and articulable suspicion for frisking Frazier. The court also held that even if the frisk had been legal the seizure of the marijuana was unconstitutional. The court cited Dickerson (1993) and Commonwealth v. Crowder (1994) as establishing a precedent that requires immediate recognition of the incriminating nature of evidence during a plain touch seizure. The court examined the officer’s testimony when determining the legality of the search.

Decision: Pro-Rights, Evidence Suppressed
Reversed Lower Court Decision

Concerns:
#3: Terry Stop
#4: Officer Testimony

Offense: Drug
Evidence: Bag of Marijuana
Circuit: Sixth
Judges: Abramson, Lisbeth Hughes (Republican)
Minton, John D., Jr. (Republican)
Noble, Mary C. (Republican)
Venters, Daniel J. (Democrat)
Cunningham, Bill (Republican)
Keller, James E. (Democrat)
Scott, Will T. (Republican)

Opinion: Abramson
Method: Officer Testimony

Louisiana Supreme Court:

70. State of Louisiana v. James (2000), 795 So. 2d 1146. A deputy in Slidell, LA received word from a convenience store owner that a Black male sporting dreadlocks was selling narcotics. The deputy responded to the store and observed an individual, Paul James, who matched the description given by the storeowner. The deputy stopped James and, fearing that James might be carrying a weapon, performed a frisk on the offender. During the frisk the deputy felt what he at once recognized to be a film canister in James’ pocket. The deputy had extensive experience with drug arrests, and he had commonly found narcotics evidence in film canisters. The deputy seized the canister, shook it, heard the sound of rattling rocks of crack cocaine, and opened the canister to verify the presence of narcotics. The deputy arrested James, who moved to suppress the evidence at trial. The trial court denied his motion, and James entered a guilty plea with the right to appeal. James appealed, and the Court of Appeal for Louisiana affirmed the trial court’s decision. James appealed, and the Supreme Court of Louisiana reversed the lower court’s decision. The court held that the nature of the evidence, an opaque, hard container, precluded the satisfaction of the immediately apparent standard. The court cited the officer’s experience with
sort of evidence, but they quickly discounted the state’s argument by contending that film canisters are not associated with the drug trade in a degree to justify a seizure.

**Decision:** Pro-Rights, Evidence Suppressed  
Reversed Lower Court Decision

**Concerns:**  
#1: Container  
#4: Officer Testimony

**Offense:** Drug

**Evidence:** Film Canister of Crack Cocaine

**Circuit:** Fifth

**Judges:** Calogero, Pascal F., Jr. (Democrat)  
Marcus, Walter F., Jr. (Democrat)  
Kimball, Catherine D. (Democrat)  
Knoll, Janette Theriot (Democrat)  
Johnson, Bernette (Democrat)  
Victory, Joseph F. (Republican)  
Traylor, Chet D. (Republican)

**Opinion:** Per Curium

**Method:** Totality of the Circumstances

---

71. *State of Louisiana v. Wilson (2000), 775 So. 2d 1051.* While patrolling in the late hours of the night a police officer in New Orleans, LA observed a suspicious white man in a predominately black, high-crime neighborhood. The white man, Carl Wilson, was crouching near a car, and when the patrol car approached Wilson quickly stood up, shoved something in his pockets, and started to walk away. The officer, who had made previous drug arrests in this area and knew that white individuals often went to the neighborhood to buy drugs, stopped Wilson and frisked him for weapons. During the frisk the officer felt what he immediately recognized to be a bag of crack cocaine. The officer seized the evidence and arrested Wilson. Wilson moved to suppress the evidence at trial, and the trial court granted his motion. The state appealed, and the Court of Appeal for Louisiana upheld the lower court’s decision. The state appealed again, and the Supreme Court of Louisiana reversed the lower court’s decision. The court first established that the initial stop and frisk were legal. Then the court upheld the legality of the plain touch seizure by examining the officer’s testimony and experience.

**Decision:** Pro-Police, Evidence Allowed  
Reversed Lower Court Decision

**Concerns:** #4: Officer Testimony

**Offense:** Drug

**Evidence:** Bag of Crack Cocaine

**Circuit:** Fifth

**Judges:** Calogero, Pascal F., Jr. (Democrat)  
Marcus, Walter F., Jr. (Democrat)  
Kimball, Catherine D. (Democrat)  
Knoll, Janette Theriot (Democrat)  
Johnson, Bernette (Democrat)  
Victory, Joseph F. (Republican)  
Traylor, Chet D. (Republican)

**Opinion:** Per Curium
Method: Totality of the Circumstances

72. State of Louisiana v. Broussard (2002), 816 So.2d 1284. Police officers in New Orleans, LA conducted an undercover sting operation in order to investigate the sale of crack cocaine. An undercover officer purchased crack cocaine with a marked bill. The individual who sold the narcotics took the officers money and retrieved the narcotics from a female at the scene. After the undercover officer left a group of police officers remained at the scene to conduct covert surveillance. The officers observed the individual who had taken the marked bill get into an SUV. The individual then got out of the SUV. The officers, fearing that another drug transaction had taken place and the marked bill was going to leave the scene, decided to stop the vehicle and detain the individuals at the scene. The officers stopped the vehicle one block from the scene of the drug sale. The vehicle tried to flee the scene, but the officers “boxed” the vehicle in with their patrol cars. The officers ordered the driver, Paul Broussard, out of the vehicle. The officers then frisked Broussard, and during the frisk the officer felt what he immediately recognized to be a bag of crack cocaine. The officers arrested Broussard, who moved to suppress the evidence from trial. The trial court denied his motion, and Broussard was convicted. Broussard appealed, and the Court of Appeal for Louisiana reversed the trial court’s decision. The state appealed, and the Supreme Court of Louisiana reversed the decision of the lower appellate court. The court held that the seizure was a legal, investigatory stop and not an unconstitutional seizure as the appellate court had said. The court then held that the frisk was legal. Finally, the court stated the seizure of the narcotics was constitutional under the plain touch exception. To justify this decision the court cited the officer’s testimony, the officer’s experience, and the nature of the evidence.

Decision: Pro-Police, Evidence Allowed
Reversed Lower Court Decision

Concerns: #4: Officer Testimony

Offense: Drug

Evidence: Bag of Crack Cocaine

Circuit: Fifth

Judges: Johnson, Bernette (Democrat)
Kimball, Catherine D. (Democrat)
Victory, Joseph F. (Republican)
Knoll, Janette Theriot (Democrat)
Weimer, John L. (Democrat)
Traylor, Chet D. (Republican)
Calogero, Pascal F. (Democrat)

Opinion: Per Curium

73. State of Louisiana v. Lipscomb (2002), 807 So. 2d 218. A police officer in New Orleans, LA received information from a security official for a housing project that an individual was engaging in the distribution of crack cocaine. The officer responded to the scene and stopped the individual, Zachary Lipscomb. Fearing that Lipscomb had a weapon the officer frisked the offender. During the frisk the officer felt what he described as a “cylinder like object”, which he promptly seized. The object was a “single shooter” crack pipe. The officer arrested Lipscomb, and Lipscomb was convicted. Lipscomb then filed an appeal where claimed ineffective assistance of counsel because his attorney didn’t move to suppress the evidence. Lipscomb also
challenged the legality of the seizure. The Court of Appeal for Louisiana reversed the trial
court’s judgment. The state then appealed, and the Supreme Court of Louisiana reversed the
decision of the appellate court. The court held that, issues of ineffective counsel not
withstanding, the seizure of the crack pipe was legal under the plain touch exception. Even
though the officer’s testimony didn’t claim immediate recognition of the contraband the court
held that the officer’s experience and the nature of the evidence allowed this sort of seizure.

Decision: Pro-Police, Evidence Allowed
Reversed Lower Court Decision

Concerns: #4: Officer Testimony

Offense: Drug
Evidence: Crack Pipe
Circuit: Fifth
Judges: Johnson, Bernette (Democrat) Dissent
Kimball, Catherine D. (Democrat)
Victory, Joseph F. (Republican)
Knoll, Janette Theriot (Democrat)
Weimer, John L. (Democrat)
Traylor, Chet D. (Republican)
Calogero, Pascal F., Jr. (Democrat)

Opinion: Per Curium
Method: Totality of the Circumstances

74. State of Louisiana v. Temple (2003), 854 So.2d 856. In October, 1996 two officers with the
New Orleans Police Department were patrolling a housing development. The officers observed
four individuals. As the officers approached one of the individuals, Derek Temple, gave the lone
female of the group a small, white object. The female, Christine Johnson, placed the object in her
pants pocket. The officers stopped the group and called for a female officer to frisk Johnson. The
officer frisked Johnson, felt something in her pocket, and reached into to seize a bag of crack
cocaine. The officers arrested Johnson and the other three individuals. At the station Johnson told
the officers that the crack actually belonged to Temple. The state charged Temple with offenses
relating to the distribution of crack cocaine. Temple was convicted, and he appealed. The Court
of Appeal for Louisiana accepted his case for review although he had not raised any motions to
suppress at trial. The Court of Appeal overturned his conviction, and the state appealed. The
Supreme Court of Louisiana affirmed the decision of the lower court. The court held that nothing
in the officer’s testimony justified the initial stop or the frisk. The court cited a lack of reasonable
suspicion relating to the initial stop and a lack of immediate appearance in the plain touch seizure
in justifying this decision.

Decision: Pro-Rights, Evidence Suppressed
Affirmed Lower Court Decision

Concerns: #3: Terry Stop
#4: Officer Testimony

Offense: Drug
Evidence: Bag of Crack Cocaine
Circuit: Fifth
Judges: Johnson, Bernette (Democrat)
Kimball, Catherine D. (Democrat)
75. **State of Louisiana v. Boyer (2007)**, 967 So. 2d 458. In July, 2006 officers with the Lafourche Parish Drug Task force served a search warrant on a residence in Raceland, LA. The officers located the individuals named in the search warrant and found evidence related to the distribution of crack cocaine. During the search an officer noticed an individual, Harry Boyer, standing twenty feet from the residence. The officer saw Boyer was talking on his cellphone. As the officer approached Boyer quickly stuck his hand in the pocket of his pants. Fearing that Boyer might have a weapon the officer ordered him to remove his hand from his pants and lay on the ground. Boyer refused, and the officer restrained him. The officer frisked Boyer for weapons. During the search the officer found two small lumps that he testified “could have been mistaken for rocks of crack cocaine”. The officer seized the “abnormal” objects and discovered that they were actually filters used to smoke crack cocaine. The officer arrested Boyer on charges related to drug paraphernalia. Boyer, who was actually an attorney responding to the scene to speak to his client, move to suppress the evidence at trial. The trial court granted his motion, and the state appealed. The Court of Appeal for Louisiana reversed the trial court’s judgment, and Boyer appealed. The Supreme Court of Louisiana reversed the decision of the appellate court and ruled that the evidence should have been suppressed from trial. The court first established the legality of the initial stop and frisk, but the court pointed out that the officer’s testimony demonstrated that the incriminating nature of the seized evidence was not immediately apparent. The officer testified that he wasn’t sure what the evidence was but that it could have been narcotics, which in the end it was not.

