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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 23

JOSEFINA JIMENEZ,

Appellant.

20 Eagle Street
Albany, New York 12207
January 15, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 23, People v.
2 Jimenez?

3 Counsel, you'd like any rebuttal time?

4 MR. JOSELSON: Yes, Judge. May I have one
5 minute in rebuttal, please?

6 CHIEF JUDGE LIPPMAN: One minute, go ahead.

7 MR. JOSELSON: May it please the court,
8 Richard Joselson for appellant Josefina Jimenez.

9 To sustain the warrantless search of
10 appellant's pocketbook in this case, the People had
11 to show two things. First they had to show that the
12 police had a reasonable belief that the pocketbook
13 contained a weapon or evidence of criminal trespass.

14 Second, they had to show that at the time
15 of the search, and not earlier at the time of the
16 arrest, but at the time of the search, appellant was
17 both unsecured and within reaching distance of the
18 pocketbook.

19 JUDGE ABDUS-SALAAM: Counsel, could you - -
20 -

21 MR. JOSELSON: And I think on this record,
22 Judge, they failed to make both of those showings.

23 JUDGE ABDUS-SALAAM: So are you saying that
24 the search and the arrest were so separate that they
25 couldn't have been contemporaneous, as Judge - - -

1 Justice Clark determined when she did the suppression
2 hearing?

3 MR. JOSELSON: I - - - I think
4 contemporaneity is only one issue here and it's not
5 enough. I'll concede that the arrest and the search
6 were essentially contemporaneous, but - - - but
7 there's more required here. There - - - Gokey and
8 Smith require exigency in addition. Exigency - - -

9 CHIEF JUDGE LIPPMAN: So why wasn't there
10 exigency here?

11 MR. JOSELSON: Well, first of all, there
12 was no reason to believe - - - there was no - - - the
13 police did not have - - -

14 CHIEF JUDGE LIPPMAN: But wasn't - - -
15 didn't the landlord look sideways at them, and - - -

16 MR. JOSELSON: Yeah, there was absolutely -
17 - -

18 CHIEF JUDGE LIPPMAN: - - - and there was
19 the report of these - - - of something going on in
20 the building.

21 MR. JOSELSON: There was - - - there was -
22 - -

23 CHIEF JUDGE LIPPMAN: Why weren't those
24 things enough to categorize - - -

25 MR. JOSELSON: There was - - -

1 CHIEF JUDGE LIPPMAN: - - - to qualify as
2 exigency?

3 MR. JOELSON: There was probable cause to
4 arrest her for the nonviolent misdemeanor offense of
5 criminal trespassing.

6 CHIEF JUDGE LIPPMAN: What about he says
7 the bag looked heavy and all of the other things?

8 MR. JOELSON: What - - - what they come -
9 - - this - - - this is what we here. We have an
10 arrest for a nonviolent misdemeanor offense.

11 CHIEF JUDGE LIPPMAN: Okay.

12 MR. JOELSON: We have a defendant who is
13 completely cooperative with the arrest procedures.

14 JUDGE PIGOTT: Let's go back to the
15 nonviolent. I mean, that - - - there was a call of a
16 possible burglary in process, right?

17 MR. JOELSON: Okay.

18 JUDGE PIGOTT: So I mean, even though
19 ultimately it turned into a trespass, at the time
20 they were - - - go ahead.

21 MR. JOELSON: Not one of the police
22 officers who've testified in this case ever testified
23 that they suspected Ms. Jimenez of participation or
24 connection to that burglary.

25 JUDGE SMITH: Yeah, but it - - -

1 JUDGE GRAFFEO: No, but their answers were
2 a little suspicious. I mean, she said they were
3 visiting somebody, but she couldn't give the name or
4 the apartment - - -

5 MR. JOSELSON: There - - -

6 JUDGE GRAFFEO: - - - number, so - - -

7 MR. JOSELSON: There was probable cause to
8 arrest her for trespass. My point here is that
9 there's no connection to this burglary - - -

10 JUDGE SMITH: I mean, the burglary of the -
11 - -

12 MR. JOSELSON: - - - off on the fifth floor
13 apart - - -

14 JUDGE SMITH: The burglary report was two
15 men, wasn't it?

16 MR. JOSELSON: Two men, exactly. Two men.
17 That - - - the two men who were between five-nine and
18 eleven. She's a woman, obviously. Her companion was
19 five-foot-two. She's not connected to this burglary.
20 And they never said that they thought that she was.

