

2018

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Kyle Knox

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Recommended Citation

Knox, Kyle (2018) "Exigent Circumstances and Searches Incident to Arrest in New York: The Difficulties and Distinctions," *Touro Law Review*: Vol. 34 : No. 4 , Article 18.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol34/iss4/18>

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EXIGENT CIRCUMSTANCES AND SEARCHES INCIDENT TO ARREST IN NEW YORK: THE DIFFICULTIES AND DISTINCTIONS

*Kyle Knox**

I. INTRODUCTION

The Fourth Amendment to the United States Constitution states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.¹

The right to be free in one's person, home and belongings from unwarranted governmental intrusions has been a tradition in our nation since its inception and finds its roots in the English common law.² Moreover, most states have similar provisions in their state constitutions to ensure the security of their citizenry with near identical language to the Fourth Amendment.³

* Touro College Jacob D. Fuchsberg Law Center, J.D. Candidate 2018; State University of New York at Plattsburgh, M.S.T., in Adolescence Education, B.A., in History, 2015. I would like to thank my parents for their constant support and love throughout my life, especially during law school. Additionally, I would like to thank my girlfriend for motivating and encouraging me to become the best lawyer I can be. Finally, I would like to thank the Honorable Mark Cohen for introducing me to the vast realm of criminal procedure, and Professor Gary Shaw for providing his valuable insight as a writer and a constitutional law scholar to me, and constantly challenging me as I wrote this article along the way.

¹ U.S. CONST. amend. IV.

² See *Semayne's Case* (1604), 77 Eng. Rep. 194; 5 Coke Rep. 91; *Entick v. Carrington* (1765), 95 Eng. Rep. 807; 19 Howell's State Trials 1029.

³ See PA. CONST. art. I, § 8 ("The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures"); TEX. CONST. art. I, § 9 ("The

The New York Constitution has followed the language provided by the Fourth Amendment to the very last word.⁴ The Fourth Amendment and New York Constitution article I, section 12, both provide that, ordinarily, for a search to be considered reasonable, there must be a warrant, signed by a neutral and detached magistrate, in the possession of the police at the time they conduct the search.⁵ The warrant *must* establish probable cause to conduct the search or seizure.⁶ Should the police not have a warrant in their possession at the time of the search or seizure, there is a possibility that the search will be considered unreasonable and trigger the Exclusionary Rule.⁷ The Exclusionary Rule provides that if police seize evidence in violation of the Fourth Amendment, a court will exclude that evidence from being introduced in a criminal trial against the person whose Fourth Amendment rights were violated.⁸

While warrants are generally required for a police officer to search a person or thing for evidence and even further to seize such evidence, there are circumstances in which a police officer is not required to provide a warrant before making such search or seizure.⁹ In other words, the lack of a warrant at the time of the search or seizure is excused. Several exceptions to the warrant requirement have been upheld in both federal courts and New York State courts.¹⁰ Two of

people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches . . .”).

⁴ N.Y. CONST. art. I, § 12 (“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.”).

⁵ See U.S. CONST. amend. IV; N.Y. CONST. art. I, § 12.

⁶ U.S. CONST. amend. IV; N.Y. CONST. art. I, § 12.

⁷ JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE 185 (6th ed. 2013).

⁸ Compare *Weeks v. United States*, 232 U.S. 383 (1914) (holding that such evidence cannot be introduced in federal prosecutions against a criminal defendant); *Mapp v. Ohio*, 367 U.S. 643 (1961) (holding that such evidence cannot be introduced in state prosecutions), with *Walder v. United States*, 347 U.S. 62 (1954) (holding that illegally seized evidence may be introduced to impeach the criminal defendant’s credibility for trustworthiness).

⁹ See *Katz v. United States*, 389 U.S. 347, 357 (1967) (“[S]earches conducted outside the judicial process, without prior approval by a judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.” (footnotes omitted)).

¹⁰ See, e.g., *Carroll v. United States*, 267 U.S. 132 (1925) (recognizing that there is an “automobile exception” to the warrant requirement where a police officer possesses probable cause to believe that the driver of such vehicle is transporting illegal substances); *People v. Langen*, 456 N.E.2d 1167 (N.Y. 1983) (same); *Schneekloth v. Bustamonte*, 412 U.S. 218

these exceptions, in particular, are *searches incident to lawful arrest*¹¹ (SILA) and *exigent circumstances*.¹²

Before going any further, there must be an explanation as to the warrantless exceptions that are to be the main foci of this Note, those being searches incident to lawful arrest and exigent circumstances. First, a search incident to lawful arrest occurs when “[a] police officer who makes a lawful custodial arrest . . . conduct[s] a contemporaneous warrantless search of: (1) the arrestee’s person; and (2) the area within the arrestee’s immediate control.”¹³ The Supreme Court justified the search incident to arrest exception in *Chimel v. California*¹⁴ by recognizing the risks that an officer confronts when arresting a suspect.¹⁵ Academic writers say that the justification for the *search* without a warrant is that “the right of an officer to search the person of the arrestee and the area within his immediate control for weapons and evidence . . . flows automatically from the arrest itself.”¹⁶ In the course of the search, after the arrest has been made, the officer may then *seize* “any article discovered during a lawful SILA search, even if it relates to a crime unrelated to the arrest, but only if the officer has probable cause to believe the object constitutes constitutionally seizeable evidence”¹⁷ This exception is so widely accepted in federal jurisprudence that in *United States v. Robinson*,¹⁸ Justice Rehnquist, writing for the majority, wrote that “in the case of a lawful custodial arrest a full search of a person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a ‘reasonable’

(1973) (holding that a search warrant is not required where a person gives the police officer consent to search); *People v. Singleteary*, 324 N.E.2d 103 (N.Y. 1974) (same).

¹¹ *Weeks*, 414 U.S. at 391-92; see *People v. Chiagles*, 142 N.E. 583 (N.Y. 1923).

¹² See *Payton v. New York*, 445 U.S. 573 (1980); *People v. Mitchell*, 347 N.E.2d 607 (N.Y. 1976), *abrogated on other grounds by* *Brigham City v. Stuart*, 547 U.S. 398 (2006).

¹³ DRESSLER & MICHAELS, *supra* note 7, at 185 (footnotes omitted).

¹⁴ 395 U.S. 752 (1969).

¹⁵ *Id.* at 762-63 (“When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer’s safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee’s person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested.”).

¹⁶ DRESSLER & MICHAELS, *supra* note 7, at 186 (citation omitted).

¹⁷ DRESSLER & MICHAELS, *supra* note 7, at 187 (citation omitted) (emphasis added).

¹⁸ 414 U.S. 218 (1973).

search under that Amendment.”¹⁹ The inherent exigencies of the arrest situation justify the search of the person,²⁰ containers and controllable area,²¹ and the vehicle.²²

Second, exigent circumstances are situations, more appropriately termed “emergencies,” in which “time constraints make it impracticable for the officer to seek a warrant.”²³ For an officer to justify a warrantless search under exigent circumstances, the police officer must have a reasonable belief that a criminal suspect is going to escape or that evidence will be lost or destroyed.²⁴ For example, if a criminal suspect begins to flee from an otherwise lawful police encounter, the officer is entitled to give chase of the suspect in order to prevent their escape.²⁵ This is known as “hot pursuit.”²⁶ Additionally, exigency requires a cursory limitation on the scope of the search.²⁷ For example, in the case of a protective sweep, the cursory limitation is that the police are entitled to conduct a protective sweep to discover a person who may pose a danger, but only in areas where they reasonably believe a person is hiding, or realistically could be hiding.²⁸ Furthermore, the exigency exception lasts no longer than the exigency exists.²⁹ For example, if the police possess an arrest warrant for D, then go to D’s house, find him, and arrest him, they cannot use exigent circumstances as a justification to search the entire house for another person, B, as the exigency ended when D was arrested.³⁰ Finally, the exception does not apply if the police “create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment.”³¹

¹⁹ *Id.* at 235.

²⁰ *Id.* at 226, 236.

²¹ *Chimel v. California*, 395 U.S. 752, 763, 768 (1969).

²² *Arizona v. Gant*, 556 U.S. 332, 343 (2009) (“Accordingly, we reject this reading of *Belton* and hold that the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant’s arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of *the search*.” (emphasis added)).

²³ DRESSLER & MICHAELS, *supra* note 7, at 179.

²⁴ DRESSLER & MICHAELS, *supra* note 7, at 179.

²⁵ *See United States v. Santana*, 427 U.S. 38, 42-43 (1976).

²⁶ *Id.*

²⁷ DRESSLER & MICHAELS, *supra* note 7, at 179.

²⁸ *See, e.g., Maryland v. Buie*, 494 U.S. 325 (1990).

²⁹ *Id.* at 335-36.

³⁰ *See id.* at 332-33.

³¹ *Kentucky v. King*, 563 U.S. 452, 462 (2011).

So, with that understanding, the Supreme Court has found that the reason that searches incident to arrest of a person or a container within the controllable area are valid searches under the Fourth Amendment is derived from the inherent exigencies that are present at the time of the arrest. For many years, New York had followed this basic principle regarding the search of the “person.”³² However, the landscape of warrantless searches in New York changed drastically in 1983.

In 1983, the Court of Appeals of New York decided the case of *People v. Gokey*,³³ where the court held that “[u]nder the State Constitution, an individual’s right of privacy in his or her effects dictates that a warrantless search incident to arrest be deemed unreasonable unless justified by the presence of exigent circumstances.”³⁴ This holding represents a drastic departure from the Supreme Court’s holding in *Robinson* such that New York has essentially rejected the entire reasoning of the *Robinson* court’s conclusions of law with regard to searches incident to arrest. This is a departure because the whole reasoning behind justifying searches incident to arrest of containers within the immediate control of an arrestee is predicated on the belief that the arrestee *may* possess weapons that *might* pose a danger to the officer or evidence that *might* be lost.³⁵ The added layer of exigency requires that when an officer has probable cause to arrest someone, they must have a reasonable belief that the container to be searched possesses a weapon or destructible evidence. *Chimel* implies that this notion is to be assumed.³⁶ In other words, if there are no exigent circumstances, the police must obtain a search warrant for the container found within the controllable area of an arrestee.

It only harms society to sustain this rule. The problem is not that the police are performing a wanton search for objects based on something less than is required to make an arrest. What is happening here is that even in the event that the police possess probable cause to make an arrest, they must possess *something more* than probable cause to make the arrest when they search the backpack on that person’s person during the arrest.

³² *People v. Chiagles*, 142 N.E. 583, 584 (N.Y. 1923).

³³ 457 N.E.2d 723 (N.Y. 1983).

³⁴ *Id.* at 724.

³⁵ *See Chimel v. California*, 395 U.S. 752, 762-63 (1969).

³⁶ *Id.*

In the years after the *Gokey* decision, it seems that the courts of New York have engaged in a string of misapplications of the *Gokey* rule, leading to inconsistent results that, as a policy consideration, can only be remedied by an overturning of the *Gokey* rule or a change to the New York Criminal Procedure Law through legislation.

This Note's focus is on exigency and searches incident to arrest for the following reason: In New York, in order to justify a search incident to arrest of a suspect's container within their immediate control, the search cannot be "divorced in time or place from the arrest," and the search must be justified under exigent circumstances.³⁷ In other words, New York requires that a warrant exception must be evident to justify another warrant exception. While it is true that the states can provide more liberty guarantees to their citizens than the federal government, the states must balance the liberty interests of their citizens against the interests of law enforcement when dealing with search and seizure issues, particularly the interests of crime prevention and public safety.

Therefore, this Note will discuss the following: Part II of this Note will discuss the Supreme Court's decision in *United States v. Robinson* and how the Court came to its conclusion. Part III will discuss *People v. Smith* and *People v. Gokey*, the relationship between the two cases, and a policy consideration for choosing *Smith* over *Gokey* as New York's search incident to arrest standard. Part IV will discuss how courts in New York have been inconsistently applying the *Gokey* rationale and coming to differing results. Finally, Part V will conclude with the remedies that the Court of Appeals or the legislature should undertake in order to eliminate the inconsistency.

II. *UNITED STATES V. ROBINSON*

On April 23, 1968, Officer Richard Jenks of the D.C. Metropolitan Police noticed the defendant driving a vehicle.³⁸ Officer Jenks knew that, based on a check that he had done four days earlier of the defendant's driver's permit, the defendant was driving with a revoked permit.³⁹ Officer Jenks signaled for the car to pull over, which the defendant did, and then the defendant and two other individuals got

³⁷ *People v. Smith*, 452 N.E.2d 1224, 1227 (N.Y. 1983).