**Decision:** Pro-Rights, Evidence Suppressed  
Reversed Lower Court Decision

**Concerns:** 
#4: Officer Testimony

**Offense:** Drug

**Evidence:** Charcoal Filters for Smoking Crack Cocaine

**Circuit:** Fifth

**Judges:**  
Knoll, Janette Theriot (Democrat)  
Ciaccio, Phillip C. (Democrat)  
Traylor, Chet D. (Republican)  
Johnson, Bernette (dissent) (Democrat)  
Victory, Joseph F. (Republican)  
Kimball, Catherine D. (Democrat)  
Calogero, Pascal F., Jr. (Democrat)

**Opinion:** Knoll

**Method:** Officer Testimony

76. **State of Louisiana v. Guillory (2009)**, 21 So.3d 945. In April, 2008 an officer with the Lake Charles Police Department received word from a probation officer about an area that contained a
thriving drug trade. The officer responded to the area and observed a suspicious looking Chevy Tahoe. As the officer approached an individual, who had been leaning through the passenger side door of the Tahoe, mouthed the words, “That’s the police”. The officer stopped the Tahoe. The officer observed that both of the individuals in the Tahoe were offenders that he had previously arrested for selling crack cocaine. The officer went to speak to the driver, Eric Dushon Guillory, and Guillory at once began to act nervous and perspire. The officer saw white crumbs on the console of the Tahoe, and he suspected the crumbs were remnants of crack cocaine. The officer ordered Guillory out of the vehicle. As Guillory exited the Tahoe the offender turned his back to the officer and suddenly reached into the waistband of his pants. Fearing that Guillory was reaching for a gun the officer pushed him against the vehicle and frisked him for weapons. During the frisk the officer felt the corner of a plastic bag, which was protruding from the waistband of Guillory’s pants, and the officer immediately recognized the bag as a container long associated with the packaging of narcotics. The officer seized the bag, found that it contained crack cocaine, and arrested Guillory. A further search of the vehicle produced more crack cocaine. Guillory moved to suppress the evidence at trial, and the trial court granted his motion. The state appealed, and the Court of Appeal for Louisiana denied review. The state appealed again, and the Supreme Court of Louisiana reversed the trial court’s decision. The court held that the initial stop was legal. Further, the court held that the initial frisk was legal due to the behavior of Guillory. The court then addressed the legality of the seizure, and they stated that the circumstances surrounding the seizure coupled with the officer’s testimony and experience allowed the officer to seize the bag. The court upheld this seizure even though the officer felt only the bag and not any actual crack cocaine.

**Decision:** Pro-Police, Evidence Allowed

Reversed Lower Court Decision

**Concerns:** #4: Officer Testimony

**Offense:** Drug

**Evidence:** Bag of Crack Cocaine

**Circuit:** Fifth

**Judges:** Kimball, Catherine D. (Democrat)

Johnson, Bernette (Democrat)

Victory, Joseph F. (Republican)

Knoll, Janette Theriot (Democrat)

Clark, Marcus R. (Republican)

Weimer, John L. (Democrat)

Guidry, Greg G. (Republican)

**Opinion:** Per Curium

**Method:** Totality of the Circumstances

Maryland Court of Appeals:

77. Jones v. State of Maryland (1996), 682 A.2d 248. In December, 1993 an officer was patrolling a high crime area characterized as an “open air drug market” in Annapolis, MD. The officer observed two suspicious individuals standing alone on a darkened street. The officer stopped one of the individuals, Samuel Jones, Jr., and asked him if he had any guns or drugs on his person. Jones answered in the negative and consented to a frisk search. During the search the officer felt what he immediately recognized to be a bag of crack cocaine in the front pocket of
Jones’ pants. Jones then withdrew consent, but the officer seized the bag of narcotics anyway. The officer arrested Jones, and Jones moved to suppress the evidence at trial. The trial court granted his motion, and the state appealed. The Maryland Special Court of Appeals reversed the lower court’s judgment and stated that the officer’s testimony justified the seizure of the evidence. Jones appealed, and the Maryland Court of Appeals reversed the lower appellate court’s judgment. Although the officer testified that he immediately recognized the bag, established his experience in dealing with the evidence, and testified as to why he had seized this particular evidence in the light of his experience the court held that his testimony still lacked key, particularized factors. Further, the court deferred to the trial court’s assessment of the officer’s credibility, whom they treated as an expert witness, and this also helped them establish the illegality of the search.

Decision: Pro-Rights, Evidence Suppressed
Reversed Lower Court Decision

Concerns: #4: Officer Testimony

Offense: Drug
Evidence: Bag of Crack Cocaine
Circuit: Fourth
Judges: Murphy, Robert C., Jr. (Democrat)
Eldridge, John C. (Democrat)
Rodowsky, Lawrence F. (Democrat)
Chasanow, Howard S. (Democrat)
Karwacki, Robert L. (Democrat)
Bell, Robert M. (Democrat)
Raker, Irma S. (Democrat)

Opinion: Bell

Method: Officer Testimony

78. Stokes v. State of Maryland (2001), 765 A.2d 612. In February, 1997 the police in Montgomery County, MD responded to a robbery at a convenience store. Officers responded to the area, but they could not locate the offender. Approximately thirty minutes later an officer observed an individual, Glen Keith Stokes, pull into parking lot that was adjacent to the robbed store. Stokes loosely matched the description of the robber given by the victim, which had identified a black man wearing a dark shirt, but the officer mainly grew suspicious of Stokes due to his erratic driving and behavior. The officer detained Stokes and patted him down for weapons. During the frisk the officer felt a bag of what he immediately recognized to be marijuana, and Stokes verbally confirmed the identity of the contraband. The officer arrested Stokes on charges related to the possession of marijuana, and Stokes moved to suppress the evidence at trial. The trial court denied the motion. Stokes was convicted, and he appealed. The Maryland Special Court of Appeals affirmed the lower court’s decision, and Stokes appealed. The Maryland Court of Appeals reversed the lower court’s decision. The court established that the seizure was a plain touch seizure, but the court denied the legality of the seizure by dismissing the legality of the stop. The court stated that officer’s testimony failed to provide a reasonable and articulable suspicion to justify the initial stop and frisk. Therefore, the seizure of the marijuana was illegal.

Decision: Pro-Rights, Evidence Suppressed
Reversed Lower Court Decision
79. Bailey v. State of Maryland (2010), 987 A.2d 72. In August, 2006 an officer with the Prince George County Police Department was patrolling a high crime area in Landover, MD. The officer noticed a suspicious individual, Robert Bailey, standing in the shadows on the side of the street. The officer questioned Bailey about his activities, and Bailey refused to answer. While talking to Bailey the officer detected a strong odor of ether, which the officer associated with the use of PCP. Although ether is not illegal the officer decided to frisk Bailey for weapons. During the frisk the officer felt a long cylindrical object that he suspected was a glass vial filled with PCP. The officer seized the evidence, field-tested it to verify that it was indeed PCP, and arrested Bailey. Bailey moved to suppress the evidence at trial, and the trial court denied his motion. Bailey was convicted and appealed. The Maryland Court of Special Appeals affirmed the trial court’s decision, and the Bailey once again appealed. The Maryland Court of Appeals reversed the lower court’s decision. Although the officer testified that he suspected Bailey was under the influence of PCP and that he recognized the suspicious nature of the vial the court held that the both the frisk and seizure were illegal. The court pointed to the fact that the officer’s testimony lacked any reasonable, articulated suspicion that justified the frisk, which the court believed was primarily based on the odor of ether. Since ether is legal the frisk was not based upon a suspected criminal activity that correlated to the presence of weapons. Further, the court stated that the seizure of the vial was precluded by the officer’s testimony that failed to satisfy the immediately apparent standard. The court justified this decision by pointing to the fact the officer had to field-test the PCP to verify its identity. 

Decision: Pro-Rights, Evidence Suppressed
Reversed Lower Court Decision

Concerns: #1: Container
#3: Terry Stop
#4: Officer Testimony

Offense: Drug
Evidence: Vial of PCP
Circuit: Fourth
Judges: Bell, Robert M. (Democrat)
Harrell, Glenn T., Jr. (Democrat) Dissent
Battaglia, Lynne A. (Democrat)
80. Ronald McCracken v. State of Maryland (2012), 429 Md. 507. In September, 2010 an officer with the Baltimore City Police Department responded to a report of an armed individual. The officer arrived at the scene and found a female and male arguing on a porch. The officer learned from the female that the male, Reginald McCracken, had been participating in “hacking”. “Hacking”, a colloquialism used to denote the unlicensed operation of a taxi, is illegal in Baltimore. The female told the officer that McCracken had threatened to shoot the female with a firearm. The officer asked McCracken how he had arrived at the scene, and McCracken stated that he had walked. The officer decided to frisk McCracken for weapons. During the frisk the officer felt a set of car keys with a remote fob. The officer, associating the keys with the suspected crime of “hacking”, seized the evidence, used the fob to unlock a nearby car, and found an illegal handgun in the vehicle. The officer arrested McCracken on charges related to “hacking” and the possession of the firearm. McCracken moved to suppress the evidence at trial, and the trial court denied his motion. McCracken appealed, and the Maryland Special Court of Appeals also denied his motion. McCracken again appealed, and the Maryland Court of Appeals affirmed the lower court’s decision. The court stated that the initial stop and frisk was legal. Further, the court compared this case to the Purnell v. State (2002) in the neighboring state of Delaware. However, the court delineated Purnell from the current proceedings by establishing that the seizure of the McCracken’s keys were directly related to the instrumentalities of the crime of “hacking” while the seizure of Purnell’s keys was not related to a drug crime. The court justified this seizure by examining the officer’s testimony.