21 So we do have the nonviolent misdemeanor.
22 We have a defendant who was completely cooperating
23 with arrest procedures. She's not struggling. She's
24 not trying to flee.

25 JUDGE GRAFFEO: But - - - but the - - -

1 MR. JOSELSON: She's not holding on - - -

2 JUDGE GRAFFEO: But the handbag - - - the
3 handbag was on the floor near her, correct?

4 MR. JOSELSON: Well, it's a - - - she
5 relinquishes her pocketbook to Officer Pagan.
6 Officer Pagan puts the pocketbook on the floor. She
7 frisks appellant's person. She cooperates in the
8 frisk. She finds nothing. She handcuffs appellant,
9 she testifies. And then after that, she goes back
10 down, picks up the bag, searches the bag.

11 CHIEF JUDGE LIPPMAN: What - - - what - - -

12 JUDGE ABDUS-SALAAM: Is there anything in
13 the record, counsel, that suggests that the bag was
14 closed or zipped or open or anything - - -

15 MR. JOSELSON: What's not in the record is
16 any allegation that this was not a search incident to
17 an arrest. There's no claim that this was in plain
18 view. That this popped open. They did not litigate
19 the case like that.

20 CHIEF JUDGE LIPPMAN: Counsel, what - - -
21 what cases do you view as controlling today, in terms
22 of this issue in the search?

23 MR. JOSELSON: I think - - - I think there
24 are a couple of things going on here. I think - - -

25 CHIEF JUDGE LIPPMAN: Go ahead. Let's hear

1 it.

2 MR. JOSELSON: I think - - - as to the
3 exigency, as to the reasonable belief that - - - that
4 the pocketbook contained a weapon, because that's
5 what we're talking about here; we're not talking
6 about evidence of trespass - - - then the controlling
7 cases are Gokey and Smith, which are these court - -
8 - this court's state constitutional cases. I think
9 those cases continue to control the state
10 constitutionality - - -

11 JUDGE GRAFFEO: What about the heaviness of
12 the bag? Could that be related to the safety - - -

13 MR. JOSELSON: Well - - -

14 JUDGE GRAFFEO: - - - of the officers?
15 Could they - - -

16 MR. JOSELSON: First of all, the only off -
17 - -

18 JUDGE GRAFFEO: - - - think there was
19 something in there?

20 MR. JOSELSON: The only officer who
21 testifies that the bag "looked heavy" had not touched
22 the bag at the time that he testified that. The
23 officer who actually did the search, who - - - who
24 handled the bag at that time, she never testified
25 that the bag felt heavy, and - - - but - - - but

1 let's - - - let's say that a pocketbook was heavy.
2 That - - - that's essentially what this case comes
3 down to on the exigency - - - on the reasonable
4 belief part of it.

5 CHIEF JUDGE LIPPMAN: So what do the cases
6 say?

7 MR. JOSELSON: The cases say that more is
8 required. What do we have? We have the - - - the
9 controlling cases. Smith, we have a defendant
10 arrested for a nonviolent offense. But the key
11 factor in this case - - - in that case, is the
12 defendant is wearing a bulletproof vest, and then he
13 lies about it. So that's Smith. That's much
14 different than the pocketbook was heavy.

15 Then we have the - - - the court's case,
16 Johnson. Before the police encountered the
17 defendant, they encountered a citizen who told them
18 that the defendant had just accosted him at gunpoint.
19 Well, that's a very different kind of case. Even - -
20 - even Bowden, which is a case from this court, that
21 the court actually didn't decide on the merits. That
22 was a case where before the search occurred, they
23 felt the outline of a gun in the bag, so certainly
24 the reasonable belief was satisfied here.

25 Here we have the pocketbook was big enough,

1 and it was heavy. Every - - - or - - - okay, almost
2 every pocketbook, knapsack, backpack, briefcase, that
3 people in New York are walking around with could be
4 large enough or heavy enough to carry a weapon. And
5 if that satisfies the state constitutional standard,
6 then I - - - I really don't know what the exigency
7 piece of this is. But - - -

8 JUDGE READ: Do you want to talk about the
9 jurors for a while, before you run out of time?

10 MR. JOSELSON: Sure, I could do that,
11 Judge. There are two jurors here with regard to the
12 challenge for cause issue. And - - - and - - - and
13 the issue with regard to those jurors was this. They
14 were posed a hypothetical, in which they were asked,
15 could they - - - could they credit the uncorroborated
16 testimony of an accused or would they need more than
17 that?