³⁸ *United States v. Robinson*, 414 U.S. 218, 220 (1972).

³⁹ *Id.*

out of the vehicle.⁴⁰ Jenks informed the defendant that he was under arrest for “operating after revocation and obtaining a permit by false pretenses.”⁴¹

After conducting a full-custody arrest of the defendant, Jenks began to search the defendant by patting him down, which Jenks was required to do by the procedures of his police department.⁴² The procedures were in place “[p]rimarily, for [the officer’s] own safety and, secondly, for the safety of the individual he has placed under arrest and, thirdly, to search for evidence of the crime.”⁴³ Upon touching the defendant’s left breast, Jenks felt an object inside of the chest pocket of the defendant’s jacket.⁴⁴ He then pulled out the object, which turned out to be a crumpled-up cigarette box.⁴⁵ Officer Jenks testified that “[a]s I felt the package I could feel objects in the package, but I couldn’t tell what they were . . . I knew they weren’t cigarettes.”⁴⁶ Jenks opened the cigarette box and found 14 gelatin capsules containing a white substance, which, after further examination, was heroin.⁴⁷

The defendant was convicted in the United States District Court for the District of Columbia of the possession and facilitation of concealment of heroin.⁴⁸ The D.C. Circuit Court of Appeals panel reversed his conviction on the basis that the search was a protective frisk, rather than a full search of the person, which meant that the officer was not entitled to seize the cigarette box and open it without a warrant because a frisk is used to find weapons that the officer reasonably believes exist and fears for.⁴⁹ In this case, the D.C. Circuit found that the officer would not have been able to find fruits of the arrest violation on the person of the defendant; thus the officer would have been allowed to only perform a protective frisk.⁵⁰

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 221-23.

⁴³ *Robinson*, 414 U.S. at 221 n.2 (alteration in original).

⁴⁴ *Id.* at 223.

⁴⁵ *Id.*

⁴⁶ *Id.* (alteration in original).

⁴⁷ *Id.*

⁴⁸ *Robinson*, 414 U.S. at 219.

⁴⁹ *See Terry v. Ohio*, 392 U.S. 1, 30 (1968).

⁵⁰ *Robinson*, 414 U.S. at 233.

The United States Supreme Court disagreed and reversed the decision of the D.C. Circuit.⁵¹ In short, the Court in *Robinson* found that the D.C. Circuit misapplied the stop-and-frisk rule in this case because Jenk's search of the defendant was not based on reasonable suspicion that the defendant might be engaging in crime, but rather the defendant had in fact engaged in a crime for which the officer had probable cause to arrest.⁵² The crux of the case was that the *Robinson* Court found that the search incident to arrest of the cigarette pack found on the defendant's person was justified as a reasonable search, entirely separate from the need to have a warrant exception:

The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment.⁵³

In one sweep, the Supreme Court deemed a search incident to lawful arrest as not an exception to the warrant requirement but rather "a reasonable search."⁵⁴ However, the Court in *Robinson* made several mentions of "the person," but not "the container," being the thing that is searched.⁵⁵ One may argue then that, because the Supreme Court does not explicitly mention "the area within the arrestee's immediate control," containers found in such area are not subject to the same rule.

⁵¹ *Id.* at 224.

⁵² *Id.* at 227-28.

⁵³ *Id.* at 235.

⁵⁴ *Id.*

⁵⁵ *Robinson*, 414 U.S. at 226-28, 235.

This argument, however, is misplaced because the evidence at issue in *Robinson* was found within a cigarette pack on the defendant's person. It would be difficult for one to claim that an object found within a person's pocket is not "in the area of immediate control." Furthermore, a "container" is defined as "[t]hat which contains; a vessel, receptacle, carton, case, or other containing or enclosing structure."⁵⁶ A cigarette pack found in a person's pocket at the time of the arrest clearly meets the definition of a "container." An "arrest" is defined as "(1) a seizure or forcible restraint, especially by authority," or "(2) the taking or keeping of a person in custody by legal authority, especially in response to a criminal charge; specifically the apprehension of someone for the purpose of securing the administration of the law, especially bringing that person before a court."⁵⁷ Finally, a "seizure," within the meaning of the Fourth Amendment, means that a person's freedom of movement has been restrained by means of physical force or show of authority (*e.g.*, displaying of a gun).⁵⁸

Therefore, the *Robinson* holding establishes that where a police officer seizes a person, and he has probable cause to perform such seizure, he is entitled to search the person and the person's belongings that are in the area of the arrestee's immediate control, and such search is reasonable.⁵⁹

The next question, however, is this: how did the Court determine that the search incident to arrest of the container is *per se* "reasonable"? Under Supreme Court jurisprudence, in order to determine whether a search is "reasonable," a court must make a determination as to whether the suspect possessed a "reasonable expectation of privacy" in the thing that was the object of the search.⁶⁰ If such person did possess a "reasonable expectation of privacy" in such thing, and the police search it without a warrant, then the search is considered "unreasonable" and will not stand, unless it is justified by a warrant exception.⁶¹

⁵⁶ *Container*, THE WEBSTER'S NEW ENCYCLOPEDIA INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 219 (1974).

⁵⁷ *Arrest*, BLACK'S LAW DICTIONARY (10th ed. 2014).

⁵⁸ *United States v. Mendenhall*, 446 U.S. 544, 553 (1980) (plurality opinion).

⁵⁹ *Robinson*, 414 U.S. at 235.

⁶⁰ *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); *Kyllo v. United States*, 533 U.S. 27, 33 (2001).

⁶¹ *See Katz*, 389 U.S. at 361.

Based on the *Katz* rationale, the Supreme Court in *Robinson* effectively determined that the search of a container found within the arrestee's immediate control is a reasonable search because, after the arrest had been made, the suspect had a reduced expectation of privacy in his belongings.⁶² This "reduced expectation" is seemingly based on the belief that, once the arrest had been made, the search of the person and any container found within the arrestee's immediate control is a *de minimis* intrusion.⁶³ In other words, because the ultimate seizure, the arrest, had already been justified based on probable cause, the search afterwards was trivial or inconsequential.

To this day, *Robinson* is still the leading authority under federal law to justify searches incident to arrest, either of the person or a container. However, New York chose a different route with regard to searches of containers.

III. ANALYSIS OF *PEOPLE V. SMITH* AND *PEOPLE V. GOKEY*

We begin this Part with the understanding that, under New York law, to justify a search incident to lawful arrest of a container found within the arrestee's immediate control, the police must possess exigent circumstances.⁶⁴ However, the two cases that created this rule, which other courts have recently relied on,⁶⁵ are somewhat at odds with each other. This Part will provide a review of both *People v. Smith* and *People v. Gokey*, and then analyze the distinctions between the two, to determine which case is the better approach for analyzing searches incident to arrest.

A. *People v. Smith*

In *People v. Smith*, the police encountered a suspect who had jumped a turnstile.⁶⁶ As they were inquiring with the suspect as to why he jumped the turnstile, the police noticed that the defendant was

⁶² *Id.*; *Robinson*, 414 U.S. at 226.

⁶³ See also *Pennsylvania v. Mimms*, 434 U.S. 106, 110-11 (1977) (holding that where a police officer has probable cause to stop a vehicle on the side of the road, the additional step of the officer in asking the driver of the vehicle to step out so that the officer can make additional observations and inquiries is a *de minimis* intrusion).

⁶⁴ *People v. Smith*, 452 N.E.2d 1224, 1227 (N.Y. 1983); *People v. Gokey*, 457 N.E.2d 723, 724 (N.Y. 1983).

⁶⁵ See *People v. Jimenez*, 8 N.E.3d 831 (N.Y. 2014).

⁶⁶ *Smith*, 452 N.E.2d at 1225.

wearing a bulletproof vest.⁶⁷ When the defendant was asked if he was wearing such a vest, the defendant denied that he was wearing one.⁶⁸ Thereafter, one officer drew his gun, arrested the defendant, and moved him 10 feet away from the location of the arrest.⁶⁹ Another officer took the briefcase that the defendant was carrying, opened it, and found a .38 caliber revolver inside.⁷⁰

The Supreme Court of New York County found that *New York v. Belton*⁷¹ and *United States v. Chadwick*⁷² controlled the case, and found that the weapon should be suppressed because the police “had exclusive control of the briefcase.”⁷³ The Court of Appeals disagreed on two separate grounds.⁷⁴ First, the Court of Appeals completely ignored the argument made by the defendant that *Belton* and *Chadwick* only applied to the automobile context, finding that those cases, specifically *Belton*, allowed an extended search of containers found within the grabbable area of an arrestee.⁷⁵ Secondly, the Court of Appeals found that, for a search incident to arrest of a container found within the arrestee’s controllable area to be valid, the search after the arrest must have been “not significantly divorced in time or place from the arrest,” and there needed to be exigent circumstances.⁷⁶

During its analysis, the Court of Appeals distinguished its interpretation of the New York Constitution against the way in which the Supreme Court interprets the United States Constitution by discussing a utilization of the totality of the circumstances rather than establishing bright-line rules of law.⁷⁷ Regarding the safety of the police officers, the Court of Appeals found that the officers reasonably believed that the defendant had access to a weapon.⁷⁸ The court

⁶⁷ *Id.* at 1225-26.

⁶⁸ *Id.* at 1226.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ 453 U.S. 454 (1981) (holding that the police may conduct a search incident to arrest of the passenger compartment an arrestee’s vehicle, based on inherent exigencies of road-side encounters).

⁷² 433 U.S. 1 (1977) (holding that a search is not incident to arrest when the search is not promptly conducted after the arrest or no exigency exists at the subsequent search much later in time), *abrogated by* *California v. Acevedo*, 500 U.S. 565 (1991).

⁷³ *Smith*, 452 N.E.2d at 1126.

⁷⁴ *Id.* at 1226-28.

⁷⁵ *Id.* at 1226, 1227.

⁷⁶ *Id.* at 1227.

⁷⁷ *Id.* at 1226-27.

⁷⁸ *Smith*, 452 N.E.2d at 1227-28.

pointed to the following facts in coming to its conclusion: a) at the time of the arrest, the defendant was holding onto the suitcase that the police searched, which made the contents of the suitcase “readily accessible” to him; b) the container “was of sufficient size to contain a weapon”; and c) the defendant had just committed a crime, and while the crime was not suggestive of the presence of a weapon, the fact that the defendant was wearing a bullet-proof vest certainly was, and was enhanced by the denial of that fact.⁷⁹

There was a flaw in the judgment of the Court of Appeals regarding its analysis. In *Smith*, the court stated that:

a container may not be searched for a weapon or evidence if it is apparent that it is so securely fastened that the person arrested cannot quickly reach its contents, or the person arrested makes unmistakably clear that he will not seek to reach the contents, or the container is so small that it could not contain a weapon or evidence of the crime.⁸⁰

These points have their flaws: first, the primary and secondary points create a spectrum that spans across a line segment.⁸¹ Under the first clause in the court’s rationale, where an arrestee has the bag so closely secured to his body, he demonstrates an inability to reach its contents.⁸² Thus, the arrestee could not realistically reach the evidence or weapon contained in the container because the way in which the container is situated on his person would prevent him from being able to. An example of this may be a backpack because, logically, a person cannot reach into a backpack when it is behind them. Additionally, the second clause states the opposite, in that if an arrestee has made “unmistakably clear” that he will not reach for the contents of the container, then he also demonstrates an inability to do so potentially.⁸³ An example of this may be that the arrestee tosses the bag away from

⁷⁹ *Id.*

⁸⁰ *Id.* at 1227.

⁸¹ A line segment is a part of a line that is bounded by two distinct endpoints and contains every point along the segment found within the two end points. Therefore, a line segment is the proper shape to describe anything along a spectrum because there are two extremes, and everything that falls in between is part of the spectrum, but everything outside of the extremes is not included.



⁸² *Smith*, 452 N.E.2d at 1227.

⁸³ *Id.*

himself prior to the arrest, but not in a way that constitutes an abandonment of the container. Thus, in the same way that the bag can be so closely secured to a person that he cannot reach its contents, distance from the bag itself can also justify such a finding. Therefore, a spectrum is created where both direct ends of the spectrum require the court to find the lack of exigent circumstances because the defendant cannot realistically reach the contents of the container at the time of the arrest, either near or far.⁸⁴

Second, the rationale used there is contradicted by other portions of the *Smith* opinion.⁸⁵ If the language mentioned above is true, then how can the Court of Appeals say right before that “a search ‘not significantly divorced in time or place from the arrest’ may be conducted even though the arrested person has been subdued and his closed container is within the exclusive control of the police.”⁸⁶ Arguably, if a person is subdued by the police, then there is no way that he could acquire the contents of his bag, whether it is securely attached to himself or not.

