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# Interpreting Search Incident to Arrest in New York: Past, Present, and Future

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# Interpreting Search Incident to Arrest in New York: Past, Present, and Future

**Cover Page Footnote**

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## INTERPRETING SEARCH INCIDENT TO ARREST IN NEW YORK: PAST, PRESENT, AND FUTURE

### SUPREME COURT OF NEW YORK NEW YORK COUNTY

People v. Luna<sup>1</sup>  
(decided March 29, 2012)

The Fourth Amendment has been a topic of discussion and a focus for debate since its inception. Throughout history, there has been disagreement on how strictly the amendment and its exceptions should be applied. There have been periods of time in which courts have applied a strict construction, focusing on protecting individual's rights.<sup>2</sup> At other times, courts have applied a loose construction, allowing for more police discretion.<sup>3</sup>

New York has further muddied the waters by pursuing its own route when it comes to protecting an individual's Fourth Amendment rights. This was done through the implementation of an exigency requirement, which narrowed the ability to conduct a warrantless search incident to arrest.<sup>4</sup> This note examines modern search-incident-to-arrest law in the State of New York, focusing on one recent case, *People v. Luna*.

The issue in *Luna* was to what extent the Fourth Amendment protects an individual from searches of his person and effects incident to a lawful arrest. This note analyzes the evolution of the current law and compares the federal approach to the New York approach, specifically in the context of closed containers. It shows that many commentators believe that New York erred in diverging from the

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<sup>1</sup> No. 5113-08, 2012 WL 1059392 (Sup. Ct. Mar. 29, 2012).

<sup>2</sup> See, e.g., *Trupiano v. United States*, 334 U.S. 669 (1948); *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 358 (1931) (finding that a search warrant must first be obtained whenever it is reasonably practicable to do so).

<sup>3</sup> See, e.g., *United States v. Robinson*, 414 U.S. 218 (1973); *Harris v. United States*, 331 U.S. 145 (1947); *Carroll v. United States*, 267 U.S. 132 (1925).

<sup>4</sup> *People v. Smith*, 452 N.E.2d 1224, 1227 (N.Y. 1983).

federal approach, and it addresses the criticisms of those critics. Finally, this note suggests a framework, which if applied uniformly, would result in consistency. It concludes by discussing the future implications of the proposed framework.

## I. THE EMERGENCE OF THE FOURTH AMENDMENT

The Fourth Amendment was created, in large part, as a reaction to the risks that warrantless searches posed to the colonists in early America.<sup>5</sup> It was designed to serve the important function of protecting early colonists against abuse from an oppressive government.<sup>6</sup> As such, the Fourth Amendment was created to govern all searches and seizures carried out by governmental officials.<sup>7</sup> The Supreme Court imposed a presumptive warrant requirement, where any search conducted without a warrant is per se unreasonable unless justified.<sup>8</sup> The Supreme Court has repeatedly stated, “a warrant authorized by a neutral and detached judicial officer is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer engaged in the often competitive enterprise of ferreting out crime.”<sup>9</sup> There are, of course, certain circumstances

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<sup>5</sup> *Weeks v. United States*, 232 U.S. 383, 389 (1914); *Chimel v. California*, 395 U.S. 752, 761 (1969).

<sup>6</sup> *Chimel*, 395 U.S. at 761. See Thomas K. Clancy, *The Fourth Amendment's Concept of Reasonableness*, 2004 UTAH L. REV. 977, 978-91, for an in-depth history of the Fourth Amendment.

<sup>7</sup> The Fourth Amendment of the United States Constitution provides:

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.

U.S. CONST. amend. IV. The Fourth Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment.

<sup>8</sup> *Johnson v. United States*, 333 U.S. 10, 13-14 (1948) (reasoning that if the authority to decide whether a search may be conducted is placed with law enforcement, without review by a disinterested magistrate, it “would reduce the Amendment to a nullity and leave the people’s homes secure only in the discretion of police officers.”); *Katz v. United States*, 389 U.S. 347, 357 (1967) (stating that subject to several well-delineated exceptions, warrantless searches are “per se unreasonable under the Fourth Amendment”).

<sup>9</sup> *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 326 (1979) (internal quotation marks omitted) (citing *Johnson*, 333 U.S. at 14); see also *United States v. Chadwick*, 433 U.S. 1, 9 (1977); *Coolidge v. New Hampshire*, 403 U.S. 443, 449 (1971) (“The classic statement of the policy underlying the warrant requirement of the Fourth Amendment”).

where the warrant requirement may be dispensed with.<sup>10</sup> As a result, the Supreme Court has carved out over twenty exceptions, which allow a search to be conducted in the absence of a warrant.<sup>11</sup> One such example is a search conducted incident to an arrest.

The Supreme Court's application of the search-incident-to-arrest exception has been anything but uniform. There have been ongoing debates regarding the scope of search authority provided by this exception. The debates center on the interpretation of the Fourth Amendment, as the framers did not provide instruction on how its two separate clauses should be reconciled. The first clause requires that searches and seizures be 'reasonable,' and the second clause imposes a requirement that all warrants must be supported by probable cause.<sup>12</sup> This has allowed for two separate views to emerge in regards to search incident to arrest.

The first view is the reasonableness approach, which finds that a lawful arrest is a "reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to arrest requires no additional justification."<sup>13</sup> This view is based on the underlying theory that a search is justified because the intrusion is "in reality *de minimus*" compared to the major intrusion of privacy caused by the arrest itself.<sup>14</sup> This approach draws a bright-line rule that is predictable and easy to apply.<sup>15</sup> A search is reasonable when it accompanies a lawful custodial arrest.<sup>16</sup> Thus, the decision to search is left entirely to the arresting officer, which provides for greater police discretion.<sup>17</sup>

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<sup>10</sup> *Johnson*, 333 U.S. at 14-15.

<sup>11</sup> Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1473-74 (1985).

<sup>12</sup> *Overview of the Fourth Amendment*, 35 GEO. L.J. ANN. REV. CRIM. PROC. 3, 3 (2006).

<sup>13</sup> *United States v. Robinson*, 414 U.S. 218, 235 (1973); *New York v. Belton*, 453 U.S. 454, 461 (1981).

<sup>14</sup> *Luna*, 2012 WL 1059392, at \*4.

<sup>15</sup> *See Carroll v. United States*, 267 U.S. 132, 159 (1925); *but see Belton*, 453 U.S. at 464 (Brennan, J., dissenting) (cautioning against this approach, and instead suggesting that "courts should carefully consider the facts and circumstances of each search and seizure.").

<sup>16</sup> *Robinson*, 414 U.S. at 235; *see also Smith*, 452 N.E.2d at 1228 (Jasen, J., concurring) ("The only reasonable restriction would be that the search occur in close spatial and temporal proximity to the arrest.").

<sup>17</sup> The Court in *Chimel* suggested the problem with the reasonableness approach is that its argument is "founded on little more than a subjective view regarding the acceptability of certain sorts of police conduct, and not on consideration relevant to Fourth Amendment interests. Under such an unconfined analysis, Fourth Amendment protection in this area would approach the evaporation point." *Chimel*, 395 U.S. at 764-65.

In contrast, the second approach requires additional justification, other than the lawful arrest, before a search may be conducted. The warrant-primacy approach takes the view that a warrantless search may be conducted only when it is shown that dispensing with the warrant requirement was necessary.<sup>18</sup> In other words, there must be some justification as to why a warrant could not have been obtained prior to the search. This approach examines the facts and circumstances surrounding a particular search before determining whether it was reasonable.<sup>19</sup> What has resulted from the two differing approaches is a pendulum that swings back and forth through history, granting limited search authority incident to arrest in some cases and broader search authority in others.

## II. FEDERAL HISTORY OF SEARCH INCIDENT TO ARREST

The concept of search incident to arrest appears to have first been recognized by the Supreme Court in 1914.<sup>20</sup> In *Weeks v. United States*,<sup>21</sup> the Court seemingly approved of the warrantless search of the ‘person’ subject to a lawful arrest.<sup>22</sup> In *Carroll v. United States*,<sup>23</sup> the Court interpreted the reasoning in *Weeks* to include “whatever is found upon his person or in his control.”<sup>24</sup> That search authority was later expanded to include a search of the person, as well as “the place where the arrest is made” in order to obtain evidence of the crime committed.<sup>25</sup> The Court affirmed this authority in *Marron v. United States*,<sup>26</sup> but it later limited the search authority with its decision in

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<sup>18</sup> *People v. Belton*, 432 N.E.2d 745, 755 (N.Y. 1982) (Fuchsberg, J., dissenting) (citing *People v. Brosnan*, 298 N.E.2d 78, 86 (N.Y. 1973) (Wachtler, J., dissenting) (“[C]areful study of the (Federal) ‘exception’ cases will reveal that the rationale underlying the case where the exception was established was not that there was a good reason to search, but that there was a good reason why a search warrant could not be obtained.”)).