18 And two of the jurors - - - the two jurors
19 at issue here - - - both said that they would want
20 more, that they would need more. In fact - - - and
21 the judge recognized correctly that that was a
22 problem. And - - - and - - - and she - - - she said,
23 oh, wait, it's the - - - it's the quality, not the
24 quantity, and you need to understand that. And with
25 regard to a number of the jurors who would have that

1 problem - - -

2 JUDGE READ: So the judge did everything
3 right up to that point?

4 MR. JOSELSON: Up until that point that - -
5 - and that cured it, with - - - some of the jurors
6 absolutely, they said, fine, no problem. With regard
7 to these two jurors, it - - - you know, they said
8 some things, but they never unequivocally stated.
9 One of them said, no, I - - - I'd still need more
10 than one. One of - - - one of them says, first - - -
11 first he says, it - - - it depends. If he would have
12 left it there, it might - - - it would have been
13 okay. But then he said, no, I - - - I would still -
14 - - I - - -

15 CHIEF JUDGE LIPPMAN: What's the judge's
16 obligation at that point?

17 MR. JOSELSON: The judge could have done a
18 couple of things. The judge - - - what the judge
19 probably should have done is just excuse those two
20 jurors. They - - - you know, they would have picked
21 two other jurors. No harm done. If the judge wanted
22 to try to salvage these jurors, she certainly had the
23 option to do - - -

24 CHIEF JUDGE LIPPMAN: What should she had
25 said to salvage the jurors?

1 MR. JOSELSON: She should have said to them
2 in no uncertain terms, look, it's the quality of the
3 evidence and not the quantity of the evidence.

4 JUDGE PIGOTT: Well, couldn't she had said,
5 those were improper questions? I mean, you're
6 getting into evidentiary issues that are not proper
7 for selecting of a jury - - -

8 MR. JOSELSON: Well, I don't think - - -

9 JUDGE PIGOTT: - - - and it's my province,
10 Mr. - - - Mr. Counsel, to give them their
11 instructions, and I will ask them now if they can
12 follow the instructions of the court, with respect to
13 corroboration and so on.

14 MR. JOSELSON: But - - - but - - - but
15 that's - - - that's actually not - - - not the way it
16 - - -

17 JUDGE SMITH: Can I - - - I mean, I - - -
18 didn't - - - at page 97 of the record, the court,
19 "It's not" - - - "not the quantity of the evidence;
20 it's the quality of the evidence". Isn't - - - isn't
21 that what you say he - - - she was supposed to say?

22 MR. JOSELSON: She absolutely was supposed
23 to say that, but there was colloquy after that with
24 regard to two of these jurors and they said even
25 after that, no, I would still need more - - -

1 JUDGE ABDUS-SALAAM: But the question that
2 was asked of - - - the hypothetical, I couldn't even
3 understand it. I'm not sure how I would answered if
4 - - - if something was not a crime two minutes ago,
5 and then you went out in a black shirt or something.
6 That - - - that made no sense. It had nothing to do
7 with the case.

8 MR. JOSELSON: But these jurors - - - well,
9 I actually think it didn't have nothing to do with
10 the case, because let's face it, in this case, it
11 could have been tried as a case where the defendant
12 testified and testified that she lacked the requisite
13 knowledge. She didn't know the gun was there. And
14 there would not have been corroboration of that. So
15 this was not something that was - - -

16 JUDGE ABDUS-SALAAM: She didn't know the
17 gun was in her purse?

18 MR. JOSELSON: Well, that - - - if that was
19 - - - that was that the defense, right? I mean,
20 that's - - - the gun was in her purse, so the defense
21 was knowledge.