However, to say that the *Smith* opinion limited “exigent circumstances” only to situations where the police reasonably believe that the defendant may gain access to a weapon or may conceal or destroy evidence would be incorrect. The *Smith* opinion did not explicitly hold that those were the only two examples of exigent circumstances that would justify such a search incident to arrest. In fact, the court stated otherwise. While the *Smith* court stated that “[a] person’s privacy interest in a closed container readily accessible to him may become subordinate to the need of the People, under exigent circumstances, to search it for weapons or evidence that otherwise might be secreted or destroyed,”⁸⁷ it also said that

[f]or *compelling reasons*, such as the safety of the officers or the public *or to protect the person arrested from embarrassment*, a search not significantly divorced in time or place from the arrest may be conducted even though the arrested person has been

⁸⁴ *Id.* (citation omitted) (“Whether the circumstances are such as to justify a warrantless search incident to arrest is to be determined . . . at the time of the arrest, but the justification does not necessarily dissipate with the making of the arrest.”).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Smith*, 452 N.E.2d at 1227.

subdued and his closed container is within the exclusive control of the police.⁸⁸

Thus, it would seem that the Court of Appeals did not attempt to limit itself to the exigencies that would justify a search incident to arrest under this new rule. Possibly, the court could have believed that “hot pursuit” would also justify the search because “hot pursuit” is an exigent circumstance, but the court did not mention it. Therefore, it would seem that *Smith* provided examples of exigencies, not limitations of them.

B. *People v. Gokey*

Five months after the Court of Appeals decided *People v. Smith*, it handed down *People v. Gokey*.⁸⁹ In *Gokey*, the Court of Appeals dealt with the exigency issue, ultimately ruling that containers within an arrestee’s “grabbable area” may not be searched incident to arrest without such evident exigencies.⁹⁰

In *Gokey*, the police had received a tip that the defendant, Gokey, was travelling by bus with a duffel bag full of marijuana to Watertown, NY.⁹¹ The police arrived with an arrest warrant for an unrelated larceny charge for the defendant, and a dog trained to sniff for marijuana.⁹² The officers approached the defendant once he exited the bus, informed him that he was under arrest, and frisked him.⁹³ During the frisk, the police dog reacted to the duffel bag on the ground.⁹⁴ After the defendant was handcuffed, the duffel bag was searched where eleven ounces of marijuana were discovered.⁹⁵

The Court of Appeals, in *Gokey*, provided an analysis that compared the federal standard regarding searches incident to arrest of containers to the New York standard.⁹⁶ Under *New York v. Belton*, the Supreme Court of the United States held that a police officer may conduct a search incident to arrest of any container within the

⁸⁸ *Id.* (emphasis added) (internal quotation marks omitted).

⁸⁹ 457 N.E.2d 723 (N.Y. 1983).

⁹⁰ *Id.* at 724.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Gokey*, 457 N.E.2d at 724.

⁹⁵ *Id.*

⁹⁶ *Id.*

“grabbable area” of the arrestee’s control.⁹⁷ Indeed, the Court of Appeals conceded that, under the federal standard, the search incident to arrest of the defendant’s duffel bag would not have violated the defendant’s constitutional rights.⁹⁸ However, the Court of Appeals chose not to follow the federal standard.⁹⁹ Instead, the court held that the search of the container within the arrestee’s immediate area needed to satisfy two elements: first, the search of the container was made contemporaneously in time and location to the arrest; and second, the presence of exigent circumstances existed.¹⁰⁰

In *Gokey*, the court held that the search of Gokey’s bag was unconstitutional under the New York Constitution.¹⁰¹ The prosecution in the case had “concede[d] that in all frankness there was no immediate suspicion by the police officers that the defendant was in fact armed.”¹⁰² The police did not take the bag away from Gokey upon his arrest; in fact, they let Gokey keep the bag on the ground in between his legs while they conducted the frisk.¹⁰³ At the time of the arrest, Gokey was handcuffed and surrounded by five police officers and a dog.¹⁰⁴ This demonstrated that the police did not reasonably believe that he posed a danger to the arresting officers or the public because the only focus was whether the bag contained marijuana. Additionally, the court found the fact that the prosecution did not assert that the officers reasonably believed that their search was justified to prevent the destruction of evidence dispositive to show the lack of exigency.¹⁰⁵

C. A Review of the Precedents

After reviewing both *Smith* and *Gokey*, it should be clear that New York requires exigent circumstances for searches incident to lawful arrest of containers found within the controllable area. However, the two cases have created confusion for lower New York

⁹⁷ *New York v. Belton*, 453 U.S. 454, 457-61 (1981) (relying primarily on *Chimel v. California*, 395 U.S. 752 (1969)).

⁹⁸ *Gokey*, 457 N.E.2d at 724.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 725.

¹⁰² *Id.*

¹⁰³ *Gokey*, 457 N.E.2d at 725.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

courts.¹⁰⁶ While *Gokey* is the leading New York precedent in this area, it seems that *Smith* is the more appropriate case law to follow for several reasons.

First, as a policy consideration, *Smith* is congruent case law more in line with the Court's reasoning in *Robinson*, in spite of *Smith*'s exigent circumstances requirement. Both *Robinson* and *Smith* recognized the inherent exigencies that can come into play with regard to an arrest situation. *Smith* took the extra step to say that there needs to be something more than probable cause to make an arrest in order to search the container; however, unlike *Gokey*, *Smith* did not go so far as to limit the several types of exigencies that would justify such a search.¹⁰⁷ The reasoning behind this is that "exigent circumstances" are not limited only to instances that deal with evidence and danger, but can also include instances where the police have engaged in "hot pursuit of a fleeing felon" and "the need to prevent a suspect's escape."¹⁰⁸ Indeed, *Smith* stated that "protect[ing] the person arrested from embarrassment" is a "compelling reason" that would justify the search of a container incident to arrest, although the court did not provide an example of such embarrassment to illustrate what it meant.¹⁰⁹

Congruence with federal law is a goal that New York should aim to achieve. Indeed, the Court of Appeals has addressed the need for uniformity with the Supreme Court in the past, with regard to Fourth Amendment cases.¹¹⁰ Additionally, even the concurrence in

¹⁰⁶ See, e.g., *People v. Luna*, 951 N.Y.S.2d 88, 2012 WL 1059392, at *8-11 (Sup. Ct. 2012) (reviewing the problems that *Gokey* has created within the New York Court system).

¹⁰⁷ Compare *People v. Smith*, 452 N.E.2d 1224, 1227 (N.Y. 1983) ("For compelling reasons, such as the safety of the officers or the public or to protect the person arrested from embarrassment, a search 'not significantly divorced in time or place from the arrest' may be conducted even though the arrested person has been subdued and his closed container is within the exclusive control of the police." (emphasis added) (citations omitted)), with *Gokey*, 457 N.E.2d at 724-25 ("When an individual subjected to arrest has a privacy interest in property within his or her immediate control or 'grabbable area', this court has identified two interests that may justify the warrantless search of that property incident to a lawful arrest: the safety of the public and the arresting officer; and the protection of evidence from destruction or concealment." (citations omitted)).

¹⁰⁸ See *Minnesota v. Olson*, 495 U.S. 91, 100 (1990).

¹⁰⁹ *Smith*, 452 N.E.2d at 1227.

¹¹⁰ *People v. Ponder*, 429 N.E.2d 735, 737 (N.Y. 1981) ("[S]ection 12 of article I of the New York Constitution conforms with the Fourth Amendment regarding the proscription against unreasonable searches and seizures, and this identity of language supports a policy of uniformity in both State and Federal Courts."). While it is absolutely true that "[t]he state courts may experiment all they want with their own constitutions," *Kansas v. Carr*, 136 S. Ct. 633, 641 (2016) (Scalia, J., opinion of the Court), because New York has insisted that it should

Smith reasoned that the court should adopt a policy that is in conformity with *Robinson*.¹¹¹ Judge Jasen stated that, other than the requirement that the search be conducted close in time and place to the arrest, there was no legitimate reason to depart from the Fourth Amendment jurisprudence on this issue.¹¹² Judge Jasen also complained that the existence of the federal standard under *Robinson* and the new exigency requirement under *Smith* would create problems.¹¹³

Second, *Smith* dealt with the issues that were contemplated in both of these cases and raised the exigency requirement *sua sponte*.¹¹⁴ Because *Smith* was first to create the rule, the court in *Smith* had the ability to deliberate on what constituted exigent circumstances in the search incident to arrest context. There, the *Smith* court mentioned that danger to the officer, loss or destruction of evidence, or other “compelling reasons” could justify the search.¹¹⁵ Therefore, *Smith* anticipated cases that would not fall neatly into the mold that it created, and yet there could be a situation that would justify the search.

On the other hand, *Gokey* limited its analysis only as to whether the officer reasonably believed in the destruction of evidence because the government had conceded that the officers in *Gokey* did not fear for their safety.¹¹⁶ Furthermore, the government had not even asserted the presence of any exigency in the case at all, dooming its claim.¹¹⁷ Based on the previous language in *Smith*, the court in *Gokey* limited its inquiry only to whether the police reasonably believed that the defendant was able to conceal or destroy evidence contained in the duffel bag, which it found lacking.¹¹⁸ Seemingly, *Gokey* presented a situation that was based on only part of the *Smith* rationale that came just months prior, and yet reached a drastically different conclusion

adopt a policy of uniformity, such congruence with respect to the Fourth Amendment would seemingly not create a Tenth Amendment violation with regard to search and seizure jurisprudence.

¹¹¹ *Smith*, 452 N.E.2d at 1228 (Jasen, J., concurring).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 1227 (relying on *People v. De Santis*, 385 N.E.2d 577, 580 (N.Y. 1978), *abrogated* by *People v. Belton*, 407 N.E.2d 420, 422 & n.1 (1980) (holding that the police may conduct a search incident to arrest of a container found with the arrestee’s immediate control without requiring or finding exigency).

¹¹⁵ *Id.*

¹¹⁶ *Gokey*, 457 N.E.2d at 725.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

with regard to the same legal issue that would have the repercussion of having inconsistent results between similarly situated defendants.

Finally, *Smith* is the more forgiving standard regarding searches incident to lawful arrest, recognizing that there are legitimate law enforcement reasons for allowing the search into the container.¹¹⁹ For example, the temporal requirement, as stated in *Gokey*, is directly from the language in *Smith* that stated that the defendant could have gained access to the container “at the time of the arrest.”¹²⁰ The critical inquiry is whether there was the existence of any set of “exigent circumstances” at the time of the arrest, and then whether the search was done contemporaneously with that arrest.¹²¹ However, the inherent exigencies of the arrest should be enough to justify the search. The *Gokey* view, based on the *Smith* language, is that there must be the existence of exigent circumstances after the arrest has been made. While this is in conformity with *Smith*, the *Gokey* limitation on what constitutes exigent circumstances is not.

Therefore, *Smith* presents the more appropriate standard to follow with regard to searches incident to lawful arrest. However, *Gokey* is the governing law regarding searches incident to lawful arrest of containers found within an arrestee’s controllable area. Assuming that the rule in *Gokey* is correct and based on sound reasoning, the next Part will demonstrate the inconsistencies in how courts have applied the *Gokey* rule, which has become problematic.

IV. GOKEY’S (MIS)APPLICATION IN PRACTICE

Because *Gokey* was decided subsequent to *Smith*, the Court of Appeals may have effectively superseded *Smith*. In the wake of *Gokey*, however, New York courts have been reaching inconsistent conclusions under *Gokey*. Furthermore, while it would seem that *Smith* has been superseded, it has been consistently relied upon, together with *Gokey*, in these cases. This Part will demonstrate the

¹¹⁹ *Smith*, 452 N.E.2d 1227-28 (“Whether in fact defendant could have had access to the briefcase at the moment it was being searched is irrelevant. He clearly could have had when arrested and neither the distance from nor the time elapsed since the arrest was sufficient to dissipate the reasonableness of conducting a search of the briefcase without a warrant.”).

¹²⁰ *Id.* at 1227, 1227-28.

¹²¹ This view is shared by another scholar in the field of New York search and seizure law. See Jacqueline K. Iaquina, *Interpreting Search Incident To Arrest In New York: Past, Present, And Future*, 30 TOURO L. REV. 1071, 1079 (2014).

inconsistencies between cases that either (a) apply a strict interpretation of *Gokey* or (b) apply a loose interpretation of *Gokey*.