**Decision:** Pro-Police, Evidence Allowed
**Concerns:** 
#1: Incriminating Evidence  
#4: Used Officer Testimony

**Offense:** Other—“Hacking”
**Evidence:** Car Keys and Key Fob

**Circuit:** Fourth

**Judges:** Bell, Robert M. (Democrat)  
Harrell, Glenn T., Jr. (Democrat)  
Battaglia, Lynne A. (Democrat)  
Greene, Clayton, Jr. (Republican)  
Adkins, Sally D. (Democrat)  
Barbera, Mary Ellen (Democrat)  
McDonald, Robert M. (Democrat)

**Opinion:** Barbera
**Method:** Officer Testimony

Supreme Judicial Court of Massachusetts:
81. Commonwealth v. Wilson (2004), 805 N.E.2d 968. In October, 2004 the police in Brockton, MA received a tip from a caller who identified themselves as “Stella’s Pizza”. The caller informed the police that a fight was occurring outside their restaurant and involved a group of approximately ten individuals. The caller also stated that the victim of the fight was being stabbed or hit with a hammer. A state trooper responded to the area, saw a group of ten individuals, and confronted the group of men. One of the individuals, Roosevelt Wilson, immediately turned away from the trooper and shoved something into the waist area of his pants. The trooper, fearing that Wilson was hiding a weapon, grabbed the back of Wilson’s shirt and placed his hand over the waistband of Wilson’s pants. The officer felt what he immediately recognized as several “dimebags” of marijuana. The officer stated, “You did that for weed?” Wilson answered in the affirmative, and the officer seized the evidence. The officer arrested Wilson, who moved to suppress the evidence from trial. The trial court denied the motion, and Wilson was convicted on charges related to the distribution of marijuana. Wilson appealed, and the Supreme Judicial Court of Massachusetts decided to transfer the case to their jurisdiction. The court first established the legality of the initial stop and frisk. The court then applied the plain touch doctrine of Dickerson (1993) to the jurisprudence of Massachusetts. The court defined the plain touch exception as a natural analog to the plain view exception and held any other doctrine to be illogical. The court examined the current case and held that the seizure of the marijuana was legal, and they utilized the officer’s testimony, the officer’s experience, and the nature of the seizure to ensure the standard of immediate appearance was justified.

Decision: Pro-Police, Evidence Allowed
Affirmed Lower Court Decision

Concerns:
#4: Officer Testimony

Offense: Drug

Evidence: “Dimebags” of Marijuana

Circuit: First

Judges:
Marshall, Margaret H. (Republican)
Greaney, John M. (Democrat)
Ireland, Roderic L. (Republican)
Spina, Francis X. (Republican)
Cowin, Judith A. (Republican)
Sosman, Martha B. (Republican)
Cordy, Robert J. (Republican)

Opinion: Cowin

Method: Totality of the Circumstances

The Supreme Court of Michigan:

82. People of the State of Michigan v. Champion (1996), 549 N.W.2d 849. In April, 1990 two officers with the Saginaw, MI police department where patrolling a high crime area. The officers came upon a group of men huddled around a parked vehicle. As the patrol car approached the individuals in the group fled. The officers approached the vehicle, and they recognized the driver, Kenneth Ray Champion, as an offender with prior weapon and drug charges. Champion fled while placing something down the front of his pants, and the officers eventually apprehended him and seized him. The officers decided to frisk Champion for weapons. During
the frisk the officer felt what he immediately recognized to be a prescription pill bottle in the groin area of Champion. Due to his fifteen years of experience in making narcotics arrests the officer knew that offenders often transported drugs in pill bottles. The officer seized the bottle, opened it, and found cocaine. The officers arrested Champion, and an inventory search of Champion’s car produced even more cocaine. Champion moved to suppress the evidence at trial, and the trial court denied his motion. A jury convicted Champion on charges related to the distribution of cocaine. Champion appealed, and the Court of Appeals for Michigan reversed the trial court’s decision. The state appealed, and the Supreme Court of Michigan reversed the lower court’s decision. The court held that the trial court made the correct judgment. The court then applied the plain touch exception of *Dickerson* (1993) to Michigan criminal procedure. The court held that the totality of the circumstances of the current case justified the seizure of the pill bottle. The court cited the officer’s experience, the location of the evidence, and the nature of the seizure when determining why the seizure of the pill bottle, an opaque, hard container, satisfied the standard of immediate appearance, which they equated with probable cause. The court also cited the officers testimony, but they made sure to elucidate that the totality of the circumstances should be used to justify plain touch seizures. Following Justice Scalia’s lead the dissent mainly expressed displeasure with the *Terry* doctrine.

**Decision:** Pro-Police, Evidence Allowed

Reversed Lower Court Decision

**Concerns:**

#1: Container

#4: Officer Testimony

**Offense:** Drug

**Evidence:** Pill Bottle of Cocaine

**Circuit:** Sixth

**Judges:**

Brickley, James H. (Republican) Dissent

Levin, Charles (Democrat) Dissent

Cavanagh, Michael F. (Democrat) Dissent

Boyle, Patricia (Democrat)

Riley, Dorothy Comstock (Republican)

Mallett, Conrad, Jr. (Democrat)

Weaver, Elizabeth (Republican)

**Opinion:** Mallett

**Method:** Totality of the Circumstances

---

83. The People of the State of Michigan v. Custer (2001), 630 N.W.2d 870. The police in Bay City, MI received a report of a possible burglary. Two officers responded to the scene and observed a suspicious parked car containing two individuals. The officers asked the driver, Billy Holder, to step out of the vehicle and instantly observed that Holder was intoxicated. The officer advised Holder that he was unfit to drive and that his car would have to be towed. To demonstrate that he had enough money to pay for the towing service Holder retrieved a wad of money from his pocket and accidentally pulled a bag of marijuana into plain view. The officers arrested Holder and transported him to the squad car. Holder yelled for his companion, Michael Robert Custer, to remain silent. The officers decided to frisk Custer in fear that he might have weapons. During the frisk the officer felt a square object that he at once recognized to be a “blotter of acid”. The officer seized the object, but when he pulled it into plain view he realized that it was actually three photographs. The officer placed the photos on top of the vehicle and
continued the search. The officer then returned to the photographs, turned them over, and discovered that they contained photographic evidence of Holder and Custer standing near a large amount of marijuana. The officers used the photographs to find the marijuana and charge Custer with the distribution of marijuana. Custer moved to suppress the evidence at trial, and the district court granted his motion. The state appealed and both the circuit court and the Court of Appeals of Michigan affirmed the trial court’s decision. The state appealed once again, and the Supreme Court of Michigan reversed the decision of the lower courts. The court held that initial stop and frisk were both justified under the *Terry* doctrine. The court then examined the plain touch seizure of the photographs. The court held that the seizure was based upon an immediate recognition of the illegal nature of the evidence. Even though the officer was mistaken in his identification of the evidence, which he thought to be a blotter of acid, the court held the seizure to be legal due to the officer’s impressions giving him probable cause to seize the evidence. Further, the court then stated that the officer was allowed to inspect the outer or visual surface of the seized evidence in this situation. Because the evidence was legally seized and the incriminating evidence was apparent on the visual surface of the photographs the court denied the motion to suppress. The court utilized the officer’s testimony and experience as well as the nature of the evidence and seizure to justify this logic. The dissent cited *Arizona v. Hicks* (1989) and stated that any manipulation of evidence seized through plain touch or plain view automatically precludes the satisfaction of the immediately apparent standard.

**Decision:** Pro-Police, Evidence Allowed = Reversed Lower Court Decision

**Concerns:**

#1: Incriminating Evidence  
#4: Officer Testimony

**Offense:** Drug

**Evidence:** Photographs of Drug Activity

**Circuit:** Sixth

**Judges:**  
Corrigan, Maura (Republican)  
Cavanaugh, Michael F. (Democrat) Dissent  
Weaver, Elizabeth (Republican)  
Kelly, Marilyn Jean (Democrat) Dissent  
Taylor, Clifford (Republican)  
Young, Robert P., Jr. (Republican)  
Markman, Stephen (Republican)

**Opinion:** Markman

**Method:** Totality of the Circumstances

**Supreme Court of Minnesota:**

84. *State of Minnesota v. Lemert* (2014), 843 N.W.2d 227. In January, 2010 officers with the Sheriff’s Office of Nicollet County, MN were investigating Thomas Wayne on the suspicion that Wayne was distributing methamphetamine. During the investigation an undercover deputy purchased methamphetamine from Wayne on two separate occasions. The deputies procured a search warrant for Wayne’s residence. As they moved to serve the warrant Wayne left the scene in his pickup. The deputies stopped and arrested Wayne on charges related to the undercover drug purchases. The deputies soon found that Wayne was travelling with a passenger, Charles William Lemert. The deputies decided to frisk Lemert for weapons. During the frisk the deputy
felt what he recognized as a pipe commonly used to smoke methamphetamine. The deputy seized the evidence and a further search produced approximately one gram of methamphetamine. The deputy arrested Lemert, and Lemert moved to suppress the evidence at trial. The trial court denied his motion, and Lemert appealed. The Court of Appeals for Minnesota affirmed the trial court’s decision, and Lemert again appealed. The Supreme Court of Minnesota affirmed the lower court’s decision. The court primarily addressed the legality of the initial stop and frisk. However, the court allowed the plain touch seizure by accepting the plain touch doctrine without giving much elucidation to their decision-making.