22 JUDGE ABDUS-SALAAM: Even so, the question
23 was something about something not being a crime
24 before you go out of your house, and then afterwards
25 you find out it's a crime, which doesn't - - -

1 MR. JOSELSON: Well, I mean, the - - -

2 JUDGE ABDUS-SALAAM: - - - make sense.

3 MR. JOSELSON: The hypothetical started
4 with the prosecutor. It was the defense lawyer who
5 then continued with it. The jurors had this
6 discussion with regard to these two jurors, as
7 opposed to some of the others; I think they were not
8 properly cured.

9 CHIEF JUDGE LIPPMAN: Okay, counsel.

10 MR. JOSELSON: I - - -

11 CHIEF JUDGE LIPPMAN: You'll have your
12 rebuttal. Let's hear from your adversary.

13 MR. JOSELSON: Thank you.

14 MR. CHAMOY: May it please the court, Noah
15 Chamoy for the People.

16 CHIEF JUDGE LIPPMAN: Counsel, what was the
17 exigency here?

18 MR. CHAMOY: The exigency was a combination
19 of circumstances - - -

20 CHIEF JUDGE LIPPMAN: But what were the - -
21 -

22 MR. CHAMOY: - - - leading to the arrest.

23 CHIEF JUDGE LIPPMAN: - - - list of the
24 couple of the combination.

25 MR. CHAMOY: Okay, first it was not an

1 anonymous phone call. It was actually an identified
2 caller saying there was a burglary in progress at
3 that location, a resident.

4 JUDGE SMITH: But is there anything to
5 indicate that the officers thought these two people
6 were the burglars?

7 MR. CHAMOY: Yes, there is. Sergeant
8 Manzari at the time that they stopped these two
9 individuals said that he took actions for personal
10 safety regarding the individuals who were present,
11 including the superintendent, to - - - to get them
12 away from the defendant.

13 JUDGE SMITH: So - - - so we - - - we're -
14 - - from his saying I was concerned for my safety, we
15 should infer that he thought they were the burglars.

16 MR. CHAMOY: That they weren't just there
17 for trespass.

18 CHIEF JUDGE LIPPMAN: She didn't fit the
19 description, though, of the burglars, right?

20 MR. CHAMOY: Your Honor, the - - -

21 CHIEF JUDGE LIPPMAN: What would be the
22 basis to think she did it?

23 JUDGE GRAFFEO: Neither one of them fit the
24 description, did they?

25 MR. CHAMOY: Your Honor, the description is

1 actually an issue that's not really reviewable here
2 for a number of reasons. First off, it wasn't
3 brought up at the time that he originally had the
4 description, which was at the hearing. This is
5 brought up on a motion to reopen. He had the
6 description at the hearing; and we know this, because
7 he cross-examined the witnesses with the description,
8 and they just couldn't remember it.

9 CHIEF JUDGE LIPPMAN: Well, we're talking
10 about the fact is it did lead them to the conclusion,
11 or lead to an exigent - - - an exigency, at least, in
12 their minds. So go on, what were the fact - - -

13 MR. CHAMOY: I - - -

14 CHIEF JUDGE LIPPMAN: What were the other
15 facts?

16 MR. CHAMOY: Okay, as far as the other
17 facts. Okay, so now they have - - - they go into the
18 building. They've confirmed no one can get out from
19 the rear of the building. So they - - - they're
20 there within minutes. They see these two individuals
21 - - -

22 CHIEF JUDGE LIPPMAN: How many of them are
23 there?

24 MR. CHAMOY: What? At that point, there
25 are only two or three officers on the scene. At that

1 point - - -

2 CHIEF JUDGE LIPPMAN: And then there are
3 more later, right?

4 MR. CHAMOY: There are more later. At that
5 point, the defendant and this codefendant, Alberto
6 Sanchez, come down the stairs. The superintendent is
7 behind them frantically gesturing. And the trial
8 record says that gesturing was like this - - - stop
9 it, stop them, stop them - - - signaling to them that
10 there's something going on with these individuals.
11 And that something in this case is a connection to
12 the burglary they're investigating.

13 JUDGE SMITH: Well, wait - - - but if the
14 trial record says that. That doesn't help you on the
15 suppression, does it?

16 MR. CHAMOY: Except that at the suppression
17 hearing there was also the same testimony. It just
18 didn't describe it as the hand gestures instead.

19 JUDGE SMITH: Does it say - - - does it say
20 "frantically"?

21 MR. CHAMOY: It says that she gestured.
22 She made a facial gesture, distinct and pointed at
23 them, and that signal that they needed to stop those
24 individuals. That was at the hearing.