<sup>19</sup> *See Robinson*, 414 U.S. at 239 (Marshall, J., dissenting) (“I continue to believe ‘[t]he scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point, the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.’”) (alteration in original) (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)).

<sup>20</sup> *Chimel*, 395 U.S. at 755.

<sup>21</sup> 232 U.S. 383 (1914).

<sup>22</sup> *Chimel*, 395 U.S. at 755 (citing *Weeks*, 232 U.S. at 392).

<sup>23</sup> 267 U.S. 132 (1925).

<sup>24</sup> *Id.* at 158.

<sup>25</sup> *Agnello v. United States*, 269 U.S. 20, 30 (1925).

<sup>26</sup> 275 U.S. 192 (1927). The court held that because there was a lawful arrest, the police

*Go-Bart Importing Co. v. United States*.<sup>27</sup> In the latter case, the Court found that although there was an “abundance of information” at the time of the search to procure a search warrant, the fact that the arresting officer had not first obtained a warrant rendered the search unlawful.<sup>28</sup> This limited interpretation was soon disregarded in *Harris v. United States*,<sup>29</sup> where the defendant was arrested pursuant to an arrest warrant based on a forged check.<sup>30</sup> The officers arrested the defendant in his living room, and then “undertook a thorough search of the entire [four-room] apartment” with the intent of recovering additional evidence used in the commission of the crime.<sup>31</sup> The Court found the search permissible as incident to arrest.<sup>32</sup>

Within a year, “the pendulum swung again.”<sup>33</sup> In *Trupiano v. United States*,<sup>34</sup> the Court referred back to the views from *Go-Bart*, and stressed the importance of the warrant-primacy approach when it stated, “[i]t is a cardinal rule that . . . law enforcement agents must secure and use search warrants wherever reasonably practicable.”<sup>35</sup> Two years later, the Court rejected this rule in *United States v. Rabinowitz*.<sup>36</sup> There, it held the test “is not whether it is reasonable to procure a search warrant, but whether the search was reasonable.”<sup>37</sup>

In *Chimel v. California*,<sup>38</sup> the Court disagreed and instead read the Fourth Amendment “in light of the history that gave rise to its words,” which is consistent with the warrant-primacy approach.<sup>39</sup> The Court agreed that it is “entirely reasonable for the arresting officer” to search the person of the arrestee, as well as the area into which the arrestee might reach in order to protect officers from dan-

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had a right to contemporaneously search the place where the arrest took place without a warrant. *Id.* at 199.

<sup>27</sup> 282 U.S. 344 (1931).

<sup>28</sup> *Chimel*, 396 U.S. at 757 (citing *Go-Bart*, 282 U.S. at 358) (noting also that the arrestee was not arrested during the commission of the crime).

<sup>29</sup> 331 U.S. 145 (1947).

<sup>30</sup> *Id.* at 148.

<sup>31</sup> *Chimel*, 395 U.S. at 758 (citing *Harris*, 331 U.S. at 148).

<sup>32</sup> *Harris*, 331 U.S. at 155.

<sup>33</sup> *Chimel*, 395 U.S. at 758.

<sup>34</sup> 334 U.S. 669 (1948).

<sup>35</sup> *Id.* at 705.

<sup>36</sup> 339 U.S. 56 (1950).

<sup>37</sup> *Id.* at 66.

<sup>38</sup> 395 U.S. 752 (1969).

<sup>39</sup> *Id.* at 760-61 (internal quotation marks omitted).

ger and to preserve evidence from concealment or destruction.<sup>40</sup> However, because the search at issue went beyond that limited area, the Court found it was unreasonable.<sup>41</sup>

In *United States v. Robinson*,<sup>42</sup> the Court addressed whether the search of a closed container fell within the exception.<sup>43</sup> There, the search involved a cigarette package found in the arrestee's pocket after he was arrested for driving without a license.<sup>44</sup> The Court noted that "[t]he validity of the search of a person incident to a lawful arrest ha[d] been regarded as settled from its first enunciation, and ha[d] remained virtually unchallenged until the present case."<sup>45</sup>

That challenge had been presented by the District of Columbia ("D.C.") Court of Appeals when it held that in order to search a cigarette box, there must be some justification other than the lawful arrest.<sup>46</sup> The D.C. Court of Appeals reasoned that because Robinson had been arrested for a driving offense and "there would be no further evidence of such a crime to be obtained in a search of the arrestee," the officer was limited to conducting a frisk for weapons.<sup>47</sup>

The Supreme Court disagreed and instead followed the reasonableness approach. A lawful arrest is a "reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to arrest requires no additional justification."<sup>48</sup> Thus, the Court overruled the holding of the D.C. Court of Appeals and found that a lawful arrest, which in itself granted the authority to search, justified the *full* search of the person.<sup>49</sup> Through this holding, the Court implied that a *full* search includes not only the search of the person but the search of his effects as well—crumpled cigarette boxes included. The Court in *Robinson* held, for the first time, that an unqualified au-

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<sup>40</sup> *Id.* at 763.

<sup>41</sup> *Id.* at 768. After arresting the defendant in his house pursuant to an arrest warrant, "the officers then looked through the entire three-bedroom house, including the attic, the garage, and a small workshop." *Id.* at 753-54.

<sup>42</sup> 414 U.S. 218 (1973).

<sup>43</sup> *Id.* at 236.

<sup>44</sup> *Id.* at 220, 223.

<sup>45</sup> *Id.* at 224 (including a search of the arrestee as well as the area within his control).

<sup>46</sup> *Id.* at 227.

<sup>47</sup> *Robinson*, 414 U.S. at 227.

<sup>48</sup> *Id.* at 235.

<sup>49</sup> *Id.* at 235. The Supreme Court rejected the Court of Appeals conclusion that "the only reason supporting the authority for a full search incident to [a] lawful arrest was the possibility of discovery of evidence or fruits." *Id.* at 233.

thority exists to search incident to arrest.<sup>50</sup>

### III. SEARCH INCIDENT TO ARREST IN NEW YORK

Despite the identical language of the United States and the New York State constitutional search and seizure provisions,<sup>51</sup> the New York Court of Appeals has invoked its power to grant further protections to its citizens. New York's highest court did so by implementing an exigency requirement, thereby diverging from the federal search-incident-to-arrest approach.

When the New York Court of Appeals decided *People v. De Santis*<sup>52</sup> in 1978, it was still following the framework provided by the Supreme Court. The Court used a reasonableness approach that where an arrest is reasonable, a search of the arrestee and “the area within his immediate control” does not require any additional justification.<sup>53</sup> Based on this premise, the court ruled, “a warrantless search, not significantly divorced in time or place from the arrest, is lawful.”<sup>54</sup>

Several years later, in *People v. Belton*,<sup>55</sup> the court touched upon the search-incident-to-arrest exception—this time in conjunction with the automobile exception. Here, the search at issue involved the defendant's jacket located on the back seat of the car, where a small amount of cocaine was recovered from inside a zippered pocket.<sup>56</sup> In 1980 the case first reached the Court of Appeals, which concluded that the search of the zippered pocket was invalid as a search incident to arrest because there was no immediate exigency.<sup>57</sup> The People appealed to the United States Supreme Court,

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<sup>50</sup> *Id.* at 230 (“Virtually all of the statements of this Court affirming the existence of an unqualified authority to search incident to a lawful arrest are dicta.”).

<sup>51</sup> Compare U.S. CONST. amend. IV (“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.”), with 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.”).

<sup>52</sup> 385 N.E.2d 577 (N.Y. 1978).

<sup>53</sup> *Id.* at 579.

<sup>54</sup> *Id.* at 580.

<sup>55</sup> 407 N.E.2d 420 (N.Y. 1980).

<sup>56</sup> *Id.* at 421.

<sup>57</sup> *Id.* at 423.

which overruled the Court of Appeals, and found the search valid as incident to arrest because there was a lawful custodial arrest and the search was conducted contemporaneously.<sup>58</sup>

On remand, the Court of Appeals abandoned its earlier ruling and upheld the search but for a new reason this time around.<sup>59</sup> It made clear the search was now upheld via the automobile exception,<sup>60</sup> despite the fact that the Supreme Court did not explore this exception.<sup>61</sup> Moreover, the Court of Appeals did not directly respond to the Supreme Court's holding regarding the search-incident-to-arrest exception.<sup>62</sup> The ultimate disposition at the state level left an important issue open for determination: whether a search of a closed container may be conducted incident to arrest, even where no exigency exists, so long as the search is done contemporaneously.<sup>63</sup> Thus, *Belton's* unique procedural history allowed New York to carve its own path.<sup>64</sup> What resulted was a substantive impact on search incident to arrest law in the State of New York.

