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The Plain View Doctrine in Nebraska: *State v. Holloman*, 197 Neb. 139, 248 N.W.2d 15 (1976)

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Note

The Plain View Doctrine In Nebraska

State v. Holloman, 197 Neb. 139, 248 N.W.2d 15 (1976).

I. INTRODUCTION

The Supreme Court of the United States has held that the fourth amendment of the United States Constitution establishes a preference for searches under warrant.[1] There are, however, constitutionally recognized exceptions to this requirement.[2] The most recent of these exceptions is the "plain view" doctrine.[3] Under this doctrine, a law enforcement officer's seizure of objects does not constitute a "search" for purposes of the fourth amendment's prohibition against "unreasonable searches and seizures" when the officer, after a prior valid intrusion, inadvertently views an object

1. *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443 (1971); Katz v. United States, 389 U.S. 347 (1967); Jones v. United States, 357 U.S. 493 (1958); McDonald v. United States, 335 U.S. 451 (1948); Trupiano v. United States, 334 U.S. 699 (1948); Johnson v. United States, 333 U.S. 10 (1948).

   This was made applicable to the states through the fourteenth amendment by Mapp v. Ohio, 367 U.S. 643 (1961).
2. *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443 (1971) (object in plain view); Warden v. Hayden, 387 U.S. 294 (1967) (exigent circumstances); Marron v. United States, 275 U.S. 192 (1927) (search incident to a lawful arrest); Carroll v. United States, 267 U.S. 132 (1925) (automobile search).
3. Although the roots of the plain view doctrine can be traced as far back as the cases of Marron v. United States, 275 U.S. 192 (1927); United States v. Lee, 274 U.S. 559 (1927); and Hester v. United States, 265 U.S. 57 (1924), it was not until Coolidge v. New Hampshire, 403 U.S. 443 (1971), that the doctrine was formally enunciated by the Supreme Court. Part IIC of Mr. Justice Stewart's plurality opinion in *Coolidge, id.* at 464-73, is now generally considered as having established the basic test for applying the plain view doctrine. There is, however, a certain amount of disagreement on this point as Part IIC was fully concurred in by only three other Justices. *See, e.g.*, Moylan, *The Plain View Doctrine: Unexpected Child of the Great "Search Incident" Geography Battle*, 26 MERCER L. REV. 1047, 1048-49 (1975). For the purposes of this article it will be assumed that Mr. Justice Stewart's opinion in *Coolidge* is the "law of the land" with respect to the plain view doctrine.

immediately apparent as evidence.[4] Rather, the seizure is held as having come about as the result of a mere observation. *State v. Holloman*[5] is the most recent Nebraska case dealing with the plain view doctrine. This article will deal with the *Holloman* decision in relation to the requirement of the plain view doctrine that an object be "immediately apparent" as evidence.

II. THE FACTS OF *HOLLOMAN*

Early in the morning of April 20, 1975, a 76 year-old woman was forcibly raped in her Omaha home, and afterwards robbed of $20 by her assailant.[6] That same morning Officer Hunt, the police officer assigned to investigate the crime, received from the victim a general description of the assailant. Officer Hunt then inspected the premises and found that the rear door of the victim's residence had been forcibly entered. In the damp ground outside the door were several heel and foot prints.[7] Later that morning, the investigation led Officer Hunt and another policeman, Officer Keavy, to the defendant's residence. After knocking on the defendant's door for several minutes, the defendant appeared and let the officers in. The officers identified themselves. After being advised that he was a possible suspect in a rape case, the defendant agreed to accompany the officers to the police station, but stated that he first had to get dressed. "While the defendant was getting dressed, Officer Hunt observed several pair of shoes lying on the floor next to where the defendant was."[8] The officer picked the shoes up and observed that the heels on one of the pairs had a design similar to the prints he had earlier seen behind the victim's home.[9] The shoes were then seized as evidence. Officer Keavy then observed a sweater on a chair next to the defendant's bed which matched the description of the one worn by the assailant. This sweater was also seized.[10] The defendant was then taken to the police station, where he was arrested. At trial, the defendant was convicted of forcible rape and robbery.[11] One of the grounds upon which the defendant appealed was

4. Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971).
5. 197 Neb. 139, 248 N.W.2d 15 (1976).
6. *Id.* at 140, 248 N.W.2d at 17.
7. *Id.*
8. *Id.* at 141, 248 N.W.2d at 17.
9. *Id.*
10. *Id.* at 142, 248 N.W.2d at 17.
11. *Id.* at 140, 248 N.W.2d at 17.