25 JUDGE SMITH: So - - - so - - - the

1 suppression record is that - - - is that the
2 superintendent pointed out the - - - the people to
3 the officers.

4 MR. CHAMOY: And - - - yes, and made a face
5 that signaled to the officers.

6 CHIEF JUDGE LIPPMAN: So what else do you
7 have? That in and of itself is not enough, right?

8 MR. CHAMOY: So now you have that as the
9 suppression testimony and them stopping them. So at
10 this point, they have in their minds that these
11 people may have something to do with the burglary.
12 At that point, it's lie after lie - - -

13 JUDGE SMITH: Do they ever say that?

14 MR. CHAMOY: - - - after lie. Excuse me?

15 JUDGE SMITH: Do they ever say that? That
16 we had in our minds that these people had something
17 to do with the burglary?

18 MR. CHAMOY: Your Honor, they didn't say
19 that, but they don't have to say that under this
20 court's established precedent, and as a matter of
21 common sense, we can use circumstantial evidence to
22 come to the conclusion that this is actually what is
23 happening.

24 JUDGE PIGOTT: Well, they asked him what -
25 - - they asked them what they were doing in the

1 building?

2 MR. CHAMOY: Yes, they asked them what they
3 were doing in the building. And - - - and the
4 defendant lied repeatedly about what they were doing
5 in the building, which happens to be one of the
6 elements of burglary, is the trespass. And that is
7 more than enough, and the trial court actually found
8 that's - - -

9 JUDGE SMITH: I mean, I - - - I - - - I can
10 understand why they - - - I mean, not only that they
11 thought she was - - - they were trespassing, but that
12 they probably weren't trespassing just - - - just as
13 tourists. That they were up to no good. But why
14 couldn't they have been perfectly harmless drug
15 dealers?

16 MR. CHAMOY: Well, in this case, the - - -
17 the police didn't have to make that conclusion.

18 JUDGE SMITH: Well, don't they - - - but
19 don't they have a basis for suspecting, not only that
20 they're up to no good, but they - - - that they could
21 be violent?

22 MR. CHAMOY: Well - - -

23 JUDGE SMITH: I mean, can - - - are you
24 saying that every trespasser in a building - - - in a
25 building like this is presumptively violent?

1 MR. CHAMOY: No, but burglars in a building
2 where residents are at home and they're doing at - -
3 -

4 CHIEF JUDGE LIPPMAN: Yeah, yeah, but
5 they're not burglars yet, right?

6 MR. CHAMOY: Correct, but this is an
7 investigation into it. The standard here is not the
8 - - - we have to establish probable cause.

9 CHIEF JUDGE LIPPMAN: You're - - - you're -
10 - - you're assuming they had in their minds they may
11 be burglars. There's not too much to connect them.
12 But what - - - what next shows you that - - - that
13 maybe they could be violent?

14 MR. CHAMOY: Well - - -

15 CHIEF JUDGE LIPPMAN: What happens now that
16 - - -

17 MR. CHAMOY: What happens now - - -

18 CHIEF JUDGE LIPPMAN: Yes.

19 MR. CHAMOY: - - - at the hearing and at
20 the trial testimony are different. But both of them
21 show that there is a reason to believe that there
22 might be something in the bag.

23 CHIEF JUDGE LIPPMAN: What is it, yeah?

24 MR. CHAMOY: Here, in - - - with regard to
25 the - - - the hearing testimony, it was the officer

1 took the bag off of her shoulder. Immediately the -
2 - - another officer noticed that she was feeling it
3 for weight, felt that there was something there.
4 Went, and just went like this, and there's the
5 weapon, immediately.

6 JUDGE ABDUS-SALAAM: What do you mean,
7 "went just like this"? Was the bag already opened,
8 unzipped, something?

9 MR. CHAMOY: Well - - -

10 JUDGE ABDUS-SALAAM: I'm unclear on this.

11 MR. CHAMOY: I - - - I can tell you from
12 the trial testimony - - - from what happened at trial
13 and the evidence at trial, that - - - what the purse
14 is, but there was nothing in - - - in the hearing, to
15 be clear, regarding what the purse looked like. The
16 purse only had a magnetic clip, one that you just
17 touch, and it pulls right apart. As far - - - and
18 that - - - that purse was in evidence at trial.