In *People v. Smith*,<sup>65</sup> the New York Court of Appeals responded by adding an exigency requirement, thereby limiting *De Santis* and narrowing the search-incident-to-arrest exception. Under the State Constitution,

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 . . . . [The] container may *not* be searched for a weapon or evidence if it is apparent that it is so securely fastened that the person arrested

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<sup>58</sup> *Belton*, 453 U.S. at 462-63.

<sup>59</sup> *Belton*, 432 N.E.2d at 746.

<sup>60</sup> *Id.* ("A majority of this court now concludes that the search which followed defendant's lawful arrest was permissible under the State Constitution under the automobile exception to the warrant requirement.")

<sup>61</sup> *See Belton*, 453 U.S. at 463 (Rehnquist, J., concurring) ("[T]he Court does not find it necessary to consider the 'automobile exception' in its disposition of this case.")

<sup>62</sup> *Belton*, 432 N.E.2d at 746 ("We do not find it necessary to consider the Supreme Court's rationale as applied to our Constitution, however, for we now hold on a different rationale [that the search was valid.]").

<sup>63</sup> *Smith*, 452 N.E.2d at 1226.

<sup>64</sup> The law could have been solidified by the Court of Appeals had it "simply affirm[ed] the determination of the Supreme Court on remand, without further comment." *Belton*, 432 N.E.2d at 748 (Gabrielli, J., concurring).

<sup>65</sup> 452 N.E.2d 1224 (N.Y. 1983).

cannot quickly reach its contents, or the person arrested makes it 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.<sup>66</sup>

The reasonableness of an officer's assertion that an exigency exists must be measured at the time of the arrest because the justification to search will not necessarily dissipate.<sup>67</sup> So long as an exigency is present at the time of arrest and the subsequent search is "not significantly divorced in time or place from the arrest," a search may be conducted, regardless of the circumstances existing at the time of the search itself.<sup>68</sup>

Less than five months later, the Court of Appeals revisited the issue in *People v. Gokey*.<sup>69</sup> The court explicitly held that where an arrested individual has a privacy interest in a closed container within his reach, a search of that container could only be justified by "the safety to the public and the arresting officer; and the protection of evidence from destruction or concealment."<sup>70</sup> Furthermore, the court instructed that the prosecution must affirmatively assert the presence of an exigency in order to overcome the requirement and justify a warrantless search.<sup>71</sup>

After *Gokey*, the Court of Appeals remained silent on the search-incident-to-arrest exception in the context of closed containers for over three decades.<sup>72</sup> Finally, in *People v. Jimenez*,<sup>73</sup> the court re-addressed the issue. It found that two separate requirements must be met in order for a warrantless search to be justified.<sup>74</sup> First, the search must be conducted within close space and time from the ar-

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<sup>66</sup> *Id.* at 1227 (emphasis added) (internal citations omitted).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> 457 N.E.2d 723 (N.Y. 1983).

<sup>70</sup> *Id.* at 724-25.

<sup>71</sup> *Id.* at 725.

<sup>72</sup> During this time, lower court decisions begged, figuratively speaking, for the Court of Appeals to revisit the issue. As will be demonstrated, this necessity arose due to inconsistent holdings and criticisms regarding the current state of the law. *See infra* notes 79-82 and accompanying text; *see also infra* part VI.

<sup>73</sup> *People v. Jimenez*, 2014 WL 696481 (N.Y. Feb. 25, 2014). Due to how recently this case was decided, no lower court cases have been decided since. As such, this article will examine the analysis of lower court opinions in light of *Smith* and *Gokey*, without taking *Jimenez* into consideration.

<sup>74</sup> *Id.* at \*3.

rest.<sup>75</sup> “The second, and equally important,” requirement is that exigent circumstances must be affirmatively demonstrated.<sup>76</sup> However, in *Jimenez*, neither officer asserted a fear for “his safety or the integrity of any destructive evidence,” nor was such a fear objectively reasonable in light of the surrounding circumstances.<sup>77</sup> Therefore, the court held that the warrantless search was improper.<sup>78</sup>

Since *Gokey*, lower courts in New York have not applied the holdings of *Smith* and *Gokey* with much uniformity. In at least one instance, the Second Department strictly construed the exigency requirement, and found a search incident to arrest to be unjustified where the search was undertaken for reasons other than the need to either detect a weapon or evidence of a crime.<sup>79</sup> In contrast, the Third Department has applied a loose construction, and found the requirement satisfied by a blanket assertion that the possibility of an exigency existed.<sup>80</sup> The First Department has applied a strict construction in some cases,<sup>81</sup> while it referred back to the *De Santis-Belton* era to apply a broad, reasonableness approach in others.<sup>82</sup>

The judicial history, differing focuses, and inconsistent applications, make it clear that the current state of law in New York is anything but settled. The same search-incident-to-arrest exception is applied in drastically different fashions, and as a result, outcomes are unpredictable. Hopefully, a more coherent path will be followed in light of the Court of Appeals direction provided in *Jimenez*, however, that is yet to be seen. A closer, in-depth analysis of *People v. Luna* illustrates the need for a more refined approach.

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at \*3, \*4 (“[There must be] reasonable belief that the suspect may gain possession of a weapon or be able to destroy evidence located in the bag.”).

<sup>77</sup> *Id.* at \*4, \*5.

<sup>78</sup> *Jimenez*, 2014 WL 696481, at \*5.

<sup>79</sup> See *People v. Branch*, 687 N.Y.S.2d 383, 384 (App. Div. 2d Dep’t 1999) (“Nor was the search a lawful incident to an arrest, as the detectives concededly searched the jacket for identification, rather than for a weapon or evidence of a crime.”).

<sup>80</sup> See *People v. Schobert*, 463 N.Y.S.2d 277, 279 (App. Div. 3d Dep’t 1983) (discussing the validity of the seizure of the defendant at length and then stating, “the exigent circumstances, including the possibility that the contraband might be destroyed, justified an immediate arrest and search.”).

<sup>81</sup> See generally *People v. Evans*, 922 N.Y.S.2d 403 (App. Div. 1st Dep’t 2011); *People v. Hendricks*, 841 N.Y.S.2d 94 (App. Div. 1st Dep’t 2007); *People v. Rosado*, 625 N.Y.S.2d 162 (App. Div. 1st Dep’t 1995).

<sup>82</sup> See generally *People v. Watkins*, 682 N.Y.S.2d 40 (App. Div. 1st Dep’t 1998); *People v. Baker*, 679 N.Y.S.2d 107 (App. Div. 1st Dep’t 1998); *People v. Wylie*, 666 N.Y.S.2d 1 (App. Div. 1st Dep’t 1997).

**IV. *PEOPLE V. LUNA***

During the summer of 2008, the New York Police Department (“NYPD”) initiated an investigation to pursue the principle target of a cocaine-dealing operation, a man identified as Kelly.<sup>83</sup> That fall, the NYPD decided to “take down” the operation and contacted Kelly in order to purchase 100 grams of cocaine.<sup>84</sup> An undercover officer carried out the transaction, and Detective Macias was instructed to remain nearby in an undercover vehicle.<sup>85</sup> At the sale location, a white taxi drove past the undercover officer’s vehicle and then returned to the area.<sup>86</sup> Shortly after, the defendant approached the undercover officer’s vehicle and knocked on the window; the undercover officer rolled down the window and asked, “Where’s Kelly?”<sup>87</sup> The defendant, later identified as Antonio Luna,<sup>88</sup> pointed in the direction of the parked taxi.<sup>89</sup> Macias moved in to apprehend Luna, identifying himself as a police officer and displaying his shield as he approached.<sup>90</sup> After facing Luna, Macias noticed a cigarette box in Luna’s hands.<sup>91</sup> Macias handcuffed Luna’s hands behind his back, took the cigarette box from Luna’s hands, conducted a quick pat down, and searched the cigarette box.<sup>92</sup> Inside the box, Macias found cocaine in a clear plastic bag.<sup>93</sup>

The court first addressed whether probable cause existed to

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<sup>83</sup> *Luna*, 2012 WL 1059392, at \*1.