**Decision:** Pro-Police, Evidence Allowed
Affirmed Lower Court Decision

**Concerns:** None

**Offense:** Drug

**Evidence:** Crack Pipe

**Circuit:** Eighth

**Judges:** Stras, David (Republican)
Gildea, Lorie Skjerven (Republican)
Hudson, Natalie E. (Democrat)
Anderson, Barry G. (Republican)
Dietzen, Christopher J. (Republican)
Wright, Wilhelmina M. (Democrat)
Lillehaug, David L. (Democrat)

**Opinion:** Stras

**Method:** None

**Supreme Court of Missouri:**

85. *State of Missouri v. Rushing (1996)*, 935 S.W.2d 30. In October, 1994 a juvenile court officer witnessed a drug transaction in Cape Girardeau, MO. The officer reported the encounter to the police, who sent an officer to investigate the area. The officer arrived and found the individual suspected of distributing the illegal products. The police officer had previously made drug arrests in this area, served several search warrants targeting drugs at the address, and noticed a large amount of gang graffiti. The officer decided to frisk the offender, Shaun Alexander Rushing, for weapons. During the search the officer felt a cylindrical object in the Alexander’s pocket. The officer immediately recognized it as a “Life Savers” candy container, which he knew was often used to transport drugs. The officer seized the container, discovered that it was actually a prescription pill bottle, and opened it to find crack cocaine. The officer then arrested Rushing on charges related to the distribution of crack cocaine, and Rushing moved to suppress the evidence at trial. The trial court denied his motion, and Rushing appealed. The Missouri Court of Appeals transferred the case to the Supreme Court of Missouri, who affirmed the trial court’s decision. The court held that plain touch seizures were allowed under both the Missouri Constitution and *Dickerson* (1993). The court equated the immediately apparent standard with the probable cause standard and recommended a totality of the circumstances approach to address plain touch seizures. The court held that the seizure of the container was legal due to the circumstances surrounding the seizure and cited the location of the seizure, the officer’s testimony and experience, and the nature of the evidence when making their
determination. The dissent argued that containers naturally precluded a tactile determination of probable cause or immediate appearance.

Decision: Pro-Police, Evidence Allowed
Affirmed Lower Court Decision

Concerns:
#1: Container
#4: Officer Testimony

Offense: Drug
Evidence: Pill Bottle of Crack Cocaine
Circuit: Eighth
Judges: Benton, William Duane (Republican)
Price, William Ray, Jr. (Republican)
Limbaugh, Stephen N., Jr. (Republican)
Robertson, Edward D., Jr. (Republican)
Holstein, John C. (Republican)
Covington, Ann K. (Republican) Dissent
White, Ronnie L. (Democrat) Dissent

Opinion: Holstein
Method: Totality of the Circumstances

Supreme Court of Montana:

86. State of Montana v. Collard (1997), 951 P.2d 56. In November, 1995 the police in Bozeman, MT received a report that a local convenience store had been robbed. An officer responded to the scene and began searching for the offender. The officer observed a suspicious car leaving a darkened trailer park. The officer followed the car in his patrol car and turned on his high beams to ascertain who was in the car. The car surprised the officer by suddenly pulling over to the side of the road. The officer exited his patrol car to speak with the driver, Jonathon Collard, and noticed that Collard was wearing blue sweatpants stained with mud and appeared to very nervous. The clerk at the store had given a description of the robber that included two-tone boots, blue sweatpants, a blue shirt, a bandana, and a pair of ski goggles. The officer also observed that Collard was wearing two-tone shoes. Fearing that Collard might be in the possession of a knife, which was the weapon used in the robbery, the officer frisked Collard. During the frisk the officer felt what he immediately recognized to be a pair of ski goggles. The officer arrested Collard for the robbery, and Collard eventually confessed. Collard moved to suppress the evidence and his confession at trial, and the trial court denied his motion. Collard appealed, and the Supreme Court of Montana affirmed the lower court’s decision. The court first established the legality of the stop by examining the officer’s experience and training as well as situational factors. The court then applied the plain touch doctrine of Dickerson (1993) to Montana criminal procedure. The court held that the seizure of the goggles satisfied the requirement of immediate appearance, and the court made this decision by examining the officer’s testimony, the nature of the evidence, and the nature of the search.

Decision: Pro-Police, Evidence Allowed
Affirmed Lower Court Decision

Concerns:
#1: Incriminating Evidence
#4: Officer Testimony
87. State of Montana v. Heath (2000), 999 P. 2d 324. In October, 1997 the police in Billings, MT received a complaint from a female that her ex-boyfriend was harassing her. The caller also informed the police that the boyfriend, Todd Heath, had earlier threatened her with a gun. Officers responded to the area where they observed a 1964 Chevrolet, Heaths’ automobile, speed away. The officers stopped the car. The officers observed that Heath was driving, and the passengers in the car made suspicious movements as though they were hiding something under the seats. The officers decided to frisk the individuals for weapons. While frisking Heath the officer felt a small object, which he seized. He opened the object, a small leather bag, and found that it contained illegal prescription medication. The officer also found a small glass tube commonly used for smoking methamphetamine. The officers arrested Heath, and Heath moved to suppress the evidence at trial. Without elucidating their reasoning the trial court denied his motion, and Heath appealed. The Supreme Court of Montana reversed the lower court’s judgment. The court cited the lack of officer testimony in the trial record and stated that the officer gave no reasoning behind his plain touch seizure. Therefore, the standard of immediate appearance was not satisfied.

Decision: Pro-Rights, Evidence Suppressed
Reversed Lower Court Decision

Concerns: #1: Container
#4: Officer Testimony

Offense: Drug
Evidence: Leather Bag of Valium
“Meth Pipe”

Circuit: Ninth
Judges: Turnage, Jean A. (Democrat)
Gray, Karla M. (Republican)
Nelson, James C. (Republican)
Hunt, William E. (Democrat)
Trieweller, Terry N. (Republican)
Regnier, Jim (Republican)
Leaphart, William E. (Republican)

Opinion: Leaphart
Method: Officer Testimony

Supreme Court of Nebraska:
88. State of Nebraska v. Craven (1997), 571 N.W.2d 612. In August, 1995 two police officers witnessed a motorcyclist driving without proper license plates or a helmet. The cyclist parked, and the officers decided to institute a traffic stop for the observed violations. The officers received word from their dispatcher that the cyclist, Thomas E. Craven, was a felon. The officers decided to frisk Craven for weapons. During the frisk the officer felt what he at once recognized to be a pipe used to smoke of marijuana. Possession of this sort of pipe was illegal in Nebraska, and the officer decided to seize the evidence. In order to get to the evidence the officer had to remove several other items from Craven’s pocket. The officer pulled out two disposable lighters, which he had also been able to tactilely identify during the frisk, and a small quantity of crack cocaine. The officer pulled out the supposed pipe, which in all actuality was a sparkplug, and arrested Craven on charges relating to the possession of crack cocaine. Craven moved to suppress he evidence at trial, and the trial court denied his motion. Craven was convicted, and he appealed. The Court of Appeals for Nebraska affirmed the trial court’s judgment, and Craven appealed again. The Supreme Court of Nebraska affirmed the decision of the lower appellate court. The court first applied Dickerson (1993) and plain touch to Nebraska criminal procedure. The court then examined the specifics of the case where they found the seizure to be lawful. The court stated that although the contraband was initially misidentified the officer’s testimony, experience, and training all satisfied the probable cause requirement contained in the standard of immediate appearance. Further, the court stated that the nature of the evidence also contributed to their determinations about probable cause as they noted the startling similarities between a pipe and a sparkplug.

Decision: Pro-Police, Evidence Allowed
Affirmed Lower Court Decision
Concerns: #4: Officer testimony
Offense: Drug
Evidence: Marijuana Pipe/Sparkplug
Circuit: Eighth
Judges: White, C. Thomas (Democrat)
Caporale. D. Nick (Republican)
Wright, John F. (Democrat)
Connolly, William M. (Democrat)
Gerrard, John M. (Democrat)
Stephan, Kenneth C. (Democrat)
McCormack, Michael C. (Democrat)
Opinion: Per Curium
Method: Totality of the Circumstances

89. State of Nebraska v. Andre W. (1999), 590 N.W.2d 827. In September, 1997 police officers served a warrant on an apartment in Lincoln, NE. The warrant authorized the police to search for crack cocaine and an individual known as “Crumb”. During the search the police located a juvenile, Andre W., who matched the description of “Crumb”. As required by departmental policy the officers handcuffed Andre W. and escorted him outside. The officers then frisked the juvenile for weapons. During the frisk the officer had Andre remove his shoes, a location where the officer had found weapons on other suspects, and the officer frisked Andre’s socks. During the frisk of the socks the officer felt what he immediately recognized to be a rock of crack cocaine. The officer arrested Andre, and Andre moved to suppress the evidence at trial.
The trial court denied his motion and adjudicated Andre as a delinquent. Andre appealed his disposition, and the Court of Appeals for Nebraska affirmed the lower court’s judgment. Andre again appealed, and the Supreme Court of Nebraska affirmed the judgment of the Court of Appeals. The court first established that the frisk and removal of the shoes was legal. The court then applied the plain touch doctrine and found that the officer’s testimony and experience and the nature of the seizure satisfied the standard of immediate appearance.

Decision: Pro-Police, Evidence Allowed
Affirmed Lower Court Decision

Concerns: #4: Officer Testimony

Offense: Drug
Evidence: Crack Cocaine
Circuit: Eighth
Judges: Hendry, John V. (Democrat)
Wright, John F. (Democrat)
Connolly, William M. (Democrat)
Gerrard, John M. (Democrat)
Stephan, Kenneth C. (Democrat)
McCormack, Michael C. (Democrat)
Miller-Lerman, Lindsay (Democrat)

Opinion: Stephan
Method: Totality of the Circumstances

90. State of Nebraska v. Smith (2010), 782 N.W.2d 913. A private security agency contracted to provide security services for a dance club in Omaha, NE. Two security officers, one of which was an off duty police officer, were stationed outside the entrance to the club and had the task of frisking every patron that entered. One of the security officers frisked an individual, William E. Smith. During the frisk the officer felt something in Smith’s front pocket but could not discern the objects identity. Smith then tried to reach into the pocket, but the off duty police officer grabbed his arm. The officers seized the evidence and discovered it to be MDMA or “ecstasy”. The officers arrested Smith, who moved to suppress the evidence at trial. The trial court denied his motion, and a bench trial resulted in a conviction. Smith appealed, and the Supreme Court of Nebraska reversed the lower court’s decision. First, the court established that the police officer’s involvement activated the protections of the Fourth Amendment even though he was off duty during the seizure. The court then established that although Smith may have consented to the frisk his actions of resisting the seizure demonstrated that he withdrew consent. The state tried to justify the seizure under the plain feel doctrine, but the court cited the officer’s testimony as clearly demonstrating that the evidence was not immediately apparent as contraband.