19 Now, as far as the trial testimony of
20 Officer Pagan, there was a even stronger evidence,
21 actually, which is why the motion to reopen was
22 almost - - - should have been reversed, which is, she
23 said that the moment she went to arrest her for
24 trespass, the defendant held the bag tightly to her
25 arm. In other words, she didn't - - -

1 JUDGE SMITH: But the - - - the - - - the
2 reopening, as I understand, was based on the theory
3 that at trial, it seemed that they had handcuff - - -
4 that - - - that - - - she testified that she
5 handcuffed her first and then did the search. You're
6 saying that's immaterial under Smith?

7 MR. CHAMOY: I'm saying that's absolutely
8 immaterial under Smith, under Johnson, and under - -
9 - even the Supreme Court precedent that - - - that's
10 being cited. Handcuffing alone has never been found
11 to be sufficient to say that someone's secure and
12 there's no possibility - - -

13 JUDGE SMITH: Well, is that be - - - is
14 that because - - - is that because the search is
15 tested as of the moment of the arrest, or is it
16 because the handcuffs aren't foolproof?

17 MR. CHAMOY: Well, it's because, regardless
18 of how you look at it, whether it's at the time of
19 the search or the time of the arrest - - -

20 CHIEF JUDGE LIPPMAN: Yeah, but the moment
21 - - - in light of the precedent, like you said - - -

22 MR. CHAMOY: Yes.

23 CHIEF JUDGE LIPPMAN: - - - the Supreme
24 Court precedent, don't we look at the moment of the
25 search now? Isn't that what we're looking at?

1 MR. CHAMOY: Well, in this case, that's a
2 forfeited issue. That's not even legally presented
3 below.

4 JUDGE SMITH: But what if it weren't for
5 the - - -

6 MR. CHAMOY: But assuming for a moment that
7 it was presented, this is not the right case to be
8 considering this issue, because this doesn't present
9 any facts that would allow you to come to the
10 conclusion - - -

11 JUDGE SMITH: Well, well, are you - - - are
12 you - - -

13 MR. CHAMOY: - - - that this individual was
14 secure.

15 JUDGE SMITH: Are you implicitly conceding
16 that under - - - under Arizona v. Gant, you're
17 supposed to look at the moment of the search and not
18 the moment of the arrest?

19 MR. CHAMOY: Under Ariz v. - - - excuse me
20 - - - under Arizona v. Gant, the plurality of four
21 judges found that you should look at the moment of
22 the search.

23 JUDGE SMITH: Well, yeah, but isn't that
24 limited - - - isn't that limited to cars?

25 MR. CHAMOY: It's limited to cars, and not

1 only that - - -

2 CHIEF JUDGE LIPPMAN: But what about Chimel
3 or whatever the name of it is?

4 MR. CHAMOY: Yes, but not only that - - -

5 CHIEF JUDGE LIPPMAN: That - - - that was
6 not limited to cars, right?

7 MR. CHAMOY: Correct, but that never made
8 that - - - the - - - Chimel and Chadwick which are
9 the Supreme Court cases this court should look at,
10 actually are the basis for Gokey. They're the basis
11 for - - -

12 JUDGE PIGOTT: Let - - - let me ask you
13 about Gokey. I had - - - you know, he - - - the - -
14 - the - - - the suppressing hearing judge walked
15 through DeBour, and then - - - and then said that
16 "two interests that would justify the warrantless
17 search exist here, one, safety, and one, preservation
18 of evidence", cite - - - citing Gokey. Is that the
19 proper way to do this? I mean, don't you have to
20 pick one? I mean, isn't there a reason why the
21 officers do stuff and you have to make sure that that
22 reason applies? You can't use a smorgasbord to say,
23 well, they must have had some reason. It could have
24 been this; it could have been this; it could have
25 been this.

1 MR. CHAMOY: Well, not necessarily, because
2 there are times when it could be evidence; it could
3 be a weapon.

4 JUDGE PIGOTT: Right.

5 MR. CHAMOY: In this case, it was more
6 likely to be a weapon, and that's what the officer's
7 concerns were. That was the personal safety aspect
8 of it and everything.