<sup>84</sup> *Id.* at \*2. Prior to this occasion, the police had purchased cocaine approximately five times from Kelly and those working with him. *Id.* at \*1. The individuals acted in various capacities, such as deliverers, lookouts, and handlers of money. *Id.* Although Kelly was not present at each transaction, he had some degree of participation in each, for example, knowledge that each transaction occurred. *Id.*

<sup>85</sup> *Luna*, 2012 WL 1059392, at \*2.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> At the time of the “take down,” Luna was not known to be involved with the drug operation, and neither the undercover officer nor the lead investigator recognized him. *Id.* However, the investigation team was first introduced to Luna prior to the initial purchase of cocaine from Kelly. *Id.* Luna and Kelly had been walking on the street when the police stopped them in order to “obtain the identity of Kelly and the person he was with at the time.” *Luna*, 2012 WL 1059392, at \*2. During this encounter, Kelly identified himself as Kelly Gomez, and Luna identified himself as Antonio Luna. *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at \*3.

<sup>91</sup> *Id.*

<sup>92</sup> *Luna*, 2012 WL 1059392, at \*3.

<sup>93</sup> *Id.*

carry out the arrest.<sup>94</sup> Next, it discussed the governing law in New York concerning the search at hand.<sup>95</sup> At the outset, the court reiterated the principle that a warrantless search conducted incident to arrest is only permissible in certain circumstances.<sup>96</sup> It then immediately made reference to the *Robinson-De Santis* rationale that a search incident to arrest is justified because the intrusion is “in reality *de minimus*” compared to the major intrusion of privacy caused by the arrest itself.<sup>97</sup> Despite this “core rationale,” the court acknowledged that the New York Constitution requires exigent circumstances.<sup>98</sup>

The court pointed to *Gokey* as the decision that “diverged from federal constitutional law” and shed light on how the added exigency requirement led to inconsistent applications.<sup>99</sup> It referred to *Rosado*, *Hendricks*, and *Evans*, to display disagreement with the strict application approach.<sup>100</sup> It cited to *Wylie*, *Watkins*, and *Baker* to demonstrate the approach focused on timing and exclusive control.<sup>101</sup>

The court in *Luna* discussed three cases dealing with the search of a cigarette box.<sup>102</sup> In *People v. Thompson*,<sup>103</sup> the search was upheld because the box had not been in the exclusive control of the police, the search occurred in close space and time, and the officer had a reasonable fear for safety, without explaining how.<sup>104</sup> In *People v. Schobert*,<sup>105</sup> the court upheld the search of a gold cigarette case, stating it was justified by exigent circumstances but never actually explained the exigency.<sup>106</sup> In *People v. Allen*,<sup>107</sup> the warrantless search of a cigarette box was found invalid because there were no ex-

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<sup>94</sup> *Id.* at \*3-4. For purposes of this article, because it is focused on search incident to arrest, the validity of the arrest is not contested. However, it is important to note that Luna was arrested based on “probable cause to believe he was a participant in the arranged sale of narcotics between Kelly and [the undercover officer].” *Id.* at \*4.

<sup>95</sup> *Id.*

<sup>96</sup> *Luna*, 2012 WL 1059392, at \*4.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at \*5 (displaying disagreement with the notion that a higher privacy interest attaches when a closed container is involved).

<sup>101</sup> *Luna*, 2012 WL 1059392, at \*6.

<sup>102</sup> *Id.*

<sup>103</sup> 703 N.Y.S.2d 148 (App. Div. 1st Dep’t 2000).

<sup>104</sup> *Luna*, 2012 WL 1059392, at \*7 (citing *Thompson*, 703 N.Y.S.2d at 149).

<sup>105</sup> 463 N.Y.S.2d 277 (App. Div. 3d Dep’t 1983).

<sup>106</sup> *Luna*, 2012 WL 1059392, at \*7 (“The Court did not explain why this exigency allowed the search of the cigarette case at the police station.”) (citing *Schobert*, 463 N.Y.S.2d at 279).

<sup>107</sup> 675 N.Y.S.2d 482 (Crim. Ct. 1998).

igent circumstances; therefore, there was no reason why a warrant could not first be obtained.<sup>108</sup>

Like many other courts, the court in *Luna* applied its own variation of the exigency requirement to conclude that the search was valid. It found that the circumstances surrounding Luna's arrest justified the police's reasonable belief that the container possibly contained narcotics<sup>109</sup> and that Luna "could easily have taken steps to destroy or conceal the contents of the cigarette box."<sup>110</sup> To support this inference, the court noted several facts: Luna initially demonstrated resistance upon arrest;<sup>111</sup> Luna continued to hold the box in his hands, even as he was handcuffed; and at the time of arrest, Detective Macias and Luna were alone on the street.<sup>112</sup> Further, "before, during, and immediately after" Luna's arrest, Detective Macias was in a position of vulnerability because Macias "placed his arm through Luna's handcuffed arms to prevent him from escaping."<sup>113</sup> Therefore, the circumstances presented the need to protect officer safety because Macias was "in a position where he could easily have been physically assaulted" by Luna.<sup>114</sup> Finally, the court justified the search because it took place "in close spatial and temporal proximity" to Luna's arrest.<sup>115</sup> Based on those reasons, the court found that the search of the contents of the cigarette box was lawful and valid.<sup>116</sup>

The court in *Luna* concluded its opinion with a lengthy display of its discontent with the current state of search-incident-to-arrest law in New York, "with the hope that such thoughts might make some contribution to the development of the law in this important area."<sup>117</sup> The court emphasized its viewpoint that New York

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<sup>108</sup> *Luna*, 2012 WL 1059392, at \*7 (quoting *Allen*, 675 N.Y.S.2d at 485, 486).

<sup>109</sup> *Id.* (stating that Luna was present at the scene because of his participation in the planned narcotics transaction, and the cigarette box was held in his hands).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* The court was referring to the fact that Luna was "initially a 'little resistant' and 'tensed up' when Detective Macias identified himself as a police officer," and Luna failed to comply with Macias when he ordered Luna to turn around. *Id.* at \*3. Interestingly, the court cited to *People v. Doe* as support, despite the fact that there, the defendant was "subdued by police after a struggle." *Luna*, 2012 WL 1059392, at \*7; *People v. Doe*, 711 N.Y.S.2d 1, 1 (App. Div. 1st Dep't 2000).

<sup>112</sup> *Luna*, 2012 WL 1059392, at \*7.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at \*8.

<sup>117</sup> *Luna*, 2012 WL 1059392, at \*8.

erred in diverging from the federal approach and gave a list of “anomalies and problems” which have resulted.<sup>118</sup> It concluded that the exigency requirement created significant negative consequences because it is hard to apply, invites arbitrary rulings, and promotes counterproductive incentives.<sup>119</sup>

## V. PAST: THE HISTORY OF NEW YORK’S DEPARTURE FROM THE FEDERAL APPROACH

When discussing the opinion that New York should not have deviated from the federal approach, the court in *Luna* is not alone; other courts and judges agree.<sup>120</sup> However, in order to determine whether the Court of Appeals erred in departing from the federal approach, a full understanding of *why* it diverged is crucial.

The vague language of the Fourth Amendment has led to two competing theories on how warrantless searches should be analyzed. It is no secret that federal courts follow the reasonableness approach, where an arrest provides authority to search without further justification.<sup>121</sup> In New York, on the other hand, the notion of adopting the more restrictive warrant-primacy approach was alluded to as early as *De Santis*.<sup>122</sup> In *Belton*, the Court of Appeals neither rejected nor accepted the Supreme Court’s approach expressly; however, it did imply that a warrantless search incident to arrest must be justified by either the need to preserve evidence relating to the crime, or the need to dispel danger.<sup>123</sup>

In *Smith*, the Court of Appeals instructed for the first time that the Federal and New York State warrant requirement provisions are to be measured differently. It implied disagreement with the Supreme Court’s “bright line” reasonableness interpretation by noting

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<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at \*10.

<sup>120</sup> *Id.* at \*11; *see also Smith*, 452 N.E.2d at 1228 (Jasen, J., concurring) (“I perceive no rationale for creating a different standard under the State Constitution than currently exists under the Fourth Amendment to the United States Constitution.”).

<sup>121</sup> *See, e.g., Robinson*, 414 U.S. at 233 (rejecting the D.C. Court of Appeals holding that there must be some justification *other* than the lawful arrest to conduct the search). A lawful arrest is a “reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to arrest requires no additional justification.” *Id.* at 235.

<sup>122</sup> *De Santis*, 385 N.E.2d at 580. While considering *Chadwick*, the court stated, “[u]nder these circumstances, there was no reason whatsoever which would justify a delay of the search until a warrant could be obtained.” *Id.*

<sup>123</sup> *Belton*, 432 N.E.2d at 748.

that the means, which “occasionally [] forbid a reasonable search or permit an unreasonable one,” are justified in the name of efficiency.<sup>124</sup> “The State Constitution, however, has not been read so broadly.”<sup>125</sup> Rather, it has been interpreted to require that the validity of each search be determined on a case-by-case basis in light of the surrounding circumstances.<sup>126</sup> Further, by implementing the exigency requirement, which makes a warrantless search of a closed container invalid unless justified by something more than the arrest, the Court of Appeals adopted the warrant-primacy approach. This approach leaves the “reasonable” determination to a neutral judge, not a law enforcement officer; as a result, it is more restrictive on police activity. The means, which are less efficient or predictable, are justified in the name of heightened constitutional protection.