Decision: Pro-Rights, Evidence Suppressed
Reversed Lower Court Decision

Concerns: #4: Officer Testimony

Offense: Drug
Evidence: Tablets of MDMA
Circuit: Eighth
Judges: Wright, John F. (Democrat)
Connolly, William M. (Democrat)
Gerrard, John M. (Democrat)
Stephan, Kenneth C. (Democrat)  
McCormack, Michael C. (Democrat)  
Miller-Lerman, Lindsay (Democrat)  

Opinion:  Gerrard  
Method:  Officer Testimony

Supreme Court of Nevada:  

91. The State of Nevada v. Conners (2000), 994 P.2d 44. In March, 1998 a deputy with the sheriff’s department of Nye County, NV initiated a traffic stop on a motorcycle. The deputy had observed the motorcycle speeding and failing to stop at a stop sign. The deputy approached the driver, Satan Renee Conners, who was visibly nervous and kept putting his hands in his pants pockets. Conners gave indirect answers about the ownership of the motorcycle, which didn’t have a license plate, and the officer suspected that the motorcycle was stolen. The officer placed Conners in handcuffs but did not arrest him. The officer frisked Conners for weapons. During the frisk the officer felt an object in the front pocket of Conners’ pants. The officer knew at once that it was not a weapon but continued to manipulate the item. The officer then determined that the object was a glass vial commonly used to transport methamphetamine. The officer seized the vial, verified that it was methamphetamine, and arrested Conners. Conners moved to suppress the evidence at trial, and the trial court affirmed his motion. The state appealed, and the Supreme Court of Nevada affirmed the lower court’s decision. The court cited the almost identical specifics of Dickerson (1993) and held that the officer’s testimony revealed that the seizure was not based upon an immediate recognition of the contraband.  

Decision:  Pro-Rights, Evidence Suppressed  
Affirmed Lower Court Decision  

Concerns:  
#1: Container  
#4: Officer Testimony  

Offense:  Drug  
Evidence:  Vial of Methamphetamine  
Circuit:  Ninth  
Judges:  Young, Clarence Clifton (Republican)  
Agosti, Deborah (Republican)  
Leavitt, Myron E. (Democrat)  

Opinion:  Per Curium  
Method:  Officer Testimony

Court of Criminal Appeals of Oklahoma:  

92. Hallcy v. State of Oklahoma (2007), 53 P.3d 66. In April, 2004 two police officers in Chickasha, OK stopped a vehicle that had been reported as stolen. The officers decided to frisk the passenger, Robert Keith Halley, for weapons. During the frisk the officer felt what he immediately recognized to be a prescription medicine bottle. The officer asked Hallcy about the bottle, and the offender told the officer that the driver had given it to him during the traffic stop. The officer’s training and experience led him to believe that the bottle contained drug contraband, and the officer seized the bottle and opened it to discover crack cocaine. The officer arrested Halley, who moved to suppress the evidence at trial. The trial court denied his motion,
and Halcy was convicted on charges related to the possession of narcotics. Halcy appealed, and the Court of Criminal Appeals of Oklahoma affirmed the lower court’s decision. The court stated that when determining the legality of the plain touch seizures of containers a court must examine the totality of the circumstances. The court held that in this case the officer’s testimony showed that he immediately recognized the object. The court verified the legitimacy of this testimony by examining the officer’s training and experience and the nature of the seizure. The court stated that this evidence satisfied the immediately apparent standard, which they correlated to probable cause.

**Decision:** Pro-Police, Evidence Allowed
Affirmed Lower Court Decision

**Concerns:**
#1: Container
#4: Officer Testimony

**Offense:** Drug
**Evidence:** Pill Bottle of Crack Cocaine
**Circuit:** Tenth
**Judges:**
- Johnson, Arlene (Democrat)
- Lumpkin, Gary L. (Republican)
- Johnson, Charles A. (Republican)
- Chapel, Charles S. (Democrat)
- Lewis, David B. (Democrat)

**Opinion:** Johnson, A.

**Method:** Totality of the Circumstances

**Supreme Court of Pennsylvania:**

93. Commonwealth of Pennsylvania v. Graham (1998), 721 A.2d 1075. In July, 1994 an officer with the police department of Erie, PA was patrolling a high crime area with his dog “Cujo”. The officer observed three individuals sitting on a stoop. The officer recognized one of the individuals as Ronnie Beason. The officer knew that Beason was subject to an outstanding warrant. The three individuals started to walk away, and the officer ordered them to stop. He ordered Beason to lie on the ground in order to effect an arrest. The officer noticed that one of the other individuals, Durrel Graham, had a suspicious looking bulge in his front pocket. Fearing that it was a weapon the officer decided to frisk the offender. During the frisk the officer identified the bulge as a wad of money, and Graham verbally verified the officer’s tactile determination. The officer then felt what he recognized to be a “Life Savers Holes” container in Graham’s back pocket. The officer then pulled open the back pocket, shined his flashlight into the pocket, and found a container that contained crack cocaine. The officer seized the evidence and arrested Graham. Graham moved to suppress the evidence at trial, and the trial court denied his motion. Graham was convicted and appealed. The Superior Court affirmed the lower court’s decision, and Graham appealed. The Supreme Court of Pennsylvania reversed the lower court’s decision. The court first established the seizure was not justified under the plain view exception. The court then addressed the legality of the seizure under Dickerson. The court held that the officer’s use of the flashlight clearly established that the seizure of the container was not motivated by immediate recognition of the item’s incriminating contraband. The officer, even though testifying that he recognized the nature of the item, clearly demonstrated that there was no immediate recognition by his further examination with the flashlight.
In a consolidated opinion featuring two cases the Supreme Court of Pennsylvania upholds a motion to suppress due to faulty officer testimony. The first case concerns the arrest of a juvenile at a high school football game. Two security officers observed the juvenile, E.M., smoking underneath a set of bleachers. The officer noticed that a plastic bag, which he believed contained marijuana, was sticking out of the front pocket of E.M. The officer seized the bag and found that it was marijuana. The officer then decided to frisk E.M. for weapons. During the frisk the officer felt what he suspected was “contraband” and seized the evidence. The item turned out to be other drug substances. The police arrested E.M., who moved to suppress the evidence at trial. The trial court denied his motion and adjudicated E.M. as delinquent. E.M. appealed, and the Superior Court affirmed the lower court’s judgment. E.M. appealed again. The second case concerns the arrest of an individual after a suspected drug sale. In March, 1991 a Philadelphia police officer observed an individual, Christopher Hall, exchange money for a small plastic bag of an unknown substance. Hall placed the bag in his pocket and walked away. The officer followed Hall down an alley and initiated an investigatory stop. The officer decided to frisk Hall for weapons and to determine the identity of the observed bag. The officer touched the pocket containing the bag and squeezed it. The officer recognized the object as a bag containing crack cocaine. The officer seized the evidence and arrested Hall. Hall moved to suppress the evidence at trial, and the trial court denied his motion. Hall was convicted and appealed. The Superior Court affirmed the lower court decision, and Hall appealed. In a consolidated opinion the Supreme Court of Pennsylvania reversed the lower courts’ decisions. The court held that a common thread united these cases. First, the court established that the initial stop and frisks were legal. However, the court then stated that the officers’ testimony denied the satisfaction of the immediately apparent standard. In a decision, which a dissenting opinion characterized as a dangerous erosion of police effectiveness, the court stated that the officers’ testimony demonstrated that the seizures were motivated only by suspicion although the totality of the circumstances seemed to establish enough evidence to construct probable cause to arrest or search.

Decision: Pro-Rights, Evidence Suppressed
Reversed Lower Court Decision

Concerns: #4: Officer Testimony
Offense: Drug
Evidence: L.S.D., Marijuana; Bag of Crack Cocaine
Circuit: Third
Judges: Flaherty, John P., Jr. (Democrat)
        Zappala, Stephen (Democrat)
        Cappy, Ralph J. (Democrat)
        Castille, Ronald D. (Republican) Dissent
        Nigro, Russel M. (Democrat)
        Newman, Sandra Schultz (Republican) Dissent
        Saylor, Thomas G. (Republican)
Opinion: Nigro
Method: Officer Testimony

95. Commonwealth of Pennsylvania v. Stevenson; In the Interest of R.A., a minor (2000), 744 A.2d 1261. In an a consolidated opinion featuring two cases the Pennsylvania Supreme Court addressed the admissibility of rigid containers under the plain touch exception. The first case concerns the arrest of an individual for crack cocaine. In October, 1995 a police officer in Parkside Borough observed an individual park in front of and enter into a residence with a history of drug activity. The officer then observed the individual drive away and initiated a traffic stop for a broken taillight. The driver, Reuben Stevenson, displayed nervous behaviors, kept reaching towards the glove department, and had no valid license. The officer decided to frisk Stevenson for weapons. During the frisk the officer felt what he immediately recognized to be cardboard containers full of cocaine. The officer arrested Stevenson, and a further search of the car produced a larger quantity of cocaine. Stevenson moved to suppress the evidence at trial, and the trial court denied his motion. Stevenson was convicted, and he appealed. The Superior Court affirmed the lower court’s decision. The second case features a similar scenario. In February, 1997 a state trooper in Harrisburg, PA observed a car with a broken windshield. The car pulled into a local gas station, and the officer followed. He instructed the driver to return to the car. The officer observed that the car also contained two passengers, and all of the occupants started to display nervous behavior. The officer decided to frisk the driver and called for back up. The officers then frisked the passengers. During the frisk of a juvenile, R.A., the officer felt what he immediately recognized to be a cigar and a medicine bottle. The officer had previously discovered contraband in these objects, and he seized them. The officer discovered marijuana in the cigar and found that the medicine bottle contained crack cocaine. The officer arrested R.A., who moved to suppress the evidence at trial. The trial court denied his motion, and he was convicted. R.A. appealed, and the Superior Court affirmed the trial courts judgment. In a joint opinion the Supreme Court of Pennsylvania reversed the lower courts’ decisions. The court held that the nature of the evidence along with the officers’ testimony precluded the satisfaction of the immediately apparent standard. The court held that Dickerson (1993) requires immediate recognition at touch. Since the evidence was in rigid containers the court held that this sort of evidence can never be immediately apparent as contraband due to the fact that the container could contain legal items. The court seemed to imply that if the officer couldn’t positively identify the items then plain touch could not apply, which leaves no rooms for mistakes but seems to require near-supernatural abilities in tactile detection. Further, although the officers mentioned their immediate recognition the court chose to discount their testimony due to the evidence.
Decision: Pro-Rights, Evidence Suppressed
Concerns:  
#1: Container  
#4: Officer Testimony  

Offense:  
Drug  

Evidence:  
Cardboards Container of Crack; Cigar of Marijuana, Bottle of Crack Cocaine  