9 JUDGE PIGOTT: So we should just ignore his
10 - - - or the finding that it could have been for the
11 preservation of evidence? It's speculative.

12 MR. CHAMOY: Well, it's not a question of
13 ignoring the finding. It's an understanding that
14 because it was an investigation of burglary, there's
15 the possibility that there could have been burglar's
16 tools; there could have been burglary, you know - - -

17 JUDGE PIGOTT: But was that - - - can you
18 do that as a - - -

19 MR. CHAMOY: Yeah - - -

20 JUDGE PIGOTT: - - - as a judge at the
21 suppression, saying, I don't know why they did this,
22 but I can - - - I can guess.

23 MR. CHAMOY: Well, the judge didn't say I
24 don't know why they did this. The judge was more so
25 - - -

1 JUDGE PIGOTT: I'm saying that. I'm saying

2 - - -

3 MR. CHAMOY: Yeah, I understand.

4 JUDGE PIGOTT: - - - can we do that?

5 MR. CHAMOY: Well, it - - - it - - - that
6 goes back to my adversary's argument that - - - that
7 he believes that you need probable cause to know what
8 was in that bag, like in Johnson, where he said, the
9 person was shooting a gun, and so they went and
10 assumed there was a gun in the bag. But that's never
11 been the standard.

12 JUDGE PIGOTT: No, I was just wondering if
13 you need a reason. In other - - - I - - - I - - - it
14 - - - maybe it's an irrelevant question, but if the
15 judge says, well, you know, I think - - - I think
16 they could have kept the gun, because it belonged to
17 the officers, because one of them looked at it, and
18 thought it was a nice gun to keep. But they may - -
19 - but in any event, they had a right to - - - I mean,
20 there's got to be a reason that then gets reviewed.

21 MR. CHAMOY: Yes, and the reason - - -

22 JUDGE PIGOTT: I don't understand why we'd
23 have two here.

24 MR. CHAMOY: Well, in this case, the
25 primary reason, which was brought back up at the

1 reopen hearing, and it was the only one mentioned at
2 the reopening, and it was the only one mentioned on
3 the appeal in the Appellate Division, is the weapon.
4 And that's really the - - -

5 JUDGE PIGOTT: Right, for safety?

6 MR. CHAMOY: For safety, specifically.

7 JUDGE PIGOTT: Not - - - not for - - -

8 MR. CHAMOY: Not for preservation.

9 JUDGE GRAFFEO: What's - - - what's the
10 theory there that even with the handcuffs on, she
11 could have reached down into the bag?

12 MR. CHAMOY: Well, in this case, she easily
13 could have. The gun was sitting loaded with a bullet
14 in the chamber on top of the bag. It would not have
15 been difficult, even with handcuffs on, to get to
16 that bag. Also, remember, there's a second defendant
17 who's not handcuffed.

18 JUDGE GRAFFEO: Were the officers asked
19 that at the suppression hearing?

20 MR. CHAMOY: Well, at the suppression
21 hearing they were - - - the way in which it was
22 referenced was she opened it up and immediately saw
23 the gun. And the reference - - - the implication
24 that we presented in our argument was that was
25 because the gun was sitting on top of the bag.

1 JUDGE PIGOTT: Was that argued - - -

2 MR. CHAMOY: The trial testimony

3 substantiated that.

4 JUDGE PIGOTT: Was that argued too? I just
5 made that note. There was two people there, and one
6 of them was not handcuffed. Is - - - would - - - is
7 that one of the reasons the police gave, or are you
8 just saying that's another reason they could have
9 given?

10 MR. CHAMOY: It's not one of the reasons
11 the police gave. It's one of the reasons that was
12 debated and discussed. But yes, it is one of the
13 reasons, absolutely why - - - keep in mind, this is
14 all in the motion to reopen. So at that stage,
15 you're only talking about the direct testimony of
16 Officer Pagan. And at that stage, the People were
17 only responding to specific arguments being made for
18 why reopening shouldn't be - - - happen, and the
19 handcuffing was the only real issue.