As a result, New York opted to provide greater protection than the federal approach, a move entirely within the bounds of the “fundamental principle of Federalism.”<sup>127</sup> The Federal Constitution creates “only a base level of protection for individual’s rights and [New York] is free *as a matter of its own law* to impose greater restrictions on police activity.”<sup>128</sup> Pursuant to that authority, New York did just that, with the purpose of providing more protection to individuals.

## VI. PRESENT: HOW WE GOT HERE

The result of New York State’s departure, as the court in *Luna* accurately stated, is a “confusing landscape of decisional law which is difficult to apply.”<sup>129</sup> However, an easy-to-apply approach can be attained without resorting back to the federal approach, which would relinquish New York’s desire to provide heightened protection. In fact, the court in *Smith* intended to do just that, but instead of following *Smith*’s instruction, lower courts challenged it by refusing to accept that higher protection should be afforded. The result has been years of misinterpretation of what we *should have* learned from the Court of Appeals. For these reasons, the criticisms enumerated in

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<sup>124</sup> *Smith*, 452 N.E.2d at 1226.

<sup>125</sup> *Id.* at 1227.

<sup>126</sup> *Id.* at 1226-27.

<sup>127</sup> *Belton*, 432 N.E.2d at 751 (Fuchsberg, J., dissenting).

<sup>128</sup> *Id.* (emphasis added) (internal quotation marks omitted).

<sup>129</sup> *Luna*, 2012 WL 1059392, at \*11.

*Luna* are misguided because they should be aimed at the lower courts for not consistently developing the law handed down by *Smith* and *Gokey* in its intended fashion. However, one cannot blame the court in *Luna* for this mistake; courts had been misinterpreting and misapplying the holdings of *Smith* and *Gokey* long before Antonio Luna ever stepped foot into that New York County Courthouse.

**A. Argument: Reasonable Expectation of Privacy Should not Differ Based on Whether an Item Is in a Container**

*Luna* criticized New York's application of search incident to arrest law because it unreasonably places a higher expectation of privacy in an item simply because of its location within a container.<sup>130</sup> The court displayed strong resistance to the notion that reasonable expectations of privacy differ depending on whether a closed container is involved.<sup>131</sup> This view is in line with *New York v. Belton*,<sup>132</sup> which placed no emphasis on the privacy interest associated with closed containers.<sup>133</sup>

The New York Court of Appeals first shed light on the importance of a container in a search-incident-to-arrest analysis in *De Santis*. The court recognized that a privacy right remains in a container, even after arrest, unless there is a "legitimate governmental interest" in the need for protection of safety or from destruction of evidence.<sup>134</sup> From there, the importance placed on a closed container grew exponentially. In *Smith*, the court stated, "[a]lthough probable cause to [arrest] will justify the search of his person, it will not necessarily justify the search of a container readily accessible to him."<sup>135</sup> By emphasizing the term 'closed container,' the court indicated that an arrestee's privacy interest to be secure from unreasonable searches

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<sup>130</sup> *Id.* at \*8.

<sup>131</sup> *Id.*

<sup>132</sup> 453 U.S. 454 (1981).

<sup>133</sup> *Id.* at 460. Despite the fact that the Supreme Court did not place emphasis on whether a closed container was involved, the New York Court of Appeals on remand advanced the position that there should exist a privacy interest in a container when it stated, "the State Constitution protects the privacy interest of the people . . . not only in their persons, but in their houses, papers and effects as well, against the unfettered discretion of government officials to search or seize." *Belton*, 432 N.E.2d at 746 (emphasis added).

<sup>134</sup> *De Santis*, 385 N.E.2d at 580 ("To be sure, the arrest of [the] defendant, standing alone, did not destroy whatever privacy interests he had in the contents of the suitcase.").

<sup>135</sup> *Smith*, 452 N.E.2d at 1227 (internal citation omitted).

and seizures is distinguishable when it comes to his ‘person’ versus his ‘effects.’

In *Luna*, the court believed the heightened privacy approach “assigns distinctions of constitutional significance . . . to facts which have little relevance to the reasonable expectations of privacy which people rely upon in their daily lives.”<sup>136</sup> This was supported by the theory that an individual does not put something within a container with the intent to provide “an additional layer of privacy.”<sup>137</sup> Rather, items are placed within a container for other reasons.<sup>138</sup> One reason provided was that “[a] person might wrap small objects in paper to shield them from view when they are removed from a pocket.”<sup>139</sup> However, if one puts an item in a container in order to “shield it from view” once that item is removed from a pocket or backpack, would that not indicate the intent to provide “an additional layer of privacy?” At the very least, it demonstrates the intent to keep the contents private from public view.

*Luna*’s argument is persuasive with regard to the other examples given—coins and cigarettes—that *those* items are not put in a container to provide more privacy. However, an approach that places a higher or lower privacy interest on a container depending on what it looks like on the outside would be troublesome. The fact that a person possesses a change purse or cigarette box does not necessarily mean coins or cigarettes are located within that container. A coin purse, in particular, can be used to hold any number of items.

Where there is a heightened privacy interest associated with a closed container, the argument to shift away from the reasonableness approach gains strength. That theory associates a higher invasion of privacy with the initial arrest than it does with the subsequent search. It cannot be disputed that an arrest is intrusive. However, by placing emphasis on the closed container, New York has made clear it finds the invasion of privacy greater when the contents of a closed container are searched than it does, not only when an arrest occurs, but also when a search of the person of the arrestee is conducted.

This belief, that the search is more intrusive than the arrest itself, is not without merit. The search of a closed container found on

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<sup>136</sup> *Luna*, 2012 WL 1059392, at \*8.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* (stating that a container may be used to keep items together, or make them easier to access, or because that is how something is normally sold or kept, for example, cigarettes).

<sup>139</sup> *Id.*

an individual's person has the potential to be immensely intrusive, depending on what an individual decides to carry day-to-day. Societal changes over the past decade have led people to carry more private, personal items on them than they had in the past. Women keep feminine products in small containers. Advancing technology has allowed businessmen to carry volumes of private information and documents on their person. A search of these types of containers, where a person specifically intended to provide an "additional layer of privacy," has the potential to be extremely intrusive and even embarrassing.

The intrusiveness of the search could be greater depending on the circumstances surrounding an arrest. Arrests generally take place in public, and it is not uncommon for an arrestee to be accompanied by others. A search of a closed container in that instance would expose the contents not only to the arresting officer, but also to anyone else close enough to observe what is transpiring. The problem is that the actual contents of a container will never be known until it is opened, at which point the privacy interest has been destroyed, and the bell cannot be un-rung.

### B. Misconception: What Exactly Must Present the Exigency

The arrestee? The circumstances? The container? Looking at lower court decisions, the answer is unclear. According to *Luna*, the arresting officer's behavior can create an exigency.<sup>140</sup> However, *Smith* had already given us the answer.

The heightened privacy interest associated with a closed container can only be overcome by "exigent circumstances, to search *it* for weapons or evidence that otherwise might be destroyed."<sup>141</sup> The court's language provides a reasonable inference that a search may be conducted where: (1) the container is not securely fastened by the police and the arrestee could "quickly reach its *contents*," (2) the actions of the arrestee provide reason to believe he may attempt to reach its *contents*, and (3) the *container* is of a size large enough to hold a

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<sup>140</sup> *Id.* at \*7 ("[Because Detective Macias] placed his arm through Mr. Luna's handcuffed arms to prevent him from escaping[,] Detective Macias was thus in a position where he could easily have been physically assaulted by [Luna] . . .").

<sup>141</sup> *Smith*, 452 N.E.2d at 1227 (emphasis added).

weapon or evidence of the crime.<sup>142</sup> The Appellate Division in *People v. Rosado*<sup>143</sup> made the same point but in more explicit terms. “A search incident to arrest [] may only extend to closed containers within the defendant’s possession or control when there is some reasonable basis for the belief that the *contents of those containers*” present an exigency.<sup>144</sup>

Although case law instructs that the contents must pose the exigency, this must nonetheless be the rule in order for the requirement to stand true to its purpose—that the privacy interest in a closed container can only be overcome by the need to dispel an exigency. Common sense dictates that if a container does not present an exigency, a search of that container will not dispel an exigency. As an illustration, take *Luna*’s assertion that Detective Macias’ safety was at issue because he placed his arms through *Luna*’s handcuffs.<sup>145</sup> Assuming the inquiry was whether an exigency existed, rather than whether the contents posed an exigency, Macias would be justified in searching the cigarette box because it is clear the exposure to physical assault presented an exigent circumstance. But in practical terms, what would a search of the box solve? If Macias’ arms were still through the handcuffs, the exigency would remain even after he flipped open the top of the box. In other words, a search of the cigarette box would, in no way, reduce the risk of physical assault.