Circuit:  
Third  

Judges:  
Flaherty, John P, Jr (Democrat)  
Zappala, Stephen (Democrat)  
Cappy, Ralph J. (Democrat)  
Castille, Ronald D. (Republican) Dissenting  
Nigro, Russel M. (Democrat)  
Newman, Sandra Schultz (Republican)  
Saylor, Thomas G. (Republican)  

Opinion:  
Nigro  

Method:  
Totality of the Circumstances  

96. Commonwealth of Pennsylvania v. Zahir (2000), 751 A.2d 1153. In March, 1992 two police officers with the Philadelphia Police Department received information from their captain about an individual selling narcotics. The officers responded to the area and observed an individual who matched the description. The individual, Abdul Zahir, saw the officers and walked into a Chinese restaurant where he threw something on the ground. The officers had previously witnessed this behavior with narcotics dealers who would often “dump” contraband to avoid arrest. The officers circled the block and saw Zahir return to the scene and pick up the “dumped” item. The officers confronted Zahir. Zahir placed his hand in his front pocket, and the officer grasped the pocketed hand in fear that Zahir was reaching for a weapon. The officer then felt what he immediately recognized to be “caps” of crack cocaine. The officer seized the evidence and discovered it to be ninety-eight vials of crack cocaine. The officers arrested Zahir, and Zahir moved to suppress the evidence at trial. The trial court denied his motion, and Zahir was convicted. Zahir appealed, and the Superior Court affirmed the judgment of the trial court. Zahir appealed once again, and the Supreme Court of Pennsylvania affirmed the decision of the lower court. First, the court for the first time accepted the legality of the plain touch exception within the Pennsylvania Constitution. The court recommended a totality of the circumstances approach when addressing the legality of plain touch seizures and also clearly stated that officers were not automatically allowed to search suspected drug offenders. The court then determined the admissibility of the evidence seized from Zahir by examining the officer’s testimony and experience, the nature of the seizure, and the physical characteristics of the evidence.  

Decision:  
Pro-Police, Evidence Allowed at Trial  
Affirmed Lower Court Decision  

Concerns:  
#1: Containers  
#4: Officer Testimony  

Offense:  
Drug  

Evidence:  
“Caps” or Vials of Crack Cocaine  

Circuit:  
Third  

Judges:  
Flaherty, John P., Jr. (Democrat) Dissent  
Zappala, Stephen (Democrat) Dissent
97. Commonwealth of Pennsylvania v. Pakacki (2004), 901 A.2d 983. A Pennsylvania State Trooper was in the process of investigating a shooting. Dispatch gave the trooper a description of the shooter and identified the assailant as Adam A. Packaki. While patrolling a country road the trooper observed Packaki walking with another individual. The officer stopped Packaki, smelled the odor of burnt marijuana, and frisked the offender. During the frisk the officer felt what he immediately recognized to be a pipe used for smoking marijuana. The officer asked Pakacki to identify the object, and Pakacki informed the officer that it was a pipe. The officer seized the evidence. A further search produced marijuana and a handgun. Pakacki moved to suppress the evidence at trial, and the trial court denied his motion. Pakacki appealed, and a Pennsylvania Superior Court granted his motion. The state appealed, and the Supreme Court of Pennsylvania reversed the Superior Court’s decision. The court first established that Pakacki was not under arrest at the time of the frisk, which nullified the offender’s Miranda argument, and the court further stated that the stop was legal and motivated by reasonable suspicion. The court then held the seizure of the pipe to be legal. The court stated that the officer’s testimony implied immediate recognition of the illegal nature of the contraband even though he asked about the identity. The court backed up this assertion by using a totality of the circumstances approach that examined the officer’s experience, the nature of the stop, and the evidence.

Decision: Pro-Police, Evidence Allowed
Reversed Lower Court Decision

Concerns: #4: Officer Testimony
Offense: Drug
Evidence: Marijuana Pipe
Circuit: Third
Judges: Cappy, Ralph J. (Democrat)
        Castille, Ronald D. (Republican)
        Newman, Sandra Schultz (Republican)
        Saylor, Thomas G. (Republican)
        Eakin, J. Michael (Republican)
        Baer, Max (Democrat)

Opinion: Eakin
Method: Totality of the Circumstances

South Carolina:

98. The State of South Carolina v. Taylor (2013), 736 S.E.2d 663. In July, 2006 an officer with the Sheriff’s Department of Florence County, SC observed a suspected drug transaction in a high crime area. The transaction featured two individuals. The officers noticed the two men huddled together while exchanging something. The officers went to stop the individuals, and one
of the men tried to escape on a bicycle. The officers physically seized the cyclist, Syllester D. Taylor, and decided to frisk him for weapons. The frisking officer felt a large object that he suspected might be a weapon. The officer pushed the object into plain view. The object, a tennis ball, fell to the ground, and the officer picked it up and squeezed it. During this manipulation the officer found that the ball contained crack cocaine. The officer arrested Taylor, and he moved to suppress the evidence at trial. The trial court denied the motion, and Taylor was convicted. Taylor appealed, and the Court of Appeals for South Carolina reversed the lower court’s judgment. The state appealed, and the Supreme Court of South Carolina reversed the appellate court’s judgment. The court first established the seizure of Taylor was an investigatory stop in nature and was reasonable. The court then held that the officer was free to manipulate the tennis ball out into plain view since it was reasonable to suspect it to be a weapon. Further, the court held that the officer was free to squeeze the tennis ball open since it was reasonable that it may contain a smaller weapon like a razor blade. Since this manipulation produced incriminating evidence the seizure was then allowed under the plain feel exception.

Decision: Pro-Police, Evidence Allowed
Reversed Lower Court Decision

Concerns: #1: Container
#4: Used Officer Testimony

Offense: Drug
Evidence: Tennis Ball Containing Crack Cocaine

Circuit: Fourth
Judges: Toal, Jean Hoafer (Democrat)
Pliecomes, Costa M. (Democrat)
Beatty, Donald W. (Democrat)
Kittredge, John W. (Republican)
Hearn, Kay Gorenflo (Republican)

Opinion: Toal
Method: None

South Dakota Supreme Court:

99. State of South Dakota v. Sleep (1999), 590 N.W.2d 235. In August, 1997 state troopers near Sturgis, SD received a report of a white Toyota pickup driving erratically. The troopers then observed a vehicle that matched that description and decided to follow the truck. The Toyota crossed over the centerline, and the troopers initiated a traffic stop. The troopers asked the driver, James Sleep, to step out of the vehicle. Sleep started to become “mouthy”, and the troopers asked him if he had any weapons. Sleep produced a pocketknife and gave it to the troopers. The troopers noticed a bulge in the front pocket of Sleep’s jeans. Fearing that it might be a weapon the officer frisked the pocket. The trooper thought that the items could be another knife and ordered Sleep to empty his pockets. Sleep produced a “bullet”, a small device used to inhale drugs, out of his pocket. The trooper arrested Sleep, and a further frisk produced a small bag of methamphetamine. Sleep moved to suppress the evidence at trial, and the trial court denied his motion. Sleep was convicted, and he appealed. The Supreme Court of South Dakota affirmed the lower court’s decision. The court cited Dickerson (1993) as allowing seizures of non-weapon contraband discovered during a legal frisk. The court held that the initial stop and frisk were legal. They further stated the trooper was legally allowed to force Sleep to empty his pockets due
to a legitimate fear that it contained weapons. Since that action resulted in the discovery of contraband the officer was then allowed to seize the evidence. The court then established that all the remaining evidence was allowed at trial under the exception related to seizures stemming from lawful arrests.

**Decision:** Pro-Police, Evidence Allowed  
**Concerns:** #4: Officer Testimony

**Offense:** Drug  
**Evidence:** “Bullet”

**Circuit:** Eighth  
**Judges:** Gilbertson, David (Republican)  
Konenkamp, John K. (Republican)  
Amundson, Robert A. (Republican)  
Miller, Robert A. (Republican)  
Sabers, Richard W. (Republican)

**Opinion:** Konenkamp  
**Method:** None

**Tennessee Supreme Court:**

100. *State of Tennessee v. Bridges* (1997), 963 S.W.2d 487. In December, 1993 an officer with the police department of Paris, TN received a tip from a reliable confidential informant that Ray Anthony Bridges was dealing crack cocaine in a local nightclub. The officer immediately responded to the scene and found that Bridges at the club. The officer spoke to Bridges and decided to frisk him for weapons. During the frisk the officer felt what he immediately recognized to be a prescription medicine bottle. The officer knew from prior experience that these sorts of bottle were often used to transport crack cocaine. The officer seized the bottle and found that it did indeed contain crack cocaine. A further frisk produced a small bag of cocaine and a knife. The officer arrested Bridges, who moved to suppress the evidence at trial. The trial court denied the motion, and Bridges was convicted. He appealed, and the Court of Criminal Appeals of Tennessee affirmed the lower court’s decision. Bridges appealed once again, and the Supreme Court of Tennessee reversed the lower court’s decision. The court first established that the stop was an investigatory stop, which they declared reasonable, and not an arrest. The court then stated that the frisk was legal. However, the declared the seizure of the medicine bottle illegal. To justify this the court highlighted the lack of trial evidence concerning the officer’s experience and training. Further, the court examined the specific construction of the bottle and stated that a rigid container naturally raised difficulties when establishing immediately appearance of illegality. The court made their determination through an examination of the totality of the circumstances, which was an approach they recommended for plain touch decision-making.