20 JUDGE ABDUS-SALAAM: Can you - - - could
21 you address the jurors before your time is up?

22 MR. CHAMOY: Yes, as for the juror
23 selection issue, as for the challenges of cause - - -
24 for cause, it was clearly not an abuse of discretion
25 as a matter of law. The question that was asked was

1 what if the accused did not know that that was a
2 crime? What if, as a matter of law, she gets up
3 there and says, I didn't know it was a crime to have
4 a gun in my purse. And the answer, which the jurors
5 themselves recognized, was ignorance of the law is no
6 excuse. It's something this court recognized in
7 Marrero - - -

8 CHIEF JUDGE LIPPMAN: So the judge had no
9 further obligation here?

10 MR. CHAMOY: No, because the same juror - -
11 -

12 CHIEF JUDGE LIPPMAN: Even as to these two
13 jurors?

14 MR. CHAMOY: No, because even as to these
15 two jurors, they said they would follow the
16 instructions of the court when later asked. They
17 were never actually asked a question that was
18 relevant to this proceeding.

19 And one last thing, which is he argues that
20 there was no corroboration. Well, he could have
21 argued that there was corroboration from the trial
22 testimony of the two officers who said, she said, "no
23 es mio", it's not mine. So the fact that she would
24 not have been there alone arguing this is sufficient
25 to find - - -

1 CHIEF JUDGE LIPPMAN: Okay, counsel.

2 MR. CHAMOY: - - - that it isn't an issue.

3 CHIEF JUDGE LIPPMAN: Thank you.

4 MR. CHAMOY: Please affirm, thank you.

5 CHIEF JUDGE LIPPMAN: Thank you.

6 Counsel, rebuttal?

7 MR. JOSELSON: Yes. Judge, the - - - the
8 way you know - - - it's not only that the police
9 never testified that they thought she was involved in
10 this burglary report. The way you know that they
11 didn't think that was they never brought the resident
12 - - - they never even brought the resident down from
13 the fifth floor apartment to view the defendant and -
14 - - and - - - and her companion, if they had any
15 inkling that they were involved.

16 JUDGE PIGOTT: How do you know that? I,
17 you know, there - - -

18 MR. JOSELSON: Well, there's - - -

19 JUDGE PIGOTT: Ultimately, there was like
20 six officers there. And it's - - - and it's - - -
21 it's a little tough to sort out who took the call
22 that there was a burglary, who knew what the
23 descriptions were, who then ran into these two, who
24 asked the questions, it's - - - it's - - -

25 MR. JOSELSON: But - - - but what do we

1 know is that there is no evidence that anyone was
2 ever - - - anyone in connection with that burglary
3 was ever - - -

4 JUDGE PIGOTT: Yeah, but - - - but - - -
5 but what I'm saying is there's a burglary going on in
6 the fourth or the fifth floor. In the meantime,
7 somebody just shot somebody on the second floor, and
8 is running out of the building. If you stop them, I
9 don't think you can say, hey, you didn't have
10 reasonable cause to stop that guy, because you were
11 up there investigating a burglary.

12 MR. JOSELSON: Again, we're not - - - we're
13 not complaining about the stop. The question is,
14 under Gokey and Smith, whenever you stop someone for
15 criminal trespass, and they cooperate with you, and
16 they give you their bag, and you put it down, and you
17 frisk them, and you - - -

18 CHIEF JUDGE LIPPMAN: So - - -

19 JUDGE PIGOTT: Is that - - - is that clear,
20 though, that it's criminal trespass?

21 MR. JOSELSON: Yes, they - - - every
22 officer who testified said, we decided there was
23 probable cause to arrest her for criminal trespass
24 and we arrested her - - -

25 JUDGE PIGOTT: Right, but that - - -

1 MR. JOSELSON: - - - for criminal trespass.

2 JUDGE PIGOTT: They arrest people for
3 criminal trespass and then charge them with burglary
4 later.

5 MR. JOSELSON: Yes, but - - -

6 JUDGE PIGOTT: Okay.

7 MR. JOSELSON: I'm sorry.

8 CHIEF JUDGE LIPPMAN: But the bottom line
9 in your argument, no exigency.

10 MR. JOSELSON: Right, and if their - - -

11 CHIEF JUDGE LIPPMAN: That's your argument
12 in a nutshell.

13 MR. JOSELSON: That is my argument, Judge.

14 CHIEF JUDGE LIPPMAN: Okay.

15 MR. JOSELSON: Thank you.

16 CHIEF JUDGE LIPPMAN: Thank you both.

17 (Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Josefina Jimenez, No. 23 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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