> that the District Court committed reversible error in overruling his pretrial motion to suppress, from use against him at trial, evidence of the impression of the bottom of the heel of one of his shoes and a blue sweater, which he claims were seized in violation of his constitutional rights.[12]

The court justified the police officers' seizure of these items under the plain view doctrine.

III. ANALYSIS

Before a seizure may be justified under the plain view doctrine, three conditions must be met.[13] The first two conditions are: (1) the police officer must have a prior justification for the intrusion, and (2) in the course of the intrusion he must inadvertently come across the piece of evidence incriminating the accused.[14] These two conditions would appear to be met in the instant case.[15] The third

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12. *Id.*
13. *See* Moylan, *supra* note 3, at 1073-88.
14. Coolidge v. New Hampshire, 403 U.S. at 466.
15. *Coolidge* stated the first two requirements of the plain view doctrine as follows:

> What the "plain view" cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused. The doctrine serves to supplement the prior justification—whether it be a warrant for another object, hot pursuit, search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused—and permits the warrantless seizure.

Id.

Thus, the first hurdle that must be cleared before evidence may be admitted at trial under the plain view doctrine is the existence of a prior valid intrusion by the police. *See, e.g.*, United States v. Gardner, 537 F.2d 861 (6th Cir. 1976), wherein evidence was held inadmissible on the ground that the officer obtained entry by means of an invalid search warrant. The Supreme Court in *Coolidge* gave examples of four situations in which a police officer's prior intrusion would be valid for purposes of applying the plain view doctrine: (1) when police acting under a valid search warrant "come across some other article of incriminating character," (2) when the initial intrusion is without warrant, but is supported by one of the recognized exceptions to the warrant requirement, (3) during a search incident to a lawful arrest, and (4) "where a police officer is not searching for evidence against the accused, but nonetheless inadvertently comes across an incriminating object." 403 U.S. at 465-66. For a discussion of the application of each situation, see Moylan, *supra* note 3, at 1072-78.

In *Holloman*, the entry of the police officer was apparently justified under the fourth situation, on the ground that it was consented to by the defendant. Defendant's brief, however, argued that, "[t]he most that can be said from a reading of the entire record is that the defend-

requirement of the plain view doctrine was stated in *Coolidge v. New Hampshire* as follows:

> Of course, the extension of the original justification is legitimate only where it is *immediately apparent to the police that they have evidence before them*; the "plain view" doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges.[16]

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ant silently acquiesced in the police entry, searches, and seizures," and "that such consent was insufficient to justify the police officers' actions." Brief for Appellant at 16-18. The Nebraska Supreme Court dismissed this argument however:

> It is clear under the facts of this case that the police officers had a "right to be in the position to have [the] view. . . ." The defendant was a suspect in a rape and robbery case. He had been positively identified by the victim as her assailant. He lived next door to the rape victim. After the officers knocked on the defendant's door, and identified themselves as police officers, they were let in by the defendant. The defendant agreed to accompany them to the police station for questioning after he first dressed. The record is devoid of any objection by the defendant to the presence of the officers in his apartment while he dressed.

197 Neb. at 142-43, 248 N.W.2d at 18 (citation omitted).

The purpose of the inadvertence requirement is to prevent police officers from taking contrived or anticipated "plain views":

> The evil at which this requirement is aimed is the "planned warrantless seizure." The "inadvertence" requirement is intended simply to prevent the police from using an entry into a "constitutionally protected area" for purposes of making an arrest—or for any other ostensibly legitimate purpose—as a mere subterfuge for a plain view reconnoitering. There may not be a contrived investigatory reconnaissance aimed at evading the warrant requirement for a search or seizure. There may not be a planned plain view.