A. Strict Interpretation of *Gokey*

Courts' analyses that have applied a strict interpretation of *Gokey*¹²² are flawed because they do not appear to take anything into account that happened prior to the arrest to determine whether exigent circumstances at the time of the arrest existed. These courts tend to focus on whether an officer testified as to their reasonable belief in such exigencies. Finally, the courts that apply this interpretation tend to find that the evidence should have been suppressed.

1. *People v. Dougall*

In *People v. Dougall*,¹²³ three officers were on patrol near Bryant Park in Manhattan when they noticed Dougall standing approximately one hundred feet away.¹²⁴ The officers then observed Dougall contact two males, reach into his shoulder bag, and give them a manila envelope in exchange for money.¹²⁵ The males took the envelope to a park bench, opened it, and began to roll what appeared to be a marijuana cigarette with the contents of the envelope.¹²⁶ Then, the officers observed a third male approach Dougall, watched Dougall reach into his shoulder bag, and witnessed him perform the same transaction as before.¹²⁷

A police officer then approached Dougall, without his service weapon drawn.¹²⁸ As he approached, a scuffle ensued between Dougall and the police officer, which caused the defendant's bag to be thrown to the ground.¹²⁹ After Dougall had been handcuffed, the police officer was joined by another officer, and all three began to leave the park, with one of the officers carrying the shoulder bag.¹³⁰ As they were walking, the officer carrying the bag opened one of the compartments of the bag and found what appeared to be marijuana in

¹²² See *infra* Part IV.A.1-6.

¹²³ 481 N.Y.S.2d 278 (Sup. Ct. 1984).

¹²⁴ *Id.* at 278-79.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Dougall*, 481 N.Y.S.2d at 279.

¹²⁹ *Id.*

¹³⁰ *Id.*

different bags.¹³¹ After opening that compartment, the officer opened up another smaller compartment and found a small black revolver.¹³²

At the hearing on the motion to suppress, the issue presented was the following:

At issue in the present case is the legal and New York Constitutional (Art. I, Sec. 12) validity of a *Belton III* warrantless search of personalty, absent an automobile, within the defendant's reach (grab area) at the time of the arrest, when the search is made contemporaneously with the arrest but after the suspect and his property are in custody en route to the police station, and there is no threat to the officer's safety or to the security of evidence, which has no nexus to the arrest.¹³³

When the issue is phrased as such, one can assume that the court would rule in favor of the defendant by the end of the hearing. Indeed, the Supreme Court of New York County found that the evidence collected from the bag needed to be suppressed because there was a lack of exigent circumstances based on the totality of the circumstances.¹³⁴ The court made the following conclusions based on the totality of the circumstances: first, at the time of the search of the bag, "there was no reasonable possibility that the defendant would have been able to quickly reach and destroy the evidence therein";¹³⁵ second, the searching officer did not reasonably expect to find a weapon for his interest was focused only on the marijuana in the bag; third, there was no apparent justification for the officers to fear for their safety at the time of the search.¹³⁶ Therefore, the court suppressed the evidence.¹³⁷

The three conclusions that the *Dougall* decision rested on are flawed. First, *Smith* explicitly rejects the "no reasonable possibility" standard that *Dougall* stated, even where, as in this case, the defendant was handcuffed and the bag was reduced to the exclusive control of the police.¹³⁸ *Smith* states that there are circumstances in which a

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Dougall*, 481 N.Y.S.2d at 279-80.

¹³⁴ *Id.* at 282.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *People v. Smith*, 452 N.E.2d 1224, 1227 (N.Y. 1983).

search such as this can be justified.¹³⁹ Second, because of the combination of the scuffle between the defendant and the police officer with two previous sales for drugs by this defendant, the court should have found that the defendant reasonably could have been armed. In 2009, the Mexican Government reported that 90% of murders committed in Mexico were related to drugs.¹⁴⁰ A study conducted in 1994 found that, within Pittsburgh, PA, 80% of nineteen-year old people who sold hard drugs, such as cocaine, were found to also carry a gun.¹⁴¹ The Chicago police have told reporters as recently as this past February that 90% of gun violence and homicides in the city came from drug gangs.¹⁴²

If there is still the belief that drug crimes and gun violence are not interrelated in some way, then one need only look to the legislatures of some of the states, including New York, and the federal government to make a determination as to how interrelated the two really are based on the fact that they either treat the possession of a weapon while engaged in a drug offense as a separate crime entirely, or allow for an upward sentencing departure.¹⁴³ Therefore, there is a significant probability that the defendant in *Dougall* may have had possession to a weapon because he had been involved in the sale of drugs and fought with the officer prior to his arrest.

Finally, for the court to find that there is no reasonable belief that the officer's safety was endangered when the officer had been involved in a fight with the defendant right after he sold drugs is absolutely preposterous because other New York courts have found that the fact that the defendant was handcuffed at the time of the search

¹³⁹ *Id.*

¹⁴⁰ Traci Carl, *Progress in Mexico Drug War is Drenched in Blood*, SAN DIEGO UNION-TRIBUNE (Mar. 10, 2009, 1:28 PM), <http://www.sandiegouniontribune.com/sdut-lt-mexico-struggling-cartels-031009-2009mar10-story.html>.

¹⁴¹ Amanda Atkinson et al., *Interpersonal Violence and Illicit Drugs*, WORLD HEALTH ORG., at 4, June 2009, http://www.who.int/violenceprevention/interpersonal_violence_and_illicit_drug_use.pdf.

¹⁴² Stephen Changary, *Drugs, Not Guns, Cause Gun Violence*, DAILYADVANCE.COM (Feb. 1, 2018), <http://www.dailyadvance.com/Letters/2018/02/01/012918changarylet.html>.

¹⁴³ *See, e.g.*, N.J. STAT. ANN. § 2C:39-4.1 (West 2018); 18 U.S.C. § 924(c)(1)(A) (2018); N.Y. PENAL LAW § 265.19 (McKinney 2018) (“A person is guilty of aggravated criminal possession of a weapon when he or she commits the crime of criminal possession of a weapon in the second degree as defined in subdivision three of section 265.03 of this article and also commits . . . a drug trafficking felony as defined in subdivision twenty-one of section 10.00 of this chapter arising out of the same criminal transaction.”).

does not completely eliminate the exigency.¹⁴⁴ The *Dougall* opinion did not live without criticism from one New York trial court judge. Judge Leslie Snyder of New York County made it very clear that the decision in *Gokey* was not reflective of previous New York cases that had held that the search of a container incident to a lawful arrest was considered a *de minimis* intrusion where the ultimate intrusion, the arrest, had already occurred.¹⁴⁵ “To illustrate the illogical result dictated by *Gokey*, see, *People v. Dougall*.”¹⁴⁶

2. *People v. Thompson*

Tausheba Thompson was in Queens at nighttime when a detective observed him engage in a hand-to-hand sale of marijuana with an unknown man by removing a bag of marijuana from his pocket while wearing a backpack.¹⁴⁷ The detective approached Thompson and asked him to remove the bag of marijuana from his pocket, which Thompson did.¹⁴⁸ Thereafter, the detective attempted to arrest the defendant and asked him to remove his backpack from his back.¹⁴⁹ Suddenly, Thompson attempted to punch the detective in the face and fled from the detective.¹⁵⁰ The detective gave chase and eventually caught up to Thompson by grabbing onto the backpack.¹⁵¹ When the detective grabbed the bag, he felt “an unidentifiable hard object” in the bag, but the detective let go of the bag because he was elbowed in the face by Thompson.¹⁵² The chase resumed with Thompson now

¹⁴⁴ *Smith*, 452 N.E.2d 1227-28; *People v. Wylie*, 666 N.Y.S.2d 1, 4 (App. Div. 1st Dep’t 1997), *appeal denied*, 694 N.E.2d 895 (N.Y. 1998) (“Like *Smith*, the search in the present case occurred immediately after the defendant was arrested and handcuffed. Indeed, the search was conducted right there on the street, a short distance from the defendant. Defendant easily could have reached for a weapon or attempted to rid himself of the money during the arrest itself, and the momentary delay in actually handcuffing defendant does not alter this result. Moreover, a determined arrestee may use means other than his hands—such as kicking or shoving the arresting officer—to disrupt the arrest process in order to gain a weapon or destroy evidence. Such actions are a realistic possibility when the search occurs within close proximity to the arrest, as was the case here.”).

¹⁴⁵ *People v. Montgomery*, 489 N.Y.S.2d 975, 978-79 (Crim. Ct. 1985) (citing to *People v. Perel*, 315 N.E.2d 452 (N.Y. 1973) and *People v. Weintraub*, 320 N.E.2d 636 (N.Y. 1974) for the position that New York follows the *de minimis* intrusion rationale).

¹⁴⁶ *Id.* at 979.

¹⁴⁷ *People v. Thompson*, 988 N.Y.S.2d 209, 210 (App. Div. 2d Dep’t 2014).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Thompson*, 988 N.Y.S.2d at 210 (internal quotation marks omitted).

carrying the backpack in front of him.¹⁵³ Eventually, the detective caught up to Thompson again and the two fought over the bag, until it was released by both, and the chase resumed again.¹⁵⁴ The detective caught Thompson a final time and was able to make the arrest, approximately thirty-six feet away from where the bag was located.¹⁵⁵ When the detective's partner secured Thompson, the detective went back to the backpack, opened it, and found a loaded semi-automatic handgun.¹⁵⁶

The Appellate Division reversed Thompson's conviction for possession of the weapon because the bag was not within Thompson's area of immediate control at the time of the arrest, the detective did not assert that he searched the bag out of safety for himself, and the facts did not support a reasonable belief that the bag contained a weapon.¹⁵⁷ In addition, the Appellate Division reversed because the detective did not assert that he searched the backpack to protect against the destruction of evidence, and the facts did not support that belief.¹⁵⁸

The Appellate Division incorrectly found that there was a lack of exigent circumstances because the detective did not affirmatively testify as to his "reasonable belief." "While an officer need not affirmatively testify as to safety concerns to establish exigency, such apprehension must be objectively reasonable."¹⁵⁹ The facts that were known to the detective prior to the arrest include the following: (1) the detective had witnessed the defendant engaging in a hand-to-hand transaction of marijuana; (2) when the detective asked the defendant to remove the baggie that had contained the marijuana, the defendant complied; (3) when the detective informed the defendant that he was to be arrested and asked him to remove his backpack, the defendant fled; (4) when the detective initially grabbed the defendant's bag, he felt "an unidentifiable hard object"; and (5) while giving chase in hot pursuit and getting elbowed in the face, the detective noticed the defendant repositioned the backpack so that it was in front of him.¹⁶⁰

Based on the flight of the defendant, the crime with which he was being arrested, the aggression of the defendant, and the

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Thompson*, 988 N.Y.S.2d at 211-12 (citations omitted).

¹⁵⁸ *Id.* at 212.

¹⁵⁹ *Jimenez*, 8 N.E.3d at 835.

¹⁶⁰ *Thompson*, 988 N.Y.S.2d at 210.

defendant's action during the course of the chase, it is entirely reasonable to draw an inference that the defendant was hiding something in that bag, probably drugs.¹⁶¹ The defendant was ready to relinquish the drugs that the detective had observed him selling from his pocket arguably because the weight of the baggie was negligible for a significant drug charge; however, a backpack was large enough to conceal either a weapon or more drugs. Indeed, when the defendant repositioned the bag to in front of himself, the contents of the bag became "readily accessible to him," for which he could have discarded evidence during the course of the chase.¹⁶² Furthermore, the bag was of "sufficient size to contain a weapon."¹⁶³ This inference was strengthened by the fact that, during the course of the chase, the officer felt "an unidentifiable hard object" in the bag.¹⁶⁴

One may argue that because the bag was over thirty feet away at the time the defendant was handcuffed, the defendant could not have realistically gained access to anything in the bag. This is valid criticism; however, one must remember the point at which the defendant is "under arrest." A seizure, including an arrest, occurs when a person reasonably believes that his freedom of movement has been curtailed.¹⁶⁵ Therefore, the point at which Thompson was seized was when the officer informed him that he was under arrest because a reasonable person would understand that, at that point, he is not entitled to go anywhere else he wanted. Indeed, Thompson's freedom of movement was restricted to the area in which he ran: anywhere away from the officer. Thus, the arrest had occurred prior to the point at which Thompson ran away, which means that the hot pursuit chase, the multiple scuffles, and the "unidentifiable hard object" were all facts that the detective was apprised of after the arrest had been made. Conclusively, this means that exigent circumstances existed after the arrest because the detective was running after the defendant in hot pursuit, the detective had witnessed the defendant dealing drugs, and he felt an unidentifiable hard object during the chase. These facts,

¹⁶¹ See *People v. Garcia*, 17 N.Y.S.3d 29 (App. Div. 1st Dep't 2015) (holding that a police officer was justified in searching arrestee's backpack incident to arrest, even where the officer performing the search was not the initial police officer to observe the "suspicious exchange" between the arrestee and another person, and there was no aggression by the arrestee).