**Decision:** Pro-Rights, Evidence Suppressed  
**Concerns:** #1: Container  
#4: Officer Testimony

**Offense:** Drug  
**Evidence:** Pill Bottle of Crack Cocaine
Texas:

101. Carmouche v. The State of Texas (2000), 10 S.W.3d 323. In August, 1996 a confidential informant telephoned a narcotics investigator with the Texas Department of Public Safety. The informant told the investigator that she would soon be travelling with an individual, Ronald C. Carmouche, who would be carrying ten ounces of cocaine. The informant could not describe the make and model of the vehicle that Carmouche would be driving, but she did agree to stop at a specific gas station in Corrigan, TX. The investigator surveilled the gas station until a car containing the informant arrived. The investigator arranged for a state trooper to stop the car after it left the station. The trooper stopped the car, the investigator and several Texas rangers arrived at the scene, and they ordered Carmouche to exit the vehicle. The officers asked for permission to search the car, and Carmouche consented. The trooper then decided to frisk Carmouche for weapons, and he felt a large bulge in Carmouche’s front pocket that immediately identified as a wad of money. The trooper seized the money, but the search of the car produced no evidence of cocaine. The informant then informed the officers that the cocaine was in Carmouche’s pants, and a ranger then asked if Carmouche would consent to another frisk. Carmouche seemed to answer in the affirmative, and the ranger then seized the cocaine from Carmouche’s pants. The officers arrested Carmouche, and the offender moved to suppress the evidence at trial. The trial court denied his motion, and Carmouche appealed. A Court of Appeals affirmed the lower court’s decision, and Carmouche again appealed. The Court of Criminal Appeals for Texas ultimately reversed the decision of the lower court by finding that the seizure of the money was not motivated by consent. The court remanded the case for further proceedings to determine if enough probable cause existed to justify the seizure of the cocaine. However, the court did find that officer’s testimony established that the seizure of the money was a valid plain feel seizure. The court held that the initial stop and frisk were legal and the officer’s verbal affirmation of the immediately apparent nature of the contraband justified this conclusion. The court agreed with the lower courts on this point of analysis.

Decision: Pro-Police, Evidence Allowed
Affirmed Lower Court Decision

Concerns:
#1: Incriminating Evidence
#4: Officer Testimony

Offense: Drug
Evidence: Wad of Money

Circuit: Fifth
Judges: Meyers, Lawrence E. (Republican)
        Keller, Sharon Faye (Republican)
        Johnson, Cheryl (Republican)
Keasler, Michael (Republican)
McCormick, Michael Jerry (Republican)
Price, Tom (Republican)
Mansfield, Stephen (Republican)
Holland, Verla Sue (Republican)
Womack, Paul (Republican)

102. O’Hara v. The State of Texas (2000), 27 S.W.3d 548. A trooper with the Texas Department of Public Safety was patrolling a rural area in the early hours of morning. The trooper, who was tasked with enforcing federal transportation regulations, noticed an “eighteen wheeler” truck with malfunctioning “running lights”. The trooper stopped the truck and began speaking with the driver, Phillip George O’Hara. The trooper noticed that O’Hara was carrying a belt knife but did not seize the weapon. Eventually, the trooper asked O’Hara to return to his patrol car. The trooper then decided to frisk O’Hara due to his standard procedure of frisking offenders who were going to enter his patrol car. During the frisk the officer felt and seized a bag of marijuana. A further search also produced a small amount of cocaine. The officer arrested O’Hara on charges related to possession of controlled substances, and O’Hara moved to suppress the evidence at trial. The trial court denied his motion, and O’Hara was convicted. O’Hara appealed. A Court of Appeals in Texas reversed the lower court’s decision, and the state appealed. The Court of Criminal Appeals for Texas reversed the decision of the lower appellate court. Although O’Hara primarily raised issues concerning the validity of the stop and frisk, which the court defined as reasonable, the court did allow the plain touch seizure of the marijuana without elucidating their logic.

Decision: Pro-Police, Evidence Allowed
Reversed Lower Court Decision

Concerns: None
Offense: Drug
Evidence: Bag of Marijuana
Circuit: Fifth
Judges: Meyers, Lawrence E. (Republican) Dissent
Keller, Sharon Faye (Republican) Dissent
Johnson, Cheryl (Republican) Dissent
Keasler, Michael (Republican) Dissent
McCormick, Michael Jerry (Republican) Dissent
Price, Tom (Republican) Dissent
Mansfield, Stephen (Republican) Dissent
Holland, Verla Sue (Republican) Dissent
Womack, Paul (Republican) Dissent

Opinion: Keasler
Method: None

103. Griffin v. The State of Texas (2006), 215 S.W.3d 403. Adam Troy Griffin was arrested in Texas for selling crack cocaine. At the time of this arrest the police discovered that Griffin preferred to transport crack cocaine in cylindrical plastic tubes. Two days after this arrest a
confidential informant advised the police that the recently released Griffin was once again selling crack cocaine in a specific area. Officers responded to the area, which was a high crime area known to contain an illegal drug market. The officers found Griffin, who was not engaging in any overt criminal activity but did act nervous as the officers approached, and they decided to frisk the offender. The officers lifted Griffin from the ground where he had been sitting, and as they started the frisk Griffin became very tense. As the officer moved to frisk Griffin's front pocket the offender reached towards the officer’s hand. Another officer seized Griffin’s hand, and they finished the frisk. Upon touching the front pocket the officer felt a long, cylindrical object that he immediately recognized to be the same container that Griffin often used to transport narcotics. The officer arrested Griffin. The officer seized the evidence, opened it, and found that it contained crack cocaine. The offender moved to suppress the evidence at trial. The trial court denied his motion, and Griffin appealed. A Court of Appeals for Texas affirmed the lower court’s decision, and Griffin again appealed. The Court of Criminal Appeals of Texas affirmed the lower court’s decision. The court first established the legality of the initial stop and frisk. The court then addressed the plain touch seizure by examining the officer’s testimony, the nature of the seizure, and the nature of the evidence. The court cited that the officer arrested the offender before seizing the evidence, which they construed as establishing the officer’s assured recognition of the contraband, and they also cited the fact the offender was known to carry narcotics in this same sort of container.

**Decision:** Pro-Police, Evidence Allowed

**Concerns:**
- #1: Container
- #4: Officer Testimony

**Offense:** Drug

**Evidence:** Plastic Cylinder of Crack Cocaine

**Circuit:** Fifth

**Judges:**
- Hervey, Barbara P. (Republican)
- Keller, Sharon Faye (Republican)
- Meyers, Lawrence E. (Republican)
- Womack, Paul (Republican)
- Keasler, Michael (Republican)
- Holcomb, Charles R. (Republican)
- Cochran, Cathy (Republican)
- Price, Tom (Republican) Dissent
- Johnson, Cheryl (Republican) Dissent

**Opinion:** Hervey

**Method:** Totality of the Circumstances

**Vermont:**

104. In re C.C., Juvenile (2009), 987 A.2d 1000. In October, 2007 a police officer in Newport, VT initiated a traffic stop on a vehicle for speeding. The officer recognized the driver, a juvenile identified as D.K., as an individual with an outstanding warrant. D.K. attempted to flee the scene, and the officer detained him. A search incident to the arrest produced a plastic bag of marijuana, illegal pills, and a handgun. The officer also spotted another juvenile, identified as C.C., sitting in the back seat of the car. The officer decided to frisk C.C. for
weapons. During the frisk the officer felt a bulge that he thought was a plastic bag of “dope” or “marijuana”. The officer seized the evidence and found that it was actually a bag of pills. The officer further searched the bag and found that it contained a tablet of ecstasy. The officer arrested C.C., who moved to suppress the evidence at trial. The trial court denied his motion by citing the officer’s testimony and the nature of the seizure. C.C. was adjudicated delinquent, and he appealed. The Supreme Court of Vermont reversed the decision of the lower court. The court first cited that plain touch seizures were allowed in Vermont, but the court held this particular seizure as being illegal. The court stated that the evidence in containers are by nature not immediately apparent as contraband. Even though this case featured a non-rigid container in the form of a plastic bag the court held that the immediately apparent standard was not satisfied. However, the court seemed to state that the officer’s testimony that featured a misidentification was what actually resulted in the suppression of evidence.

**Decision:** Pro-Rights, Evidence Suppressed

**Concerns:** #4: Officer Testimony

**Offense:** Drug

**Evidence:** Bag of Pills Containing One Pill of Ecstasy

**Circuit:** Second

**Judges:** Reiber, Paul L. (Republican)

Dooley, John (Democrat)

Johnson, Denise R. (Democrat)

Skoglund, Marilyn (Democrat)

Burgess, Brian L. (Republican)

**Opinion:** Dooley

**Method:** Officer Testimony

**Virginia:****

105. Murphy v. Commonwealth of Virginia (2002), 570 S.E.2d 836. In September, 1999 a magistrate issued a search warrant that targeted a residence in Franklin, VA. The warrant authorized the police to search the residence and one individual, Eric Smith, for items related to the distribution of narcotics. The officers entered the residence and began the search. During the execution of the warrant the officers handcuffed and decided to frisk another individual, Phillip Jerome Murphy, who was present at the scene. During the frisk the officer felt what he immediately recognized as a bag of a leafy substance that his training and experience told him was marijuana. The officer seized the evidence, verified that it was marijuana, and arrested Murphy. A further search revealed that Murphy was also holding crack cocaine and heroin. Murphy moved to suppress the evidence at trial, and the trial court denied his motion. Murphy was convicted, and he appealed. The Court of Appeals for Virginia affirmed the lower court’s decision, and Murphy again appealed. The Supreme Court of Virginia reversed the lower court’s decision. The court cited the officer’s testimony, which featured no overt, direct admonishments about the immediately apparent nature of the contraband, as precluding the seizure of the marijuana. The court then suppressed the rest of the evidence seized because of the “fruit of the poisonous tree” doctrine. Although the officer testified that his training and experience instructed him that that item was marijuana the court ignored this other evidence to rule the marijuana inadmissible at trial.
In December, 2004 a police officer with the Portsmouth Police Department patrolled housing complex and observed a suspicious car. The officer, who was assigned to patrol housing complexes, approached the car. The individual, Darrio L. Cost, who was sitting in the passenger seat began to make furtive motions and reach towards his right front pocket as the officer approached. Fearing that Cost had a weapon the officer decided to frisk the offender. During the frisk of the front pocket the officer felt what he immediately recognized as a bag of medicinal capsules, and his experience led him to believe that these capsules contained narcotics. The officer seized the evidence, and a later test demonstrated that the capsules contained heroin. The officer arrested Cost, who moved to suppress the evidence at trial. The trial court denied his motion, and Cost was convicted. Cost appealed, and the Court of Appeals for Virginia affirmed the lower court’s decision. Cost appealed, and the Supreme Court of Virginia reversed the lower court’s decision. The court held that the officer’s testimony, nature of the evidence, and the nature of the seizure all established the illegality of the seizure. The court, although professing the use of a totality of the circumstances approach, repeatedly cited the officer’s testimonial admission that the capsules could have contained a legal substance. The dissent attacked the majority’s reasoning and contended that the majority was instituting the standard of beyond a reasonable doubt for plain touch seizures. The dissent demonstrated the officer had probable cause to seize the evidence.
107. Jones v. Commonwealth of Virginia (2010), 691 S.E.2d 801. Two police officers with the Portsmouth Police Department patrolled a high crime area in Portsmouth, VA. The officers observed what they suspected to be a drug sale. During the sale a vehicle stopped in the street and impeded traffic. An individual leaned into the vehicle, which contained a driver and a passenger, and handed the driver an object. The officer, citing his prior experience with drug related arrests, recognized this activity as a possible transaction involving narcotics. The officers stopped the vehicle and asked the driver for his identification. The driver stated that he did not have any identification but did give the officers a name and social security number. The officers, who did not have any ability to positively verify the veracity of the individual’s identification, radioed for a backup unit with a computer capable of making sight based determinations of identification. The officers decided to frisk the driver for weapons. During the frisk the officer felt what he recognized to be a wallet. The driver stated that the wallet was his cousin’s, but the officer seized the wallet and found identification, which featured a different name than originally given by the driver. The driver, now identified as Michael Eugene Jones, never consented to the removal of the wallet, but the officers used this evidence in their determination to handcuff Jones and place him the back of their car for officer safety. The officers asked Jones if they could search his car, and Jones consented. The search of the vehicle produced two firearms and a quantity of cocaine. The officers arrested Jones, who moved to suppress the evidence at trial. The trial court denied his motion, and Jones was convicted. He appealed, and the Court of Appeals for Virginia denied his petition for review. Jones appealed, and the Supreme Court of Virginia reversed the decision of the lower court in terms of the plain touch seizure. The court stated that the wallet could not be immediately apparent as contraband since a wallet is not an illegal object. Therefore, the court ruled this seizure as unlawful under the Dickerson (1993) doctrine.