Moylan, *supra* note 3, at 1083-84. Notably, it was this requirement of the plain view doctrine which largely sparked the dissenting opinions in *Coolidge* of Justices Black, 403 U.S. at 505-10 (Black, J., concurring and dissenting), and White, *id.* at 513-22 (White, J., concurring and dissenting). The Nebraska Supreme Court's decision that this requirement was met appears to be correct. There was no evidence that the officers entered the defendant's residence for any purpose other than that of taking him to the police station for questioning.

16. 403 U.S. at 466 (emphasis added).

The United States Supreme Court has stressed the constitutional disfavor for general exploratory searches, stating that the fourth amendment

> emphasizes the purpose to protect against all general searches. Since before the creation of our government, such searches have been deemed obnoxious to fundamental principles of liberty. They are denounced in the constitutions or statutes of every State in the Union. . . . The need of protection against them is attested alike by history and present conditions. The Amendment is to be liberally construed and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of

The decision in *Holloman* must be carefully scrutinized in relation to this requirement that the incriminating character of the object be immediately apparent.

The court in *Holloman* recognized the difficulty of justifying the seizure under the plain view doctrine when it stated:

> The real question in this case is whether or not Officer Hunt's actions in *picking up several pair* of the defendant's shoes and examining the heels went beyond the "plain view" doctrine and constituted an unconstitutional search and seizure.
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> . . . While the shoes themselves were clearly in plain view, the heels could not have been observed without Officer Hunt taking the action that he did.[17]

Thus, the court accurately identified the two overt acts involved in the case which arguably extended the officer's actions beyond the realm of mere observation of immediately apparent evidence. First, before the shoes were seized they were picked up and turned over so as to allow the police officer to view their heel marks. Second, the shoes were lying among several other pair of shoes at the time of their seizure.[18]

In considering any question arising under the fourth amendment, it is important not to lose sight of that amendment's fundamental guarantee:

> [T]he rule [is] that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.[19]

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which it was adopted.
Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931) (citations omitted).

17. 197 Neb. at 143, 248 N.W.2d at 18 (emphasis added). The seizure of defendant's sweater does not seem to raise difficulties similar to those involved in the seizure of the shoes, and therefore will not be discussed. Unlike the shoes, as soon as the officer observed the sweater he could ascertain that it matched the description of that worn by the assailant. *Id.* Thus, it was not necessary for the sweater to be picked up for its incriminating character to be revealed.
18. Clearly, once Officer Hunt had picked up and turned over the shoes, it was apparent to him that they were evidence. The plain view doctrine, however, cuts in at an earlier point in time, namely, at the time Officer Hunt saw the shoes. Just as a search cannot be made legal by what it turns up, Wong Sun v. United States, 371 U.S. 471 (1963), a plain view seizure cannot be justified upon the ground that the object subsequently turned out to be evidence.
19. Boyd v. United States, 116 U.S. 616, 635 (1886).

The sentiments of this guarantee were discussed in *Gouled v. United States*,[20] in referring to both the fourth and fifth amendments. The Supreme Court stated: "It has been repeatedly decided that these Amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intended but mistakenly over-zealous executive officers."[21] Thus, the "few specifically established and well-delineated exceptions"[22] to the fourth amendment, having been "jealously and carefully drawn,"[23] are to receive a narrow construction, while the amendment itself must receive an expansive one.

Coolidge held the plain view doctrine applicable only in certain limited circumstances. In so doing, the Court "manifested a clear purpose of narrow construction and strict application of the plain view exception."[24] Unfortunately, by its decision in *Holloman*, the Nebraska Supreme Court has not followed the lead of the United States Supreme Court.