¹⁶² See *Smith*, 452 N.E.2d at 1227.

¹⁶³ *Id.*

¹⁶⁴ *Thompson*, 988 N.Y.S.2d at 210.

¹⁶⁵ See *Henry v. United States*, 361 U.S. 98, 103 (1959) ("When the officers interrupted the two men and restricted their liberty of movement, the arrest, for purposes of this case, was complete."); *Sibron v. New York*, 392 U.S. 40, 67 (1968).

taken in their totality, would allow a reasonable inference that the defendant was either concealing evidence or in possession of a weapon.

3. *People v. Jimenez*

In *People v. Jimenez*,¹⁶⁶ the police responded to a radio call about a burglary in progress at an apartment building that was participating in Operation Clean Halls, a program where police were authorized entry into privately owned buildings to conduct patrols.¹⁶⁷ The suspects that were identified in the radio call were two Latino males.¹⁶⁸ At first, two officers arrived at the scene; shortly thereafter, four to six additional officers arrived to help with the investigation.¹⁶⁹ When the first two officers arrived, they noticed Jimenez, who was a Latina woman, and another Latino man exit the stairwell into the lobby.¹⁷⁰ Behind Jimenez and the other man, the superintendent of the apartment complex was following them, pointing at them and “mak[ing] a face” that one of the officers understood as a request to stop them even though she never explicitly stated to do so.¹⁷¹ The officers moved the superintendent to the side “for safety reasons,” and then began questioning the defendant.¹⁷² At first, she told the officers that the two of them were in the building to visit a friend; however, she changed her story to say that she was in the building to find a notary.¹⁷³ Upon further questioning, she could not provide the names or apartment numbers of either the “friend” or the notary.¹⁷⁴ Additionally, there was a “No Trespassing” sign posted in the lobby.¹⁷⁵

At that point, the officers arrested the defendant for trespassing in the building.¹⁷⁶ Prior to handcuffing, one of the officers went to remove Jimenez’s shoulder bag.¹⁷⁷ Another officer stated that the bag

¹⁶⁶ 8 N.E.3d 831 (N.Y. 2014).

¹⁶⁷ *Id.* at 833.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Jimenez*, 8 N.E.3d at 833.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Jimenez*, 8 N.E.3d at 834.

¹⁷⁷ *Id.*

she was holding “appeared to be heavy.”¹⁷⁸ The officer removed the bag, opened it, and found a handgun that appeared to be loaded.¹⁷⁹

Jimenez was indicted for possession of a weapon in the second degree and criminal trespass in the first degree.¹⁸⁰ Justice Darcel Clark denied the defendant’s motion to suppress the evidence for safety concerns.¹⁸¹ She reasoned that the bag was not within the exclusive control of the police at the time of the arrest and that the superintendent’s gestures suggested that Jimenez and the other man were in the building in connection with the reported burglary.¹⁸² The defendant was tried and convicted on both counts.¹⁸³

The Appellate Division, First Department, unanimously affirmed the trial court’s decision.¹⁸⁴ The judges agreed that, at the time of the arrest, Jimenez’s shoulder bag had not been reduced to the exclusive control of the police, thus giving the defendant a potential opportunity to reach into the bag.¹⁸⁵ Additionally, they reasoned that the bag was big enough to contain a weapon.¹⁸⁶ Finally, they stated that the surrounding circumstances supported a reasonable belief that exigency was required in spite of neither officer testifying at the suppression hearing regarding their concern for safety.¹⁸⁷

The Court of Appeals, in a 4 to 3 decision, reversed the decision of the Appellate Division.¹⁸⁸ Chief Judge Lippman, writing for the majority, stated that the People failed to meet their burden of proving exigency, in part, because neither officer testified at the suppression hearing regarding their reasonable belief for safety.¹⁸⁹ However, the Court of Appeals held that “[w]hile an officer need not affirmatively testify as to safety concerns to establish exigency, such apprehension must be objectively reasonable.”¹⁹⁰

Then, the Court of Appeals analyzed each fact of the case and dissected them, piece-by-piece, and found that the search was

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Jimenez*, 8 N.E.3d at 834.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *People v. Jimenez*, 950 N.Y.S.2d 700, 700 (App. Div. 1st Dep’t 2012).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Jimenez*, 8 N.E.3d at 833, 836.

¹⁸⁹ *Id.* at 835.

¹⁹⁰ *Id.*

unreasonable.¹⁹¹ The court reasoned the following: (1) at the time of the search of the bag, there were between four and eight police officers; (2) there was no indication that either Jimenez or her partner was acting threateningly, and they complied with the police during the removal of the bag, the arrest, and the subsequent frisk; (3) the heaviness of a bag, on its own, is not enough to support a reasonable belief of a lack of safety or destruction of evidence; (4) the superintendent's gestures, on their own, would also not provide a reasonable belief; (5) the fact that Jimenez and the other man were separated during the questioning by the officers, on its own, is not enough to establish a particularized suspicion of a person possessing a weapon; and (6) while the police were responding to a call about a burglary, there was no evidence to establish that either Jimenez or the other man was part of the burglary, putting aside their common ethnicity.¹⁹²

The problems with the court's analysis in *Jimenez* are twofold. First, the court's use of the number of officers to deal with possible safety concerns is a factor that should have been given less weight. Second, the court used a divide-and-conquer analysis when dealing with each fact in the analysis and failed to apply the totality of the circumstances to the situation and account for all of the facts.¹⁹³

Regarding the number-of-officers factor, there can be no doubt that multiple officers would arrive when there was a radio call about an ongoing burglary. In 2008, the year that the *Jimenez* case began, 41 police officers across the country lost their lives while in the line of duty to gunfire.¹⁹⁴ In this particular case, the apartment complex that was entered into had been participating in Operation Clean Halls.¹⁹⁵ Operation Clean Halls is a program designed to allow the NYPD entry into the building, upon a request made by the landlord to the New York City Department of Housing and Development, so that the officers can stop and question people loitering in the building in an attempt to reduce the amount of drug dealing in these buildings.¹⁹⁶ In all likelihood, the landlords contact the New York City Department of Housing and Development because they have a problem with drug

¹⁹¹ *Id.*

¹⁹² *Id.* at 835-36.

¹⁹³ *Jimenez*, 8 N.E.3d at 835-36.

¹⁹⁴ *Honoring Officers Killed in 2008*, OFFICER DOWN MEMORIAL PAGE, <https://www.odmp.org/search/year?year=2008> (last visited Oct. 24, 2018).

¹⁹⁵ *Jimenez*, 8 N.E.3d at 833.

¹⁹⁶ *Operation Clean Halls Request*, NYC.GOV, <http://www1.nyc.gov/nyc-resources/service/2154/operation-clean-halls-request> (last visited Oct. 24, 2018).

dealing going on in the building, establishing the belief that the building is located in a high-crime area.¹⁹⁷

The *Jimenez* officers' apprehension of safety would logically be increased when they found Jimenez, in a high crime area, while responding to a call for a burglary.¹⁹⁸ Furthermore, the superintendent of the building followed the defendant, while pointing at her, and making a face that the officers understood to mean "don't let her get away."¹⁹⁹ Finally, the defendant lied to the officer about why she was there.²⁰⁰

Additionally, where safety is concerned, the number of officers present at the scene will not reduce the number of bullets located in the magazine of Jimenez's handgun. While the number of officers is bound to have an impact on a suspect's decision as to whether to use a weapon, the danger persists regardless and, therefore, that fact should be a minor factor in determining whether exigency exists. At the time of the arrest, while there were potentially eight officers, the bag had not been reduced to the "exclusive control of the police," as it was still in Jimenez's possession because she had not yet been handcuffed.²⁰¹ Additionally, Jimenez's bag "was of sufficient size to contain a weapon,"²⁰² and one of the arresting officers testified that the bag "appeared to be heavy."²⁰³ Therefore, Jimenez had the opportunity to reach into her big bag, while she was unhandcuffed, and reach for a weapon that the officers reasonably believed she might have possessed. This leads to my next point.

The court in *Jimenez* found it necessary to look at each of the facts in this case, in isolation of one another, and analyze them piecemeal before reaching its conclusions.²⁰⁴ The court's divide-and-conquer analysis of every fact in the case was the reason why it came to its conclusion. The court found that the superintendent's gestures, the heaviness and size of the bag, and the ethnicity of the defendant were not facts, standing alone, that would allow the court to find a reasonable belief for the threat to the safety of the officers on the

¹⁹⁷ *Operation Clean Halls*, LATINO USA (Apr. 5, 2012), <https://latinousa.org/2012/04/05/operation-clean-halls/>.

¹⁹⁸ *Jimenez*, 8 N.E.3d at 833.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *See* *People v. Smith*, 452 N.E.2d 1224, 1227 (N.Y. 1983).

²⁰² *Id.*

²⁰³ *Jimenez*, 8 N.E.3d at 834.

²⁰⁴ *Id.* at 835.

scene.²⁰⁵ Seemingly, the court provided a good faith, innocent reasoning to determine that the search was unreasonable based on all of the facts in the case. However, this type of analysis is generally prohibited in the context of dealing with a Fourth Amendment claim.²⁰⁶ “The totality-of-the-circumstances test ‘precludes this sort of divide-and-conquer analysis.’”²⁰⁷

In this case, the court possessed the following facts: (1) there was a call about a burglary in which two Latino males were involved; (2) the area where the burglary was reported was a high crime area, based on the apartment’s participating in Operation Clean Halls; (3) when the police entered the building, they noticed the defendant being followed by the superintendent of the building, who was pointing at her and making a face that the officer believed meant “don’t let her get away”; (4) when the officers began questioning about why she was there, she lied two times; (5) she was trespassing in the building, which was suspicious because the building was located in a high crime area; (6) she was carrying a bag that was sufficiently big to carry a weapon, and it appeared heavy; (7) while the defendant did not fit the description in the radio call, her partner may have; and (8) at the time of the arrest, Jimenez’s bag had not been reduced to the exclusive control of the police.²⁰⁸ Additionally, to take an extra precaution, the officers moved the superintendent to the side “for safety reasons.”²⁰⁹

While it is true that each of these facts could be subject to a completely valid, innocent, good-faith rationale for its existence, taken in the collective, they represent an entirely different story. The officers had probable cause to arrest the defendant for trespass.²¹⁰ In addition

²⁰⁵ *Id.*

²⁰⁶ *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949) (“Probable cause exists where ‘the facts and circumstances’ within their (the officers’) knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or being committed.” (citation omitted)); *Maryland v. Pringle*, 540 U.S. 366, 372 n.2 (2003); *District of Columbia v. Wesby*, 138 S. Ct. 577, 588 (2018) (“Our precedents recognize that the whole is often greater than the sum of its parts—especially when the parts are viewed in isolation.”); *Smith*, 452 N.E.2d at 1226-27 (“We have interpreted the New York Constitution to require that the reasonableness of each search or seizure be determined on the basis of the facts and circumstances of the particular case.”).

²⁰⁷ *Wesby*, 138 S. Ct. at 588 (quoting *United States v. Arvizu*, 534 U.S. 266, 274 (2002)).

²⁰⁸ *Jimenez*, 8 N.E.3d at 833-34; *but see* *People v. McPherson*, 750 N.Y.S.2d 862 (App. Div. 1st Dep’t 2002) (holding that the search of an arrestee’s container was appropriate where the police had responded to an anonymous 911 call about a burglary and the container had not been reduced to the exclusive control of the police at the time of the search).

²⁰⁹ *Jimenez*, 8 N.E.3d at 833.

²¹⁰ *Id.* at 834.

to the crime of the arrest, “[e]xigency may also derive from circumstances other than the nature of the offense.”²¹¹ When taken in the totality of the circumstances, the facts in this case would give rise to a reasonable belief that the officers feared for the safety of themselves, or the superintendent. Most strikingly, the court did not mention the fact that the defendant lied to the police in its analysis of the officer’s reasonable belief. Nor did the court address the lack of “the exclusive control of the police” in the container at the time of the arrest. Therefore, after reviewing the facts in the totality, there can be no question that the search of Jimenez’s bag in this case was reasonable.