### C. Misconception: The Exigency Requirement Is Easily Satisfied

Obviously, the exigency requirements have been applied with different degrees of scrutiny. Some lower courts have applied a strict construction, finding an exigency must be asserted.<sup>146</sup> In contrast, others have allowed an exigency to be inferred by the facts.<sup>147</sup> In

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<sup>142</sup> *Id.* (emphasis added).

<sup>143</sup> 625 N.Y.S.2d 162 (App. Div. 1st Dep’t 1995).

<sup>144</sup> *Id.* (emphasis added)

<sup>145</sup> See *supra* text accompanying note 140.

<sup>146</sup> See *Rosado*, 625 N.Y.S.2d at 162 (finding the requirement unsatisfied because “[n]o one, and most notably not the arresting officer,” suggested the container may hold a weapon or that a search was necessary to preserve evidence). Similarly, in *Evans*, there was no indication of fear by the officer and no assertion of how any potential evidence could have been destroyed. *Evans*, 922 N.Y.S.2d at 405.

<sup>147</sup> See, e.g., *Watkins*, 682 N.Y.S.2d at 40 (finding the exigency requirement satisfied because the search was done in close space and time and the “requisite exigency was readily inferable”).

*Thompson*, the court accepted a blanket assertion that an exigency existed, without analyzing the assertion in light of the facts.<sup>148</sup> In other cases, courts have found the possibility that an exigency might exist sufficient.<sup>149</sup>

However, the decision in *Smith*, through its language and application, implied that the requirements be strictly construed and explained. First, it instructed that the circumstances justifying the search must be considered at the time of the arrest.<sup>150</sup> This indicates that the justification provided can be subject to dispute and must be able to withstand scrutiny. Further, through its relatively lengthy application, the court gave an explanation as to *why* the need to protect officer safety was present,<sup>151</sup> leaving the assertion unchallengeable.

As early as *Gokey*, the Court of Appeals instructed that the reasonableness of an officer's justification for dispensing with the warrant requirement must be judged in light of the circumstances existing at the time of the arrest.<sup>152</sup> By giving instruction on when the reasonableness of the justification must be considered, it would follow that a reason must be given. *Jimenez* added that although "an officer need not affirmatively testify as to the safety concerns" posed by the exigency, the exigency "must be affirmatively demonstrated."<sup>153</sup> There must be a "robust evidentiary showing" to satisfy the search-incident-to-arrest exception.<sup>154</sup>

However, some courts treat the exigency requirement as self-executing and instead focus on the timing of the search.<sup>155</sup> As a result, the requirement becomes a legal fiction because it is, in essence, always satisfied. A closer look at *People v. Wylie*<sup>156</sup> demonstrates how this flawed approach came to fruition.

At the outset, the court implied that the only relevant inquiry was whether the search was done close in space and time, as per *Bel-*

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<sup>148</sup> *Thompson*, 703 N.Y.S.2d at 149 ("[T]he record reveals that the officer had a reasonable fear for his safety and that exigent circumstances remained at the time the box was searched.").

<sup>149</sup> See *supra* note 80 and accompanying text; see also *Wylie*, 666 N.Y.S.2d at 4.

<sup>150</sup> *Smith*, 452 N.E.2d at 1227.

<sup>151</sup> *Id.* at 1227-28.

<sup>152</sup> *Gokey*, 457 N.E.2d at 725.

<sup>153</sup> *Jimenez*, 2014 WL 696481, at \*4.

<sup>154</sup> *Id.* at \*5.

<sup>155</sup> See generally *Wylie*, 666 N.Y.S.2d 1; *Watkins*, 682 N.Y.S.2d 40; *Schobert*, 463 N.Y.S.2d 277; *Baker*, 679 N.Y.S.2d 107.

<sup>156</sup> 666 N.Y.S.2d 1 (App. Div. 1st Dep't 1997).

ton and *De Santis*.<sup>157</sup> It applied the *Belton* rule that a search is valid so long as it “closely follows the arrest” and cited to *De Santis*’ ‘*de minimus*’ rationale in support.<sup>158</sup> The court compared the facts before it with the facts from *De Santis* because the two searches were “materially indistinguishable” and found that the search occurred immediately.<sup>159</sup>

Exigent circumstances were eventually addressed,<sup>160</sup> but not in conformity with the three steps set forth by *Smith*. The third prong, which considers the size of the container, was undisputed because the search involved a plastic bag large enough to conceal a weapon.<sup>161</sup> As to the first prong—whether the arrestee could have accessed the container—the court determined that because the container was not in the exclusive control of the police, the arrestee “easily could have reached for a weapon.”<sup>162</sup> According to this reasoning, the first prong will always be satisfied so long as the container is not within the exclusive control of the police, even if the arrestee has been handcuffed. Regarding the second prong—whether the arrestee’s actions provided reason to believe he may attempt to reach the container—the court never referenced specific, articulable actions undertaken by *Wylie*. Instead, it generally stated,

[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.<sup>163</sup>

After the court established the search was reasonable, it discussed the preservation of evidence prong.<sup>164</sup>

The approach utilized by the court in *Wylie* is misguided for

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<sup>157</sup> *Id.* at 3.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 4. The court alluded to exigencies, without ever actually mentioning the term.

<sup>161</sup> The bag itself was evidence of a theft, so there was reason to believe it may contain further evidence of the crime for which the arrest was based. *Wylie*, 666 N.Y.S.2d at 4.

<sup>162</sup> *Id.* at 4. The defendant argued that despite the close space and time, any exigency was dispelled once he was handcuffed. *Id.* at 3. The court disagreed and cited *De Santis* as the “governing standard,” which asks, “whether the property has been reduced to the ‘exclusive control’ of the police.” *Id.* at 4.

<sup>163</sup> *Id.*

<sup>164</sup> *Wylie*, 666 N.Y.S.2d at 4.

several reasons. First, it failed to abide by the rule of precedent. *Belton* and *De Santis*, although often referred to for background and insight, should not have been cited to for applicable law after *Smith* and *Gokey* because the latter materially distinguished and limited the holdings of the former. Instead, the court in *Wylie* only applied portions of *Smith*—the portions that discussed timing—in combination with *Belton*.<sup>165</sup> As a result, it inaccurately bolstered *Belton*'s 'close space and time' aspect to provide the impression that, because an exigency could remain throughout the process of an arrest, the only real inquiry is whether the search happened immediately. The court in *Wylie* seemed to have missed *Smith*'s instruction that "[t]here must, however, be circumstances at the time of the arrest justifying the search."<sup>166</sup> Therefore, when *Smith* is read as a whole, it provides that when an exigency is present, the subsequent search must be conducted close in space and time. Instead, the court in *Wylie* advanced a drastically different premise, that where a search is done in close space and time, an exigency will always be present.

Under this approach, the exigency requirement is always satisfied, simply because of the hostile nature of an arrest.<sup>167</sup> The court made this point itself by stating, "a determined arrestee may use means other than his hands" to create a danger.<sup>168</sup> It took the position that an arrest is inherently an emergency circumstance, and an arrestee can always pose a threat, even if handcuffed.<sup>169</sup> In turn, this approach also misconstrues what may provide search authority. The court in *Wylie* never explained why the search of the container was immediately necessary, but it instead attempted to use the surrounding circumstances to demonstrate urgency.<sup>170</sup> The misplaced focus here is perplexing because the court devoted a portion of its opinion to discussing the importance of the bag being classified as a 'closed container.'<sup>171</sup>

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<sup>165</sup> *Id.* at 3, 4.

<sup>166</sup> *Smith*, 452 N.E.2d at 1227.

<sup>167</sup> See *Chimel*, 395 U.S. at 773-74 (Harlan, J., concurring) ("An arrest itself may often create an emergency situation . . .").

<sup>168</sup> *Wylie*, 666 N.Y.S.2d at 4.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* The court found a likelihood that the container may contain "further evidence of the crime," but it never explained how that presented the need to search in order to protect the contents from destruction or concealment. *Id.*

<sup>171</sup> On appeal, the People argued that the evidence did not establish the bag was closed or sealed; therefore, the defendant did not have a privacy right in the bag. *Id.* at 2. Although the court agreed, the People had not raised the issue at the suppression hearing and were,

Although the outcome of *Wylie*, which found the search valid, is not contested, the framework applied to reach that conclusion was misguided and could have negative consequences under other circumstances. This new test would allow the exigency requirement to be satisfied across the board, and the only consideration would be whether the search took place in close space and time, a decision that remains entirely with the arresting officer.