The court in *Holloman* justified the seizure of the shoes on the grounds that, "[t]he defendant's shoes were in plain view. Officer Hunt's actions under the circumstances clearly were not unreasonable."[25] As a basis for this conclusion, the court relied upon *Harris v. United States*,[26] to the effect that, "[i]t has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence."[27]

The court, however, possibly seduced by the rather indiscriminate use in *Harris* of the phrase "plain view," overlooked the simple fact that not every "open view" constitutes a "plain view" for purposes of the plain view doctrine.[28] In *Harris*, the petitioner's

20. 255 U.S. 298 (1921).
21. *Id.* at 304.
22. Katz v. United States, 389 U.S. 347, 357 (1967).
23. Jones v. United States, 357 U.S. 493, 499 (1958).
24. Comment, *"Plain View"—Anything But Plain*: Coolidge *Divides the Lower Courts*, 7 LOY. L.A. L. REV. 489, 515 (1974).
25. 197 Neb. at 144, 248 N.W.2d at 19.
26. 390 U.S. 234 (1968).
27. *Id.* at 236 (quoted in State v. Holloman, 197 Neb. at 142, 248 N.W.2d at 17).
28. Moylan, *supra* note 3, at 1096. *Coolidge* stated this proposition as follows:

> It is well established that under certain circumstances the police may seize evidence in plain view without a warrant.

car had been seen leaving the scene of a robbery. Petitioner was arrested, and his car was impounded as evidence and towed to the police station. There it was searched by a police officer pursuant to a police department regulation.[29] After the search was completed, the officer opened the front door on the passenger side to roll up the window and lock the door. When he opened the door, he "saw the registration card *which lay face up* on the metal stripping over which the door closes."[30] Thus, upon opening the door it was possible for the officer to determine that the card was evidence merely by looking at it. The Supreme Court held that the card was properly seized and admitted at trial.[31]

It is to be noted that *Harris* did not involve a situation in which a law enforcement officer physically manipulated an object in order to discover its incriminating nature, and thus the Supreme Court's holding does not address itself to that point. The Court only pointed out facts indicating that upon the law enforcement officer's mere viewing of the registration card, its incriminating character was immediately apparent. The theory behind the plain view doctrine is that an officer who inadvertently sees evidence or the fruits of a crime should not be required to turn his head and pretend he didn't see it.[32] To read *Harris* as allowing an officer who views

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> But it is important to keep in mind that, in the vast majority of cases, *any* evidence seized by the police will be in plain view, at least at the moment of seizure. The problem with the "plain view" doctrine has been to identify the circumstances in which plain view has legal significance rather than being simply the normal concomitant of any search, legal or illegal.

403 U.S. at 465 (emphasis in original).

29. Harris v. United States, 390 U.S. at 235.
30. *Id.* at 235-36 (emphasis added).
31. *Id.* at 236. A similar case is United States v. Lee, 274 U.S. 559 (1927). In that case, a Coast Guard patrol boat approached a schooner 24 miles off the United States coast at night. Upon nearing the schooner, the patrol discovered a motor boat alongside the schooner. A searchlight shined on the motor boat revealed several cases of contraband liquor on its deck. *Id.* at 563. The Court held that the Coast Guard's action did not violate the Constitution, stating:

> [N]o search on the high seas is shown. The testimony of the boatswain shows that he used a searchlight. It is not shown that there was any exploration below decks or under hatches. For aught that appears, the cases of liquor were on deck and . . . were discovered before the motor boat was boarded.

Id. Thus, in *Lee*, as in *Harris*, it would appear that the mere observation of the object by the law enforcement officer immediately revealed its incriminating nature, without necessitating picking it up and turning it over.

32. "Where, once an otherwise lawful search is in progress, the police in-

what he suspects might be evidence to pick the object up and thoroughly examine it for the purpose of revealing its incriminating character does not seem to be in keeping with either the purpose of this exception or the construction of the fourth amendment in general.