However, the court did allow the evidence seized from the car to be used at trial since they construed Jones’ consent as valid.

Decision: Pro-Rights, Evidence Suppressed
Reversed Lower Court Decision

Concerns:
#1: Incriminating Evidence
#4: Officer Testimony

Offense: Drug
Evidence: Wallet
Circuit: Fourth

Judges: Hassell, Leroy R., Sr. (Democrat)
Keenan, Barbara M. (Democrat)
Koontz, Lawrence L., Jr. (Democrat)
Lemons, Donald W. (Democrat)
Goodwyn, S. Bernard (Democrat)
Millette, Leroy F., Jr. (Democrat)
Lacy, Elizabeth B. (Democrat)

Opinion: Millette
Method: None
Washington:

108. State of Washington v. Garvin (2009), 207 P.3d 1266. In October, 2005 a police officer in Union Gap, WA stopped a car for driving with a broken windshield and a malfunctioning license plate light. The officer approached the car and noticed that the ignition had been “punched out” and that a knife was sitting next to the driver, Anthony Gaylord Garvin. The officer asked Garvin if he had any other weapons, and Garvin replied that he had another knife. The officer asked Garvin to step outside of the car, and the officer decided to frisk the offender. During the frisk the officer felt something odd as he squeezed the Garvin’s coin pocket. The officer continued to squeeze the material until he felt it separate into granules. The officer ascertained that it was methamphetamine, seized the evidence, and arrested Garvin. Garvin moved to suppress the evidence at trial, the trial court denied the motion, and Garvin was convicted. Garvin appealed, and the Court of Appeals for Washington affirmed the lower court’s decision. Garvin again appealed, and the Supreme Court of Washington reversed the lower court’s decision. The court cited the officer’s testimony where he repeatedly admitted to manipulating the evidence as invalidating the plain touch exception. The court cited that the officer continued the manipulation well after he had determined the methamphetamine was a not a weapon.

Decision: Pro-Rights, Evidence Suppressed
Reversed Lower Court Decision

Concerns: #4: Officer Testimony

Offense: Drug

Evidence: Small Bag of Methamphetamine

Circuit: Ninth

Judges: Sanders, Richard B. (Democrat)
Alexander, Gerry L. (Democrat)
Owens, Susan (Democrat)
Johnson, Charles W. (Democrat)
Fairhurst, Mary (Democrat)
Madsen, Barbara (Democrat)
Johnson, James M. (Democrat)
Chambers, Tom (Democrat)
Seinfeld, Karen (Democrat)

Opinion: Sanders

Method: Officer Testimony
APPENDIX 3

Federal Circuits

Source: Administrative Office of the U.S. Courts
APPENDIX 4

Reduced Models

The various regression models and tables within Chapter 7 contain several variables that are theoretically important but are not statistically significant. I chose to leave these variables in the models to better control for the potential effects of certain characteristics of the judges and each case. However, the inclusion of these variables may result in a poorer model fit and raise certain statistical difficulties. Therefore, I will include three models within this appendix that feature only statistically significant variables, although I have included the same variables in all models to allow for comparison. It should be noted that these models do not show any drastically different findings from the models in Chapter 7, but they may be more parsimonious.

All Cases:

Federal Circuit Courts and State Supreme Courts

Table A.4.1. presents the results of the binary regression modeling for all the cases (N=108) in this study. The findings closely parallel the results outlined in Table 7.5, although there is a modest increase in the model fit statistics. However, the variable of “Harvard/Yale” is no longer marginally significant. These findings show that appellate courts, when considered in totality, are influenced by political ideology, and Republican judges are more likely to institute pro-police decisions. However, as earlier stated the control variables related to legal context are the primary determinant of judicial decision-making, and appellate courts routinely defer to the decisions of the trial court when deciding the admissibility of evidence seized under the plain touch exception.
<table>
<thead>
<tr>
<th>Variable</th>
<th>Coefficient</th>
<th>SE</th>
<th>Odds</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constant</td>
<td>-329.618</td>
<td>111.486</td>
<td>.000</td>
</tr>
<tr>
<td>% Republican</td>
<td>.022 (p=.047)</td>
<td>.011</td>
<td>1.022</td>
</tr>
<tr>
<td>Affirm Trial Court</td>
<td>3.185* (p&lt;.001)</td>
<td>.659</td>
<td>23.528</td>
</tr>
<tr>
<td>Year</td>
<td>.162* (p=.004)</td>
<td>.055</td>
<td>1.175</td>
</tr>
<tr>
<td>“Pure Drug”</td>
<td>1.899 (p=.002)</td>
<td>.599</td>
<td>6.678</td>
</tr>
</tbody>
</table>

**Model Fit**

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Nagelkerke $R^2$</td>
<td>.581</td>
</tr>
<tr>
<td>-2 Log Likelihood</td>
<td>82.466</td>
</tr>
</tbody>
</table>

*Note*: Outcome Variable (0=Suppression of Evidence, 1=Admission of Evidence)

*Note*: Significance of p<.05

*Note**: Moderate Significance of p<.1

Federal Circuit Court Cases

*Table A.4.1* presents the results of the reduced binary regression model for the subsample of cases (n=45) that were decided by the federal circuit courts. The results closely mirror those presented in *Table 7.7*, but the high odd’s ratios of the earlier regression model are partially reduced by the more parsimonious nature of the this current analysis. The model fit statistics show a poorer fit as compared to the earlier model, but the substantive findings of the earlier models are unchanged. This current model shows that federal circuit courts mainly rely on legal variables to institute their decisions, and political affiliation shows no apparent effect on judicial decision-making in this setting.
Table A.4.2
Binary Logistic Regression:
Political Affiliation and Outcome
(n=45)

<table>
<thead>
<tr>
<th>Variable</th>
<th>Coefficient</th>
<th>SE</th>
<th>Odds</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constant</td>
<td>-700.947</td>
<td>260.174</td>
<td>.000</td>
</tr>
<tr>
<td>% Republican</td>
<td>-.011</td>
<td>.660</td>
<td>.989</td>
</tr>
<tr>
<td>Affirm Trial Court</td>
<td>3.836* (p&lt;.001)</td>
<td>1.586</td>
<td>46.355</td>
</tr>
<tr>
<td>Year</td>
<td>.349* (p=.007)</td>
<td>.130</td>
<td>1.418</td>
</tr>
<tr>
<td>“Pure Drug”</td>
<td>3.903 (p=.005)</td>
<td>1.138</td>
<td>49.573</td>
</tr>
</tbody>
</table>

Model Fit
Nagelkerke $R^2$ .7
-2 Log Likelihood 23.843

Note: Outcome Variable (0=Suppression of Evidence, 1=Admission of Evidence)
Note*: Significance of p<.05
Note**: Moderate Significance of p<.1

State Supreme Court Cases

Table A.4.3 shows the results of the reduced binary logistic regression model for the cases (n=63) decided in the state supreme courts. The model shows similar findings to those presented in Table 7.9, but the model fit statistics show a poorer fit. The moderately significant variables of “South” and “Harvard/Yale” no longer show any significance. Further, the variable “Pure Drug” no longer shows any significance. This might imply that state supreme courts are not influenced by evidentiary concerns in plain touch cases, which contrasts with the decision-making of the federal circuit courts. The reduced model shows that state supreme courts are primarily influenced by the decision of the trial court, but this influence is not as prominent as it is in the decision-making of the federal circuit courts. As the earlier findings also illustrate this reduction in the effect of legal variables allows for the influence of political ideology to enter.
into the decision-making process, and Republican judges are more likely to institute pro-police decisions in the state supreme courts.

<table>
<thead>
<tr>
<th>Variable</th>
<th>Coefficient</th>
<th>SE</th>
<th>Odds</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constant</td>
<td>-329.618</td>
<td>111.486</td>
<td>0.000</td>
</tr>
<tr>
<td>% Republican</td>
<td>0.029 (p=0.047)</td>
<td>0.015</td>
<td>1.030</td>
</tr>
<tr>
<td>Affirm Trial Court</td>
<td>3.222* (p&lt;0.001)</td>
<td>0.766</td>
<td>25.082</td>
</tr>
<tr>
<td>Year</td>
<td>0.076</td>
<td>0.067</td>
<td>1.079</td>
</tr>
<tr>
<td>“Pure Drug”</td>
<td>1.255</td>
<td>0.804</td>
<td>3.509</td>
</tr>
</tbody>
</table>

**Table 7.4**
Binary Logistic Regression:
Political Affiliation and Outcome
(n=63)

**Model Fit**
- Nagelkerke $R^2$: 0.448
- -2 Log Likelihood: 48.584

*Note 1:* Outcome Variable (0=Suppression of Evidence, 1=Admission of Evidence)

*Note*: Significance of p<0.05

*Note**: Moderate Significance of p<0.1