## VII. FUTURE: WHERE DO WE GO FROM HERE: A SUGGESTION

The New York Constitution has been interpreted to “require that the reasonableness of each search . . . be determined on the basis of the facts and circumstances of the particular case.”<sup>172</sup> This implies the need for a particularized, case-by-case analysis. In order to remain true to the State Constitution and the Court of Appeal’s desire to afford heightened protection, there is only one option when it comes to bright-line rules: no more bright-line rules. A suggestion on how the framework should be applied is necessary.

Distinction must remain between the search of an arrestee’s ‘person’ and a search of his or her ‘effects.’<sup>173</sup> Therefore, the initial consideration should be whether the intended search involves a closed container found on or within the “immediate control” of the arrestee.<sup>174</sup> If it does not, this framework need not be considered. If it does, *Smith* tells us there is a higher privacy interest involved. Because the search in *Luna* involved a cigarette box, found on Luna’s person at the time of the arrest, the heightened privacy interest applied.<sup>175</sup> From there, two separate requirements must be met: (1) exigent circumstances must be “affirmatively demonstrated;” and (2) the arrest and search must be done contemporaneously.<sup>176</sup>

Exigent circumstances can be demonstrated in one of two ways: as either the need to protect “the safety of the public and the arresting officer”, or as the need to “protect[ ] evidence from destruction or concealment.”<sup>177</sup> The critical question must be whether the

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thus, precluded from raising the issue on appeal. *Wylie*, 666 N.Y.S.2d at 2-3.

<sup>172</sup> *Smith*, 452 N.E.2d at 1226-27.

<sup>173</sup> *Id.* at 1227.

<sup>174</sup> 31 N.Y. JUR. 2D *Criminal Law* § 481 (2014).

<sup>175</sup> *See Allen*, 675 N.Y.S.2d at 486 (“Defendant’s cigarette box was undeniably a closed container in which he had a privacy expectation for constitutional purposes.”).

<sup>176</sup> *Jimenez*, 2014 WL 696481, at \*3, \*4.

<sup>177</sup> *Id.*

*container* or its *contents* present an exigency.<sup>178</sup> In order to satisfy this requirement, there must be an affirmative assertion that an immediate search of the container was necessary, and the reasonableness of that assertion is to be judged at the time of the arrest. Therefore, in *Luna*, the inquiry would end here unless there was a reasonable assertion that the cigarette box posed a threat. Detective Macias admitted that “he looked in the cigarette box to see if there were narcotics inside,” and the court found that there was “a reasonable belief that the cigarette box [ ] might contain narcotics.”<sup>179</sup> Arguably, the fact that the cigarette box might contain narcotics allows the court to consider whether the threat posed by the container amounted to an exigency.

The court should consider first whether the container is large enough to hold a weapon. If it is, consider the crime for which the arrest was made. An arrest based on a violent crime involving a weapon may, by itself, provide the need to search a container.<sup>180</sup> An arrest based on a violent crime not involving a weapon will not provide search authority itself but could increase the need to conduct a search.<sup>181</sup> Where the crime was non-violent, the surrounding circumstances could enhance the need to search.<sup>182</sup> Assuming the container posed a threat to safety, only then should an officer consider the arrestee’s behavior and actions, specifically whether they provide reason to believe the arrestee may attempt to reach the container. If the arrestee demonstrates resistance or does not cooperate with the officer, the need to search would increase. For purposes of analyzing *Luna*, this line of inquiry is irrelevant because although Macias “was initially concerned that [Luna] might be armed,” he did not allege, or even believe, that there might be a weapon inside the cigarette box.<sup>183</sup>

If the container is not large enough to hold a weapon, the fo-

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<sup>178</sup> *Rosado*, 625 N.Y.S.2d at 162; *Hendricks*, 841 N.Y.S.2d at 96-97.

<sup>179</sup> *Luna*, 2012 WL 1059392, at \*3, \*7.

<sup>180</sup> *Jimenez*, 2014 WL 696481, at \*4 (citing *People v. Johnson*, 449 N.Y.S.2d 41, 42 (App. Div. 1st Dep’t 1982) (noting the defendant struck the victim in the head with a gun and threatened to shoot him)).

<sup>181</sup> *See, e.g., Gokey*, 457 N.E.2d at 725 (taking into consideration the fact that the defendant was arrested for two nonviolent crimes).

<sup>182</sup> *See, e.g., Smith*, 452 N.E.2d 1224. Smith was arrested for jumping a subway turnstile without paying the fare and wearing a bulletproof vest. *Id.* at 1225-26. The briefcase Smith had been carrying presented the need for protection of safety, because it was large enough to contain a weapon, and although the defendant’s crime was not one that would be suggestive of a weapon, he was wearing a bulletproof vest, which enhanced suspicion. *Id.* at 1227.

<sup>183</sup> *Luna*, 2012 WL 1059392, at \*3.

cus must switch to preserving evidence. Obviously, the container must be capable of enclosing the evidence sought, and that evidence must, in some way, be connected to the crime for which the defendant was arrested. Otherwise, the arresting officer could simply use the arrest as a basis to conduct an unlimited search in hopes of finding unrelated evidence or more proof of criminality. In *People v. Hendricks*,<sup>184</sup> the court noted that the fact that the arrest took place in a drug-prone apartment alone was insufficient, and because the defendant was arrested for trespassing, it would be “difficult to imagine” what evidence could have existed in connection with that specific crime.<sup>185</sup> In a different opinion, the First Department stated that a search motivated by the arresting officer’s intent to find and retrieve new evidence or contraband, “would be manifestly inadequate as a predicate” to search incident to arrest.<sup>186</sup>

Unlike the arrest for trespass in *Hendricks*, the arrest in *Luna* involved the sale of drugs, and therefore the evidence sought by Macias—the narcotics believed to be inside the container—was connected to the crime for which the arrest was based. However, it can be argued that the container at issue was not large enough to hold the alleged evidence connected to the crime, because Detective Macias admitted “[h]e did not believe that the planned sale of 100 grams of cocaine would fit inside the cigarette box.”<sup>187</sup>

In *People v. Ortiz*,<sup>188</sup> the search of a package found on the arrestee was deemed justified “for the purposes of ‘the protection of evidence from destruction or concealment.’”<sup>189</sup> There, police saw the defendant hide “his drug supply on his person” during an observed sale of drugs.<sup>190</sup> In contrast, *Luna* held the box in his hands throughout the course of the arrest, and therefore made no attempt to hide the container or its contents. Instead, the police in *Luna* merely had reason to believe that he *might* have been concealing something.

In *Allen*, even where the defendant made an attempt to conceal the cigarette box at issue, the search was found improper.<sup>191</sup>

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<sup>184</sup> 841 N.Y.S.2d 94 (App. Div. 1st Dep’t 2007).

<sup>185</sup> *Id.* at 97.

<sup>186</sup> *Rosado*, 625 N.Y.S.2d at 162 (referring to the People’s speculation that the search was motivated by “the arresting officer’s desire to retrieve and safeguard marked buy money”).

<sup>187</sup> *Luna*, 2012 WL 1059392, at \*3.

<sup>188</sup> 593 N.Y.S.2d 6 (App. Div. 1st Dep’t 1993).

<sup>189</sup> *Id.* at 7 (alteration in the original) (quoting *Gokey*, 457 N.E.2d at 725).

<sup>190</sup> *Id.*

<sup>191</sup> *Allen*, 675 N.Y.S.2d at 483, 486.