Mr. Justice Stewart perhaps best focused upon the limitations of *Harris* in his concurring opinion in *Stanley v. Georgia*,[33] cited with approval in *Coolidge*.[34] State and federal agents entered petitioner's house pursuant to a search warrant authorizing them to search for evidence of illegal bookmaking activity. In petitioner's bedroom, three reels of film were discovered.[35] Using a projector and screen, which were found in the living room, these films were viewed and seized by the state officers. Petitioner was subsequently arrested and convicted under Georgia law for knowingly possessing obscene matter.[36] The majority disposed of the case on the grounds that, "the mere private possession of obscene matter cannot constitutionally be made a crime."[37] Mr. Justice Stewart, however, in an opinion concurred in by Justices Brennan and White, argued that the case should have been decided upon fourth amendment grounds.[38] After finding that the agents had legitimately entered petitioner's bedroom, Mr. Justice Stewart stated that the warrant gave the agents no authority to seize the films:

> This is not a case where agents in the course of a lawful search came upon contraband, criminal activity, or criminal evidence in plain view. For the record makes clear that the contents of the films could not be determined by mere inspection. . . . After finding them, the agents spent some 50 minutes exhibiting them by

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advertently come upon a piece of evidence, it would be a needless inconvenience, and sometimes dangerous—to require them to ignore it until they have obtained a warrant particularly describing it." Coolidge v. New Hampshire, 403 U.S. at 467-68.

33. 394 U.S. 557 (1969).
34. 403 U.S. at 465, 467.
35. 394 U.S. at 558.
36. *Id.* at 558-59.
37. *Id.* at 559.
38. In affirming the appellant's conviction, the Georgia Supreme Court specifically determined that the films had been lawfully seized. The appellant correctly contends that this determination was clearly wrong under established principles of constitutional law. But the Court today disregards this preliminary issue in its hurry to move on to newer constitutional frontiers. I cannot so readily overlook the serious inroads upon Fourth Amendment guarantees countenanced in this case by the Georgia courts.

Id. at 569 (Stewart, J., concurring).

> means of the appellant's projector in another upstairs room. Only then did the agents return downstairs and arrest the appellant.[39]

Thus, although the officers during the course of their search observed in plain view three reels of film, their incriminating nature was not immediately apparent and could be determined only upon further physical examination. In this respect, *Stanley* is very similar to *Holloman*.

In *Holloman*, the court recognized the fact that it was only after Officer Hunt had physically manipulated the shoes that their incriminating nature became apparent.[40] Nothing in the court's decision in *Holloman* overcomes this difficulty. The constitutional requirement is that the object be "immediately apparent" as evidence. Not only were the heels not visible until the shoes were picked up and turned over, but there were also several pairs of shoes that had to be examined.[41] Undoubtedly, the fact, standing alone, that there were several pairs of shoes would not move Officer Hunt's actions into the realm of a "search." Further, the mere fact that there were numerous shoes lying together does not preclude the application of the plain view exception, if the viewing officer could identify those shoes constituting evidence by mere observation. In this case, however, it was necessary for the officer to pick up and turn over the shoes before he could make such a determination.[42] This, combined with the fact that there were several pairs of shoes present and that Officer Hunt picked up and examined most, if not all, of these shoes, further emphasizes the fact that until the shoes were moved nothing about them was immediately apparent as being incriminating. Furthermore, it seems obvious that Officer Hunt's only purpose for his action was to pursue his suspicion that a shoe with a heel print matching those on the ground outside the victim's door *might* be among the shoes.

A certain amount of disagreement among the courts has centered around just how "immediately apparent" an object must be as evidence before its seizure is justified. "The standard has ranged from mere suspicion to probable cause to virtual certainty that an item has evidentiary value."[43] While this question is still unsettled, the general trend is apparently moving towards requiring the police

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39. *Id.* at 571 (Stewart, J., concurring) (footnote omitted).
40. *See* note 17 and accompanying text *supra*.
41. State v. Holloman, 197 Neb. at 141, 248 N.W.2d at 17.
42. *Id.* at 143, 248 N.W.2d at 18.
43. Comment, *supra* note 24, at 502.

officer to have at least probable cause for the seizure, as that is the requirement for the issuance of a search warrant. Unfortunately, the court in *Holloman* has apparently opted for the least stringent of the three standards—that of suspicion.