In the dissent, three judges criticized the majority for substituting its beliefs for the factual considerations that were made by both the trial court and the Appellate Division.²¹² While the dissent acknowledged that, at the time of the arrest, the police did not have probable cause to arrest the defendant for the burglary,²¹³ the dissent pointed out that the officers had reason to believe that the defendant was involved with the burglary because of the actions of the superintendent following the defendants to the lobby.²¹⁴ Additionally, the dissent reasoned that the case was more akin to *Smith* than to *Gokey* because the defendant lied to the police and the defendant’s bag was of sufficient size to contain a weapon.²¹⁵ Moreover, the dissent distinguished *Gokey* because the government had not conceded the lack of exigent circumstances for the officers’ safety and the police in *Jimenez* did not allow the defendant to keep the container in their possession to search immediately.²¹⁶ Finally, the dissent noted that the

²¹¹ *Id.* at 835.

²¹² *Id.* at 836 (Abdus-Salaam, J., dissenting in part) (“Whether the police acted reasonably in conducting the warrantless search of defendant’s handbag involves ‘mixed questions of law and fact’ and our review is therefore ‘limited to whether there is record support for the determinations of the courts below.’ Contrary to the majority, I conclude that there is record support for the unanimous findings of the lower courts that the search here was reasonable under all of the circumstances. Accordingly, I would affirm the conviction.”); see *People v. Carroll*, 740 N.E.2d 1084, 1089 (N.Y. 1990) (holding that trial courts are entitled to wide discretion in their evidentiary determinations and that such determinations should not be disturbed on appeal absent an abuse of discretion); *People v. Prochilo*, 363 N.E.2d 1380, 1381 (N.Y. 1977) (“At the outset we observe that much weight must be accorded the determination of the suppression court with its peculiar advantages of having seen and heard the witnesses.”).

²¹³ *Jimenez*, 8 N.E.3d at 838.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.* at 837.

number of officers would not have prevented the defendant from firing the weapon that she possessed at them.²¹⁷

I share the views of the *Jimenez* dissent and would have affirmed the decisions of the lower courts.

4. *People v. M.R.*

On January 2, 2007, four police officers went to the defendant's apartment to ask him questions about the shootings of the defendant's two brothers a few days earlier.²¹⁸ At the time that they visited the defendant, the police had not yet suspected that the defendant was, in fact, his own brothers' shooter.²¹⁹ They also did not confer with the detective tasked with investigating the shooting or the shooting victims.²²⁰ The defendant permitted the officers to enter his apartment, and the officers went to an L-shaped couch and a love seat where the defendant had his jacket.²²¹ Four bags of marijuana were located near the jacket, and the police decided, at that point, to handcuff the defendant but not place him under arrest; they detained him in order to investigate further.²²² After another search revealed marijuana in a bedroom, the defendant was moved away from the couch where he had initially been sitting, questioned by the police, and then allowed to sit on the love seat.²²³ Thereafter, one of the officers lifted the couch cushions of the love seat and found empty glassine envelopes.²²⁴

The other officer made the following admissions in a court proceeding: (1) at the time that the defendant had been placed in handcuffs, the love seat was not within the defendant's "lungeable" area; and (2) he had no idea why the first officer decided to lift the love seat cushions up.²²⁵ Furthermore, the officer never stated that he felt in danger during the investigation.²²⁶ When the first officer lifted another love seat cushion, he found a .357 caliber revolver, the defendant's driver's license and live ammunition for the gun.²²⁷

²¹⁷ *Id.* at 838.

²¹⁸ *People v. M.R.*, 907 N.Y.S.2d 102, 2009 WL 5525297, at *1 (Sup. Ct. Bronx Cty 2009).

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.* at *2, *5.

²²² *Id.* at *2.

²²³ *M.R.*, 2009 WL 5525297, at *3.

²²⁴ *Id.* at *2-3.

²²⁵ *Id.* at *2-4.

²²⁶ *Id.* at *2, *3-4, *11.

²²⁷ *Id.* at *4.

The Bronx County Supreme Court suppressed the gun reasoning that there was a lack of exigent circumstances because the officer never feared for their safety or the destruction of evidence.²²⁸ While the officer testified that the handcuffs were only used to detain the defendant, the People conceded that the defendant was not free to leave at that point, and the court deemed that the defendant was arrested at that point, which meant that they could search the defendant's person and the couch where the jacket had been located.²²⁹ However, the court found that, based on the officer's testimony, the love seat was not within the defendant's area of immediate control.²³⁰ The court's conclusion in *M.R.* with respect to the "area of immediate control" is correct and, therefore, the gun, the driver's license, and the ammunition should have been suppressed; however, the *Gokey* application, with regard to the temporal requirement, was incorrect.

First, if the officer testified that the loveseat was not within the area of immediate control of the defendant at the time that he was arrested, then the search not only violates the defendant's New York constitutional rights, but it also violates his federal constitutional rights.²³¹ The search incident to arrest exception, as it relates to this Note, allows the police to search the person and the area within the arrestee's immediate control and nothing more. What then follows is that if the search is not of the person of the arrestee or of his area of immediate control after the arrest, then it cannot be justified as a search incident to arrest, under any law, absent a warrant or another exception. While the court in *M.R.* did address *Chimel*, it did so after a full-blown *Gokey* analysis. However, if the search would not pass muster under *Chimel*, then there would be no need to address whether the search passes under state law because it already violated federal law.

Second, the temporal requirement under *Gokey* was clearly not met in this case, but it was not addressed by the court. Under *Gokey*, the search of the container must be done "contemporaneously with the arrest."²³² In *Gokey*, for example, when the defendant was under arrest, he was frisked, and the officers used a dog to sniff his bag for drugs.²³³ Immediately after the dog reacted, the defendant was placed in

²²⁸ *M.R.*, 2009 WL 5525297, at *11.

²²⁹ *Id.* at *10.

²³⁰ *Id.*

²³¹ See *Chimel v. California*, 395 U.S. 752, 762-63 (1969).

²³² *People v. Gokey*, 457 N.E.2d 723, 725 (N.Y. 1983).

²³³ *Id.* at 724.

handcuffs, and the police searched the bag.²³⁴ Because the court in *Gokey* never addressed the issue of whether the officer's conduct there met the temporal requirement, it would seem that that the officers met the requirement because the only ground that the *Gokey* court reversed on was the lack of exigent circumstances. Therefore, such a prompt search, as was performed in *Gokey*, will be used as the marker for determining the satisfaction of the "contemporaneous" prong.

In *M.R.*, the court mentioned the temporal requirement²³⁵ but did not address whether it was satisfied in this case.²³⁶ Here, the defendant was arrested and placed on a couch.²³⁷ Thereafter, one officer went to the bedroom and found more marijuana.²³⁸ When the officer emerged from the bedroom, the following occurred: (1) the officer noticed the defendant and another police officer having a conversation; (2) the officer asked the defendant if there was anything else in the apartment; (3) the defendant admitted that the marijuana in the bedroom was his; (4) the defendant's girlfriend told the officer that the bedroom was her son's; (5) the defendant was then allowed to smoke two cigarettes, one of which was done very quickly; (6) the defendant drank half a glass of water; and (7) the officer gave the defendant the option to sit on a living room chair or the love seat, and the defendant chose the latter.²³⁹ Prior to all of this occurring, neither the couch where the defendant's jacket was nor the loveseat had been searched. In total, the time between the officer emerging from the bedroom and discovering the handgun had been about three minutes, not including the time between when the defendant had been handcuffed before entry into the bedroom.²⁴⁰

If the search in *Gokey* was contemporaneous, the search in *M.R.* was the opposite. Unlike *Gokey*, the search in *M.R.* was not performed on the love seat until more than three minutes after the defendant had been arrested. Arguably, the contemporaneous requirement must be read in conjunction with the exigency requirement because the fact that an officer would immediately search an object after an arrest lends credence to the belief that the officer may have believed there was something in the bag. However, these

²³⁴ *Id.*

²³⁵ *M.R.*, 2009 WL 5525297, at *10.

²³⁶ *Id.* at *11.

²³⁷ *Id.* at *2 ("The People concede that defendant was not free to leave at that point.").

²³⁸ *Id.* at *3.

²³⁹ *Id.*

²⁴⁰ *M.R.*, 2009 WL 5525297 at *2-3, *4.

requirements are separate from one another.²⁴¹ Therefore, it would appear that a search occurring three minutes after an arrest has been made is not a contemporaneous search, even if there had been the existence of exigent circumstances. That being said, the substantive *Gokey* exigency analysis was not needed for two reasons, as stated above. Thus, it would seem that the court in *M.R.* was correct but for the wrong reasons.

5. *People v. Morales*

At around 9:00 pm on February 29, 2008, two officers responded to a 911 call from someone about a suspicious man located in a restaurant.²⁴² When the officers arrived, the restaurant owner greeted them outside and told them that the suspect appeared to be stealing from several women's purses.²⁴³ The officers went inside the restaurant, asked the defendant to talk with them outside, and he did so.²⁴⁴ As the three were walking outside, the defendant turned around and jammed his hands into his jacket pockets.²⁴⁵ The officers attempted to remove the defendant's hands from his pockets, and then a struggle ensued.²⁴⁶ The police eventually subdued and arrested the defendant by handcuffing him, and then moved him to the back of a police car.²⁴⁷ After the defendant had been moved to the car, the police searched his jacket, which had fallen off during the struggle, and found a box cutter knife and several envelopes containing drugs.²⁴⁸

The New York County Supreme Court denied a motion to suppress the drugs that were found in the jacket, and the defendant was convicted at trial of criminal possession of a controlled substance in the fifth degree.²⁴⁹ The Appellate Division, First Department, reversed the trial court decision, finding that the evidence seized from the jacket

²⁴¹ *Gokey*, 457 N.E.2d at 724-25 (“Under the State Constitution, an individual’s right of privacy in his or her effects dictates that a warrantless search incident to arrest be deemed unreasonable unless justified by the presence of exigent circumstances. . . . Moreover, the search must have been conducted contemporaneously with the arrest.”).

²⁴² *People v. Morales*, 2 N.Y.S.3d 472, 474 (App. Div. 1st Dep’t 2015).

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Morales*, 2 N.Y.S.3d at 474.

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 477.

was not the product of a valid search incident to arrest.²⁵⁰ In coming to this conclusion, the court found that, at the time of *the search*, the defendant did not have access to the jacket because he was in a police car, thus negating any sense of exigency.²⁵¹ This conclusion completely misreads both *Smith* and *Gokey* because the measurement of whether exigency existed is not determined at the time of the search but rather “[t]he reasonableness of a police officer’s assertion of either or both of these predicates to justify a warrantless search is measured *at the time of the arrest.*”²⁵²

With that understanding, one must determine when the defendant was “arrested” within the meaning of the Fourth Amendment. That moment occurred after the defendant had jammed his hands into his pockets and the defendant engaged in a scuffle with the police. Prior to that point, the police had received a 911 call about the defendant, the store owner pointed the defendant out when they arrived, and the defendant complied with the police request to go outside, all of which would lead to the belief that the police had “reasonable suspicion” prior to the defendant’s jamming his hands in his pocket.²⁵³ During the scuffle with police, that would be enough to give the police probable cause to make an arrest, and because defendant’s freedom of movement was curtailed, the defendant was seized, and was therefore “under arrest.”

Moreover, the defendant was fighting with the police, and the jacket was still in his possession at that time, and not reduced to the exclusive control of the police. Furthermore, because the defendant’s hands were in his pockets, the contents of his pockets were “readily accessible” to him. Finally, because the restaurant owner believed that the defendant was stealing from women’s purses and the defendant jammed his hands in his pockets, an officer could reasonably believe

²⁵⁰ *Id.*

²⁵¹ *Id.* at 475. In coming to this conclusion, the *Morales* court relied on the following cases: *People v. Thompson*, 988 N.Y.S.2d 209 (App. Div. 1st Dep’t 2014); *People v. Diaz*, 966 N.Y.S.2d 413 (App. Div. 1st Dep’t 2013) (holding that the search of a backpack was unlawful where the defendant was handcuffed at the time of the search and the bag was no longer in his control); *People v. Julio*, 666 N.Y.S.2d 171 (App. Div. 1st Dep’t 1997).

²⁵² *People v. Gokey*, 457 N.E.2d 723, 725 (N.Y. 1983) (emphasis added); *People v. Smith*, 452 N.E.2d 1224, 1227-28 (N.Y. 1983) (“*Whether in fact defendant could have had access to the briefcase at the moment it was being searched is irrelevant. He clearly could have had when arrested and neither the distance from nor the time elapsed since the arrest was sufficient to dissipate the reasonableness of conducting a search of the briefcase without a warrant.*” (emphasis added)).