Similar to *Luna*, the “small and innocuous” container could not have presented a concern for safety, and the defendant was handcuffed when the search was conducted.<sup>192</sup> “Under [those] circumstances, the record must demonstrate that despite the compelling restraint of handcuffs, [the] defendant retained the capacity to destroy whatever evidence was contained in the cigarette box.”<sup>193</sup> In *Luna*, the court argued that despite being handcuffed, “the [d]efendant could easily have taken steps to destroy or conceal the contents of the cigarette box” because the container was not in the exclusive control of the police.<sup>194</sup> Therefore, the court attempted to use the non-exclusivity in order to establish the exigency requirement. This blanket assertion is identical to that made in *Wylie*,<sup>195</sup> which cannot be deemed sufficient. Further, there was no indication how, or even if, Luna would have been able to destroy the evidence despite the “compelling restraint” of the handcuffs.<sup>196</sup>

The case most comparable to *Luna* is *Rosado*, which involved the search of a “little change pouch.”<sup>197</sup> The small container was found on the defendant’s person, and there was no suggestion that the container concealed a weapon.<sup>198</sup> In *Rosado*, despite the drug-related arrest, the arresting officer admitted that he had not been given any indication that Rosado would have drugs on his person.<sup>199</sup> Because the coin purse did not pose an exigency, the court found the search invalid.<sup>200</sup> Similarly, despite the fact that Luna was arrested for his alleged participation in a drug transaction, Macias had not received any indication that Luna would have drugs on him. In fact, Macias did not know Luna had any involvement in the transaction whatsoever until Luna knocked on the window of the undercover vehicle.<sup>201</sup> Therefore, despite the drug-related arrest, it is undisputable that the circumstances in *Luna* did not objectively lead Macias to believe Luna had drugs on his person, let alone in his pack of cigarettes.

Assuming the exigency prong is satisfied, the court should

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<sup>192</sup> *Id.* at 486; *Luna*, 2012 WL 1059392, at \*3.

<sup>193</sup> *Allen*, 675 N.Y.S.2d at 486.

<sup>194</sup> *Luna*, 2012 WL 1059392, at \*7.

<sup>195</sup> *See infra* part VI, section C.

<sup>196</sup> *Luna*, 2012 WL 1059392, at \*7.

<sup>197</sup> *Rosado*, 625 N.Y.S.2d at 162.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Luna*, 2012 WL 1059392, at \*2.

then consider the “spatial and temporal limitations.”<sup>202</sup> The timing aspect must be an absolute requirement because if a search is not done within a short time from the arrest, there is, by definition, no exigency.<sup>203</sup> If an officer holds onto a container for a prolonged period of time without opening it, his or her own actions would indicate that there was no exigent threat. In *Luna*, the record indicated that the search of the cigarette box was done in close space and time to the arrest because Macias took only a few steps before looking into the box and only a matter of moments had passed.<sup>204</sup>

Under the search-incident-to-arrest exception to the warrant requirement, a search is no longer ‘incident to arrest’ when the container is within the exclusive control of the police.<sup>205</sup> Therefore, even where a container presents an exigency, if it is no longer accessible by the arrestee, it does not fall within the exception because “there [is] absolutely no reason” to justify an immediate search without first obtaining a warrant.<sup>206</sup> In making this determination, courts have considered whether the scene of the arrest was secured, taking into account the number of officers present.<sup>207</sup>

In reaching its decision, the court in *Luna* mentioned that at the time of arrest, Luna and the arresting officer were alone on the street.<sup>208</sup> However, the court immediately noted that the defendant and detective were not, in fact, alone on the street, as there was an undercover officer in a vehicle close by.<sup>209</sup> Therefore, it was merely *as far as the defendant was aware* that the two were alone on the street. Additionally, it could be argued that the container was not in the exclusive control of the police because Luna held the box in his hands at the time he was handcuffed and arrested. However, Detective Macias conceded on cross-examination that because he patted down and handcuffed Luna, and “had possession of the cigarette box,” Macias had control of the container so that Luna could not ac-

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<sup>202</sup> *Jimenez*, 2014 WL 696481, at \*3.

<sup>203</sup> *Exigent Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/exigent?show=0&t=1398549048> (last visited May 2, 2014) (defining exigent as “requiring immediate aid or action”).

<sup>204</sup> *Luna*, 2012 WL 1059392, at \*7-8.

<sup>205</sup> 31 N.Y. JUR. 2D *Criminal Law* § 481 (2014).

<sup>206</sup> *Rosado*, 625 N.Y.S.2d at 162; *Hendricks*, 841 N.Y.S.2d at 97.

<sup>207</sup> *Wylie*, 666 N.Y.S.2d at 4.

<sup>208</sup> *Luna*, 2012 WL 1059392, at \*7.

<sup>209</sup> *Id.*

cess it or destroy its contents.<sup>210</sup> Therefore, at that point, when Luna could no longer destroy any potential evidence and Detective Macias was in possession of the cigarette box, there was absolutely no reason a warrant could not have first been obtained before the search was conducted.

Under the suggested approach, the facts in *Luna* demonstrate that the search was impermissible. Although the search was done in close space and time, neither the cigarette box nor its contents posed an exigency. Detective Macias admitted he did not believe that Luna had a weapon or the 100 grams of cocaine in the cigarette box.<sup>211</sup> Further, not only did Detective Macias have no indication that Luna had drugs on his person, he did not even know who Luna was at the time of the arrest.<sup>212</sup> Even if it were found that an exigency had existed, at the moment Macias gained exclusive possession of the cigarette box, that exigency was dispelled. Thus, it was entirely possible for Macias to delay the search until a warrant was procured. For these reasons, the search of the cigarette box in *Luna* should have been found to be invalid.

#### VIII. FUTURE IMPLICATIONS OF PROPOSED FRAMEWORK

To be clear, the suggested approach will not reduce an officer's ability to protect him or herself from danger. Where a container is large enough to hold a weapon, and the surrounding circumstances indicate a need for protection, an officer may undoubtedly conduct a search incident to arrest for protection. Therefore, the proposed rule maintains an officer's discretion to search a container posing a threat to safety, but reduces the officer's discretion when it comes to searching smaller, seemingly harmless containers.

The proposed rule affords individuals with insight as to the extent of their protection. The rule provides that surrounding circumstances may be considered, and no one factor will be dispositive; this indicates a sliding scale where privacy can either be reduced or maintained. If an individual commits a violent crime and has a container large enough to hold a weapon, it will likely be searched. If an individual resists arrest or does not cooperate with the officer, the likelihood of a search increases. If the container on an individual's person

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<sup>210</sup> *Id.* at \*3.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at \*2.

is large enough to hold further evidence of the crime for which he or she was arrested, the possibility of the search increases.

A final consideration to take into account is how the different search-incident-to-arrest approaches will fare with evolving technology. For the most part, ‘closed container’ cases have arisen in the context of purses, paper bags, wallets, and cigarette boxes. What if, instead of carrying a cigarette box in his front coat pocket, Antonio Luna was carrying a cell phone or a digital camera? How much search authority for police would be desirable in that closed container situation?

New York has not specifically addressed the issue of whether a cell phone may be searched pursuant to the search-incident-to-arrest exception. However, federal courts have, and the circuits have been split. The Fifth Circuit found the search of a cell phone, including text messages, could be searched as incident to arrest.<sup>213</sup> The Fourth, Seventh, and Tenth Circuits agreed.<sup>214</sup> The First Circuit reached the opposite conclusion, finding a search of cell phone data invalid as incident to arrest.<sup>215</sup> The Eleventh Circuit has declined to address the issue.<sup>216</sup>

Speculating how search incident to arrest jurisprudence will evolve in response to advancing technology may make one hesitant before giving more power to the police to search and impede on individual privacy. Now, more than ever, individuals carry an immense amount of private and personal information in their pockets every time they walk out their front door. Caution should be exercised before instituting a “bright-line” rule that provides the police with unqualified search authority upon arrest. Rather, it is imperative that a framework be adopted that is flexible enough to emerge with chang-

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<sup>213</sup> *United States v. Curtis*, 635 F.3d 704, 711-12 (5th Cir. 2011) (citing *United States v. Finley*, 477 F.3d 250, 259-60 (5th Cir. 2007)).

<sup>214</sup> *Id.* at 712.

<sup>215</sup> *United States v. Wurie*, 728 F.3d 1, 13 (1st Cir. 2013) (“[the court was not convinced] that such a search is ever necessary to protect arresting officers or preserve destructible evidence.”). Thus, it appears the court applied a framework more akin to the New York approach than the traditional Federal approach allowing an unqualified search authority. *Id.* It did so by strictly construing the justifications put forth in *Chimel* that allowed for the search-incident-to-arrest exception. *Id.*

<sup>216</sup> *United States v. Chaidez-Reyes*, 1:13-CR-158-ODE-AJB, 2014 WL 547178, at \*11 (N.D. Ga. Feb. 10, 2014) (quoting *United States v. Allen*, 416 F. App’x 21, 27 (11th Cir. 2011) (“It is a fairly difficult question, however, it also is a question that we need not answer today.”)).

ing times.<sup>217</sup> The further courts move towards a broad scope and expansive police discretion when applying this exception, the less value the Fourth Amendment has to an individual's right to be free from unreasonable searches and seizures.

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<sup>217</sup> *United States v. Olmstead*, 277 U.S. 438, 472 (1928) (Brandeis, J., dissenting) (“Clauses guaranteeing to the individual protection against specific abuses of power, must have [the] capacity of adaption to a changing world.”).

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