In support of its position that the police officer was not acting unreasonably in scrutinizing the shoes more carefully by lifting them and turning them over,[44] the court cited *United States v. Catanzaro*.[45] *Catanzaro* involved a situation in which a postal inspector, lawfully inside the defendant's apartment to investigate his alleged fraudulent use of credit cards, noticed a rifle on a wall rack and recalled some repair work done on a rifle of similar description which was paid for by credit card. The inspector observed that the serial number of the rifle matched that of the one whose repair work was paid for by way of a fraudulently used credit card and seized the rifle as evidence.[46] The court in *Holloman* quoted with approval the following language from *Cantanzaro*: "The inspector was not precluded from observing what was clearly and plainly to be seen. Having seen the rifle, the inspector properly scrutinized it more carefully, thereby confirming his *suspicions* that it was part of the fruit of the alleged crime."[47]

The Alabama Supreme Court, in *Shipman v. State*,[48] pointed out the consequences of allowing a seizure under the plain view doctrine based upon less than probable cause. *Shipman* involved a case in which a police officer, after stopping a car, observed an occupant shift some cellophane bags from one hand to another, and then conceal them in the top of his boot.[49] The court held that the seizure of the bags was not justifiable under the plain view doctrine,[50] as the proper standard was probable cause, and the officer, at the time of the seizure, was acting upon suspicion. In so doing, the court emphasized the result of using a standard of less than probable cause:

> The reason for this rule is apparent. If the rule were otherwise, an officer, acting on mere groundless suspicion, could seize anything and everything belonging to an individual which happened

44. 197 Neb. at 144, 248 N.W.2d at 19.
45. 282 F. Supp. 68 (S.D.N.Y. 1968).
46. *Id.* at 69.
47. *Id.* at 69-70 (quoted in State v. Holloman, 197 Neb. at 144, 248 N.W.2d at 18) (emphasis added).
48. 291 Ala. 484, 282 So. 2d 700 (1973).
49. The facts of the case are set out in Shipman v. State, 51 Ala. App. 80, 282 So. 2d 696 (1973).
50. 291 Ala. at 488, 282 So. 2d at 704.

> to be in plain view on the prospect that on further investigation some of it might prove to have been stolen or to be contraband. It would open the door to unreasonable confiscation of a person's property while a minute examination of it is made in an effort to find something criminal.[51]

By utilizing suspicion as the test of when an object is immediately apparent as evidence, the court in *Holloman* reached precisely the type of result which the *Shipman* court had feared. The decision in *Holloman* would further seem to have clearly violated Justice Stewart's caveat in *Coolidge* that "the plain view doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges."[52]

It is difficult to find any factors in *Holloman* justifying the court's use of the "suspicion" requirement. At the time of the seizure, the defendant had not been arrested, but had merely been asked to accompany the officers to the police station for questioning.[53] While the exigencies of a particular situation may justify police action based on less than probable cause,[54] in the present case the police officers were in no danger, and the potential evidence was in no apparent danger of being moved or destroyed. Thus, any delay resulting from requiring the officers to obtain a search warrant would seem to have been of little consequence.

IV. CONCLUSION

Regardless of the correctness of the court's decision, *Holloman* is presently the rule in Nebraska with respect to the "immediately apparent" requirement of the plain view doctrine. That rule, apparently, is that when an officer views an object which he suspects might be evidence, or a number of objects one of which he suspects might be evidence, he may physically examine the object or objects for the purpose of revealing incriminating characteristics.

By allowing the defendant's shoes to be introduced at trial, the court has greatly expanded the potential for application of the plain view doctrine, arguably extending its scope beyond the boundaries established by the United States Supreme Court. In so doing, the

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51. *Id.*
52. Coolidge v. New Hampshire, 403 U.S. at 466.
53. 197 Neb. at 141, 248 N.W.2d at 17.
54. Warden v. Hayden, 387 U.S. 294, 298-300 (1967).

court has come dangerously close to violating the spirit of the constitutional proscription of general exploratory searches. The decision in *Holloman* serves to emphasize the importance of closely adhering to the "immediately apparent" requirement of the plain view doctrine.

Richard Birch '78