²⁵³ *Morales*, 2 N.Y.S.3d at 474.

that the defendant was possibly attempting to destroy evidence related to that crime,²⁵⁴ and the officer did not even have to affirmatively testify to that.²⁵⁵

6. *Summary of Strict Interpretation Cases*

Dougall, Thompson, Jimenez, M.R. and Morales present a sample of cases where New York courts have applied a strict interpretation of *Gokey*, leading to results that conflict with the underlying justification for searches incident to arrest. These cases clearly demonstrate the difficulty in application that *Gokey* has set forth for the trial courts and the problems that the rules of law have created for subsequent Appellate Division and Court of Appeals decisions. However, some of the following cases have established that reviewing courts give a rather loose reading of *Gokey* in denying a defendant's motion to suppress in similar circumstances as in the above cases.

B. *Loose Interpretation of Gokey*

Courts that have applied a loose interpretation of the *Gokey* rule²⁵⁶ seem to rely less on *Gokey* and more on *Smith*. Additionally, these courts tend to either (1) infer that exigent circumstances existed based on the facts of the case, or (2) not mention exigency at all. Finally, these courts are more willing to deny motions to suppress in cases concerning searches incident to arrest where the search of the container was done immediately after the arrest had been made.

1. *People v. Wylie*

On February 20, 1996, a police officer was assigned to investigate a robbery of a "Love Store" employee who had been bringing the proceeds of the Love Store's business to the bank.²⁵⁷ The robber was described as a six foot tall, black male with a goatee, weighing between 230 and 250 pounds, and wearing a black or tan

²⁵⁴ *Gokey*, 457 N.E.2d at 724.

²⁵⁵ *People v. Jimenez*, 8 N.E.3d 831, 835 (N.Y. 2014).

²⁵⁶ *See infra* Part IV.B.1-5.

²⁵⁷ *People v. Wylie*, 666 N.Y.S.2d 1, 1-2 (App. Div. 1st Dep't 1997), *leave to appeal denied*, 694 N.E.2d 895 (N.Y. 1998).

jacket.²⁵⁸ The robber also had possession of the bag in which the proceeds had been kept—the brown bag with the money was located inside a Love Store bag, which was contained inside a Gap bag.²⁵⁹ No one at the bank saw the robbery.²⁶⁰ Furthermore, the robbery victim showed no signs of being hurt from the robbery, in spite of the fact that he said he had been hit in the face.²⁶¹ Additionally, the victim had given conflicting descriptions to other police officers.²⁶² Eventually, the victim confessed that the robbery was a “phony robbery” and that he had been working with a man by the name of “Paul,” who worked at a local jewelry store.²⁶³

With the new information they had acquired about Paul, the police went to Paul’s residence and waited for him to show up.²⁶⁴ When a man meeting Paul’s description approached, the police left their vehicle and approached him.²⁶⁵ After confirming that the person they found was the Paul they were looking for, the police officers arrested him and handcuffed him.²⁶⁶ A search of his right coat pocket revealed a plastic bag with the Love Store logo, and inside there were two bundles of \$3,000 each.²⁶⁷

The trial court found that the money in the bag should have been suppressed because the police had an obligation to secure a warrant to search the closed bag after the defendant had been handcuffed.²⁶⁸ Furthermore, the trial court also reasoned that *Gokey* controlled, the search was not justified to prevent the destruction of evidence, and the search was not based on a reasonable belief that the defendant had a weapon in the bag.²⁶⁹

The Appellate Division, First Department, unanimously disagreed with the suppression ruling and reversed.²⁷⁰ The court in *Wylie* explained that the search incident to arrest exception was based on the need to protect the arresting officer by permitting him “to search

²⁵⁸ *Id.* at 2.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Wylie*, 666 N.Y.S.2d at 2.

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Wylie*, 666 N.Y.S.2d at 2.

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 3.

for and seize weapons when there is reason to fear for his safety and in preventing the person arrested from destroying evidence of criminal involvement by permitting the arresting officer to search for and seize such evidence.”²⁷¹ The court also recognized that “[a]nother consideration underlying this exception is that since the arrest itself constitute[d] such a major intrusion on an individual’s privacy, ‘the encroachment caused by a contemporaneous search of the arrestee and his possessions at hand is in reality *de minimis*.’”²⁷²

This rationale conflicts with *Gokey* because the *de minimis* rationale is rejected by the Court of Appeals, which recognizes rather that “[u]nder the State Constitution, an individual’s right of privacy in his or her effects dictates that a warrantless search incident to arrest be deemed unreasonable unless justified by the presence of exigent circumstances.”²⁷³ Therefore, the *de minimis* rationale is at odds with a New York citizen’s reasonable expectation of privacy as protected by *Gokey* and its progeny.²⁷⁴

Furthermore, the court in *Wylie* found that the bag had not been reduced to the exclusive control of the police because it failed to meet the “test for exclusive control, as defined . . . by the Court of Appeals.”²⁷⁵ Then, the court in *Wylie* stated:

Like *Smith*, the search in the present case occurred immediately after the defendant was arrested and handcuffed. Indeed, the search was conducted right there on the street, a short distance from the defendant. Defendant easily could have reached for a weapon or attempted to rid himself of the money during the arrest itself, and the momentary delay in actually handcuffing defendant does not alter this result. Moreover, *a determined arrestee* may use means other than his hands—such as kicking or shoving the arresting officer—to disrupt the arrest process in order to gain a weapon or destroy evidence. Such actions are a realistic possibility when the search occurs within close proximity to the arrest, as was the case here. In any

²⁷¹ *Id.* (citing *People v. Belton*, 432 N.E.2d 745, 746-47 (N.Y. 1982)).

²⁷² *Wylie*, 666 N.Y.S.2d at 3 (quoting *People v. De Santis*, 385 N.E.2d 577, 579 (N.Y. 1978)).

²⁷³ *Gokey*, 457 N.E.2d at 724.

²⁷⁴ *Id.*

²⁷⁵ *Wylie*, 666 N.Y.S.2d at 3-4.

event, the factual scenario in this case is a far cry from the police-controlled arrest scenes in *Chadwick* and *Gokey*, where no interpretation of the evidence would permit a finding of exigent circumstances.²⁷⁶

While the conclusion of the court in *Wylie* was correct, it does not comport with *Gokey*. New York courts have held that handcuffing a defendant can, in some instances, eliminate any reasonable inference of exigent circumstances.²⁷⁷ Under the traditional *Gokey* view, the police would have been entitled to seize the Love Store bag but not search it without a warrant because the defendant had been handcuffed, and the bag had been removed from his jacket, which put it in the exclusive control of the police and removed the exigency. However, the court in *Wylie* invented the “determined arrestee” and allowed for the possibility of kicking or shoving, maybe even biting, to justify why a search that is done right after an arrest had been made is justified and some leniency is granted in such case. To this day, *Wylie* is still the only Appellate Division case in New York that mentions “a determined arrestee” when performing an exigency analysis.

2. *People v. Doe*

Similar to *Thompson*,²⁷⁸ *People v. Doe*²⁷⁹ involved the search of a bag after the defendant had taken flight from the police officer.²⁸⁰ A police officer witnessed the defendant exchange a small package that he pulled from a pack on his waist for money.²⁸¹ Thereafter, the officer yelled “police,” and the defendant fled into an abandoned building.²⁸² The officer eventually subdued and arrested the defendant, removed the defendant from the building, and then checked the pack on his waist, in which he found narcotics.²⁸³

²⁷⁶ *Id.* at 4 (emphasis added).

²⁷⁷ *People v. Rosado*, 625 N.Y.S.2d 162, 163 (App. Div. 1st Dep’t 1995) (“Once the defendant was under arrest and the change purse was safely in the possession of the arresting officer, there was absolutely no reason why a warrant for a search of the purse’s contents could not have been obtained if there had in fact been any basis to suppose that the purse contained either contraband or evidence of the crime for which the arrest had been made.”).

²⁷⁸ *See supra* Part IV.A.2.

²⁷⁹ 711 N.Y.S.2d 1 (App. Div. 1st Dept. 2000).

²⁸⁰ *Id.* at 1.

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *Id.*

The Appellate Division, First Department, unanimously affirmed the defendant's conviction.²⁸⁴ The court held that the search was justified because "the situation was volatile in that [the] defendant had been subdued after a struggle [with police]."²⁸⁵ The Appellate Division made no direct mention of exigent circumstances, or whether the police officer reasonably believed in them at the time. Furthermore, the Appellate Division relied on *De Santis*²⁸⁶ and *Wylie* in coming to its conclusion; it did not cite to *Gokey*, nor did it mention exigent circumstances.²⁸⁷

Because this was a search incident to arrest of a container found within the controllable area of the arrestee, *Gokey* controlled.²⁸⁸ Additionally, this case presented similarities to *Thompson*, where a defendant fled after the police had approached him for drug sale and the situation became volatile. However, the Appellate Division in *Doe* chose not to rely on *Gokey* as the controlling precedent but rather chose to follow *Wylie* and *De Santis*.²⁸⁹ Under this rationale, the Appellate Division eschewed the exigent circumstances requirement and seemingly reasoned that the search was proper because it was a *de minimis* intrusion. Furthermore, the rationale may have considered *Wylie*'s "determined arrestee" because there was a struggle. Be that as it may, *Gokey* requires the existence of exigent circumstances to justify a search of a container in the area of immediate control.²⁹⁰ Because the Appellate Division in *Doe* chose not to rely on *Gokey* explicitly, it seems as though it implicitly recognized that the struggle that occurred was an exigent circumstance and would justify the search of the pack on the defendant.

3. *People v. Jones*

In a case somewhat analogous to *Jimenez*, the Appellate Division, Third Department, dealt with a case where a defendant was trespassing and lied about why he was present. In *People v. Jones*,²⁹¹ an employee of a private residential facility noticed that the defendant

²⁸⁴ *Doe*, 2000 N.Y. App. Div. LEXIS 7147, at *1.

²⁸⁵ *Id.*

²⁸⁶ *People v. De Santis*, 385 N.E.2d 577 (N.Y.1978).

²⁸⁷ *Doe*, 2000 N.Y. App. Div. 7147, at *1-2.

²⁸⁸ *People v. Gokey*, 457 N.E.2d 723, 724 (N.Y. 1983).

²⁸⁹ *Doe*, 2000 N.Y. App. Div. 7147, at *2.

²⁹⁰ *Gokey*, 60 N.Y.2d at 311.

²⁹¹ 523 N.Y.S.2d 187 (App. Div. 3d Dep't 1987).

was in the lobby of the facility at approximately 7:00 pm.²⁹² The building had a sign-in procedure for visitors coming to the building.²⁹³ An employee asked the defendant why he was in the building, to which he responded that he was there to visit a friend.²⁹⁴ After the employee reported the defendant's presence to her supervisor, she returned to the lobby, but the defendant was no longer there.²⁹⁵ Sometime later, the supervisor found the defendant lying face down on the basement floor, partially in the employee's locker room.²⁹⁶

Upon seeing the supervisor, the defendant got up and entered the locker room, so the supervisor called the police.²⁹⁷ When the police arrived, they were notified by the dining room attendant that the defendant had just left through the back door.²⁹⁸ The police found the defendant outside and questioned him as to why he was there, to which he responded that he was looking for the bathroom and showed the police a social services card bearing his name and photograph.²⁹⁹ The police asked him to return with them to the lobby, which he agreed to, and he was identified by the original employee and the supervisor, the latter of whom requested that the police arrest the defendant for trespassing.³⁰⁰ The defendant was arrested and given *Miranda* warnings.³⁰¹ Then, the police requested identification from the defendant, pointing to a wallet hanging out of the defendant's jacket.³⁰² The defendant stated that the wallet was not his.³⁰³ The police took the wallet, opened it up, and found information that indicated the wallet belonged to an employee of the facility.³⁰⁴

The defendant was indicted for burglary in the second degree, grand larceny in the third degree, criminal possession of stolen property in the second degree, and criminal possession of a weapon in

²⁹² *Id.* at 188.

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Jones*, 523 N.Y.S.2d at 188.

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Jones*, 523 N.Y.S.2d at 188.

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.*

the fourth degree.³⁰⁵ The defendant pled guilty to the burglary charge.³⁰⁶

In justifying the arrest of the defendant, the Appellate Division, Third Department, pointed to the following facts: (1) the facility where the defendant was located had a strict sign-in policy; (2) the defendant's inconsistent answers with regard to his presence in the building; (3) the defendant's presence in the locker room, which was a non-public area of the building; (4) the complaining witness's presumptively reliable statements to the police; and (5) the subsequent identification.³⁰⁷ Because of these facts, the Appellate Division found that the defendant's arrest was supported by probable cause.³⁰⁸

As to the question of whether the wallet was properly seized, the Appellate Division found that the defendant was arrested based on reasonable cause.³⁰⁹ Based on the fact that the arrest was based on reasonable cause, the Appellate Division found that the search of the person was reasonable as well.³¹⁰ The Appellate Division did not cite

³⁰⁵ *Id.*

³⁰⁶ *Jones*, 523 N.Y.S.2d at 188.

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.* Under New York law, "reasonable cause" and "probable cause" are terms of art utilized in making a determination as to whether the police officer has enough information in front of him or her to warrant an objective person in reasonably believing that a crime has been committed, and thus the terms are used interchangeably on occasion by the courts, as was done here. *See id.*; N.Y. CRIM. PROC. LAW § 70.10(2) (McKinney 2018) ("Reasonable cause to believe that a person has committed an offense" exists when evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment and experience that it is reasonably likely that such offense was committed and that such person committed it."); *Id.* § 140.10(1)(a) ("Subject to the provisions of subdivision two, a police officer may arrest a person for: (a) Any offense when he or she has reasonable cause to believe that such person has committed such offense in his or her presence."); *see also* *Beck v. Ohio*, 379 U.S. 89, 91 (1964) ("Whether that arrest was constitutionally valid depends in turn upon whether, at the moment the arrest was made, the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.").

³¹⁰ *Jones*, 523 N.Y.S.2d at 188.

to *Gokey*, nor did it mention exigent circumstances. Rather, it cited to *People v. Marsh*³¹¹ and *New York v. Belton*.³¹²

The Appellate Division, Third Department's analysis of the search was flawed because it made no mention of the appropriate standard under *Gokey*. While the wallet was technically an object found on the person of the arrestee, the wallet, itself, was a container, which meant that it was governed by *Chimel*, *Gokey* and their progeny. In fact, the Appellate Division implicitly recognized that by citing to *Marsh* and *Belton*.³¹³ The problem is that both of those cases involved the search incident to an arrest exception with regard to vehicles, whereas this case dealt with an on-the-street encounter that had a search incident to arrest of a container, a wallet. Therefore, *Gokey* was the controlling, on-point case law. As such, the police needed to have exigent circumstances at the time of the arrest to search the defendant's person.

In *Jones*, the defendant was arrested for trespassing in a private building, but the facts and circumstances of the case would not lead a police officer to reasonably believe that the defendant possessed a weapon that could hurt the officers. Moreover, the wallet was in the possession of the arrestee, but the arrestee himself had been reduced to the exclusive control of the police after his arrest. As a result, there could have been no reasonable belief on the part of the officers to believe that the defendant would have been able to conceal the wallet that the officers had directly pointed out to the defendant prior to the search. However, the Appellate Division found the opposite: regardless of exigent circumstances, the search was valid.³¹⁴ Seemingly, this search would have been suppressed under *Gokey*.

³¹¹ 228 N.E.2d 783, 785 (N.Y. 1967) (holding that the legislature of New York would not have intended the search incident arrest exception to the warrant requirement to extend to arrests made specifically for traffic violations where Vehicle Traffic Law § 155 provides that “[a] traffic infraction is not a crime and the punishment imposed therefor shall not be deemed for any purpose penal or criminal punishment and shall not affect or impair the credibility as a witness or otherwise of any person convicted thereof.”).

³¹² 453 U.S. 454 (1981) (holding that the police may conduct a search incident to arrest of the passenger compartment an arrestee's vehicle, based on inherent exigencies of road-side encounters).

³¹³ *Jones*, 523 N.Y.S.2d at 188-89.

³¹⁴ *Id.* at 188.

4. *People v. Watkins, People v. Baker, and People v. Thompson*

In *People v. Watkins*,³¹⁵ the Appellate Division, First Department, held that a search incident to arrest of a defendant's bag was proper because the search had been done close in time and location to the arrest where the defendant had been handcuffed, the bag had not been reduced to the exclusive control of the police, and exigent circumstances were "readily inferable" from the officer's testimony.³¹⁶ The problem is that the court found that the circumstances were "readily inferable" more than 15 years before the court in *Jimenez* reasoned that an officer need not affirmatively testify to his belief.³¹⁷ Seemingly, *Watkins* is analogous to *Jimenez* in that the bags had not been reduced to the exclusive control of the police and that the exigent circumstances were "readily inferable." Unlike *Watkins* however, *Jimenez* was not handcuffed at the time of her search. Be that as it may, the two cases have inconsistent results.

In *People v. Baker*,³¹⁸ the Appellate Division, First Department, unanimously affirmed a trial court's ruling to deny a motion to suppress, basing its conclusion on the fact that the drugs contained in the bag found during a search that had been conducted right after an arrest had been made.³¹⁹ The court in *Baker* made no mention in its opinion about the existence of exigent circumstances, nor did it speak to whether the container was within the exclusive control of the police.

In *People v. Thompson*,³²⁰ the Appellate Division, First Department, unanimously found that the search of a cigarette box had been done immediately after the defendant had been arrested, and that "the record" revealed the existence of exigent circumstances.³²¹ The court in *Thompson* gave no indication about how the record established exigency.

³¹⁵ 682 N.Y.S.2d 40 (App. Div. 1st Dept. 1998), *leave to appeal denied*, 710 N.E.2d 1105 (N.Y. 1999).

³¹⁶ *Id.*

³¹⁷ *Cf.* *People v. Thompson*, 988 N.Y.S.2d 209 (App. Div. 2d Dep't 2014) (holding that evidence should be suppressed when an officer did not testify to his reasonable belief and the facts did not support such a belief).

³¹⁸ 679 N.Y.S.2d 107 (App. Div. 1st Dep't 1998), *leave to appeal denied*, 708 N.E.2d 182 (N.Y. 1999).

³¹⁹ *Id.*

³²⁰ 703 N.Y.S.2d 148 (App. Div. 1st Dep't), *leave to appeal denied*, 733 N.E.2d 245 (N.Y. 2000).

³²¹ *Id.*

5. *Summary of Loose Interpretation Case*

A common theme in most of these cases is that all of them cite to *Smith* or *Wylie* for the authority to justify the search, and none of them cite to *Gokey*.³²² Under a *Smith* or *Wylie* approach, it would seem that the police are given more deference in their actions at the time of the arrest. However, these cases conflict with *Gokey* because they tend to find exigent circumstances more easily than cases that apply *Gokey* strictly.

V. CONCLUSION

The inconsistencies, both found in cases where evidence has been suppressed and cases where it has not, have proven to create significant Fourth Amendment jurisprudence flaws within New York. Where the Courts of New York have inconsistently applied the *Gokey* rule, the Court of Appeals should review these cases to address these inconsistencies and correct them. Alas, given that *Jimenez* was the most recent Court of Appeals decision on the issue of searches incident to arrest of containers found within the controllable area of an arrestee, it is unlikely that change is on the horizon. Borrowing the words of Judge Gabrielli in his *People v. Belton*³²³ concurrence, “[t]he majority, by its decision to reject the theoretical underpinnings of the Supreme Court’s holding in this case, leaves the citizens and law enforcement officials of New York in a state of continued confusion.”³²⁴

As a policy consideration, the proper course for the New York courts would be to adopt a precedent of uniformity with regard to the current Fourth Amendment jurisprudence because both article I, section 12, of the New York Constitution and the Fourth Amendment of the United States Constitution share identical language. Indeed, the Court of Appeals has addressed the need for uniformity with the Supreme Court in the past with regard to Fourth Amendment cases.³²⁵ In line with the Court of Appeals language in *Ponder*, the Court of Appeals should follow the rules created in *Chimel* and *Robinson*, with regard to searches incident to arrest, and eschew the rule created by *Gokey*.

³²² See *People v. Watkins*, 682 N.Y.S.2d 40, 1998 N.Y. App. Div. LEXIS 13778, at *1 (1st Dept. 1998); *Baker*, 679 N.Y.S.2d at 107; *Thompson*, 711 N.Y.S.2d at 173.

³²³ 432 N.E.2d 745 (N.Y. 1982) (*Belton II*).

³²⁴ *Id.* at 749 (Gabrielli, J., concurring).

³²⁵ *People v. Ponder*, 429 N.E.2d 735, 737 (N.Y. 1981).

Continuance with *Gokey* creates confusion in the realm of search and seizure jurisprudence for New York law enforcement officials dealing with on-the-street encounters. While a defendant being handcuffed is strong evidence that he will not be able to get into a container that he possesses,³²⁶ the police may still search his container.³²⁷ As mentioned in *Smith*, if the bag is too tightly attached to defendant so as to prevent him from “quickly” reaching it, the evidence collected therefrom can be suppressed.³²⁸ Worst of all is that the Court of Appeals understands that these searches, if reviewed in a federal court, would be sustained.³²⁹

In her *Jimenez* dissent, the late Judge Sheila Abdus-Salaam criticized the Court of Appeals for supplanting its reasonable inferences of the case for the reasonable inferences that had been found by both Justice Clark at the Supreme Court level and the Appellate Division, First Department.³³⁰ She wrote:

This is not an instance where, even accepting the entirety of the hearing court’s factual findings, none of the inferences that reasonably may be drawn from [the] settled facts can support the conclusion that [the search] was lawful. Rather, the facts do support the inferences reached by the lower courts, although other inferences could also be reached, as demonstrated by the conclusions drawn by the majority. For example, the majority notes that the police need not affirmatively testify that they were concerned about their safety, but that the apprehension of the police must be objectively reasonable. In concluding that there was nothing connecting defendant or her companion to the burglary, the majority downplays the uncontroverted testimony that when the police officers first entered the lobby, they were directed to defendant by the gestures of the superintendent, who motioned to the police to stop defendant and her companion.³³¹

³²⁶ See *People v. Rosado*, 625 N.Y.S.2d 162, 163 (App. Div. 1st Dep’t 1995).

³²⁷ See *People v. Smith*, 452 N.E.2d 1224, 1227 (N.Y. 1983).

³²⁸ *Id.*

³²⁹ *People v. Gokey*, 457 N.E.2d 723, 724 (N.Y. 1983).

³³⁰ *People v. Jimenez*, 8 N.E.3d 831, 837-38 (Abdus-Salaam, J., dissenting).

³³¹ *Id.* (alteration in original) (citations and internal quotations marks omitted).

The main issue with the opinion in *Jimenez* is the flagrant disregard of the inferences drawn by both the trial court and the Appellate Division, both of which utilized the *Gokey* opinion in their rationales but came to opposite conclusions from the Court of Appeals. In addition, the precedent of a “divide-and-conquer” analysis will only allow judges who have personal disagreements with the case to find a way to impose their personal beliefs rather than the rule of law and facts in making determinations. Judicial activism, on this level, presents issues in Fourth Amendment jurisprudence for law enforcement officials, the likes of which the officials will not be apprised at the time that they do their job, and only realized years later.

Ten years ago, in *People v. Hall*,³³² Judge Ciparick distinguished body cavity searches from the traditional search incident to arrest rationale, stating that the latter searches “are permitted because they represent *de minimis* intrusions when compared with the loss of liberty occasioned by the arrest that preceded them.”³³³ The Appellate Division, Second Department, once stated that a seizure of a defendant’s bag was justified, where it was located ten feet away from him at the time of the arrest, because “the seizure . . . did not invade his expectation any more than the arrest itself.”³³⁴ That same court found that the search of the same bag was justified because the search was “not significantly divorced in time or place from the arrest”; no exigent circumstances were mentioned.³³⁵ Thus, it is apparent that New York recognizes the *de minimis* intrusion rationale as a legitimate basis for eschewing a suspect’s reasonable expectation of privacy in containers; however, it would seem that the rationale is inconsistently applied.

Robinson presents the clear, straightforward answer to searches incident to arrest. If *Robinson* is unavailable, however, then *Smith* should govern rather than *Gokey*. But, because of the questions *Gokey* left unanswered, New York courts have been left to fill in the blanks, coming to conclusions that leave similarly situated defendants in completely different places within the law. In 1981, the Supreme Court stated:

³³² 886 N.E.2d 162 (N.Y. 2008).

³³³ *Id.* at 174 (Ciparick, J., concurring).

³³⁴ *People v. Thomas*, 738 N.Y.S.2d 357, 358 (App. Div. 2d Dep’t 2002).

³³⁵ *Id.*

Fourth Amendment doctrine . . . is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be literally impossible of application by the officer in the field.³³⁶

No one could have said it better.

³³⁶ *New York v. Belton*, 453 U.S. 454, 458 (1981) (internal quotation marks omitted).