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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 33

NELSON MIRANDA,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
February 11, 2016

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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Official Court Transcriber

1  
2 CHIEF JUDGE DIFIORE: Next on the calendar,  
3 number 33, People v. Nelson Miranda.

4 Counsel?

5 MS. GALLAGHER: I'd like three minutes  
6 rebuttal.

7 CHIEF JUDGE DIFIORE: Two?

8 MS. GALLAGHER: Three.

9 CHIEF JUDGE DIFIORE: Three, very well.

10 MS. GALLAGHER: May it please the court, my  
11 name is Frances Gallagher, and I represent Mr. Nelson  
12 Miranda.

13 The question presented here is at what  
14 point do we evaluate the existence of exigent  
15 circumstances, police safety, and the preservation of  
16 evidence to justify a search incident to arrest of  
17 closed containers. Our contention is that if  
18 exigencies exist at the time of the arrest, the  
19 analysis does not stop there. The question then  
20 becomes whether the ex - - - can you hear me --  
21 whether the exigencies continue to exist at the time  
22 of the search of the object. And according to the  
23 Supreme Court in Gant - - -

24 JUDGE ABDUS-SALAAM: Counsel, before you go  
25 on, is any of - - - are - - - are any of these

1 arguments preserved?

2 MS. GALLAGHER: Well, it is preserved here  
3 because in response to a protest by the party the  
4 court below expressly decided the question that is  
5 raised here on appeal. In general, the court decided  
6 that this was a search incident to arrest - - -

7 JUDGE ABDUS-SALAAM: This means that you  
8 didn't raise it or your client didn't raise it.

9 MS. GALLAGHER: The - - -

10 JUDGE ABDUS-SALAAM: You're relying on  
11 whether the court actually determined the issue?

12 MS. GALLAGHER: Well, the - - - there was a  
13 motion to suppress the evidence. Plus the court  
14 decided that this was a search incident to arrest,  
15 and then specifically decided that the exigent  
16 circumstances should be evaluated at the time of the  
17 stop; it evaluated the exigent circumstances at the  
18 time of the stop.

19 CHIEF JUDGE DIFIORE: So are you suggesting  
20 once a defendant is handcuffed it's over?

21 MS. GALLAGHER: Once the defendant - - - I  
22 mean, that's the holding of the Arizona v. Gant. And  
23 the Supreme Court said that if the defendant is  
24 secured, or if the container is - - - is inaccessible  
25 to him, then the exigent circumstances can no longer

1           exist, and they can no - - - they cannot justify a  
2           search incident to arrest.

3                       JUDGE ABDUS-SALAAM:   And - - - and where -  
4           - - - where is it that the court decided that there  
5           were exigent circumstances?

6                       MS. GALLAGHER:   The court said that the  
7           reason that the search incident to arrest was  
8           justifiable was because of the dropping of the  
9           hacksaw at that time of the stop and also because of  
10          the observations of the police, which was beforehand.  
11          And then the court also mentioned because of what  
12          they found in the satchel.   So the court definitely  
13          was analyzing the exigencies at the time of the stop.

14                      JUDGE FAHEY:   I guess, on that point it  
15          seemed like the court sua sponte - - - the court sua  
16          sponte decided itself that - - - that Miranda's  
17          search was incident to a lawful arrest, and - - - and  
18          that issue hadn't been brought up; the court did it  
19          itself.

20                      MS. GALLAGHER:   Right, right.

21                      JUDGE FAHEY:   I see.

22                      MS. GALLAGHER:   Well, I mean, there was a  
23          suppression motion, but I mean, no one had said  
24          search incident to arrest, if that's what you are  
25          asking me.

1 JUDGE GARCIA: Going back to the Chief  
2 Judge's question, so would there be a per se rule any  
3 time a defendant is handcuffed, there's no exigent  
4 circumstances that would justify opening any  
5 container, or backpack, or purse.

6 MS. GALLAGHER: Well, I think - - - I think  
7 that the issue is whether the person is secured.

8 JUDGE GARCIA: Right.

9 MS. GALLAGHER: Not - - - I mean, and I - -  
10 - you know, I don't know that that's always equated  
11 with handcuffing. It's whether the person is  
12 secured.

13 JUDGE STEIN: What if the person is secured  
14 but they're secured in such a way that they - - -  
15 they could access some container that - - - that is  
16 on their person, for example. In other words, you  
17 know, a person could be secured - - -

18 MS. GALLAGHER: Then I would - - -

19 JUDGE STEIN: - - - could be handcuffed - -  
20 -

21 MS. GALLAGHER: - - - I mean - - -

22 JUDGE STEIN: - - - and could reach in  
23 their bag and pull out a - - - you know, gun or a  
24 knife or a switchblade.

25 MS. GALLAGHER: Well, then - - - then - - -

1 I mean then - - - then I think the Pe -- the People -  
2 - - you know, it's their burden to overcome the  
3 presumption of unreasonableness, and - - -

4 JUDGE STEIN: Now you're talking about a  
5 presumption, but it's not a per se rule.

6 MS. GALLAGHER: It's - - - it's a - - - the  
7 - - - I guess, if the person can do that, then he's  
8 not secured.

9 JUDGE FAHEY: One of the things I struggle  
10 with with this issue is the contemporaneous nature of  
11 the actions. Somebody - - - a officer arrest and  
12 search, and usually that happens simultaneously. And  
13 this - - - I understand the bag - - - I'm not sure  
14 what kind of bag it was, but it was under his coat,  
15 so you would think that the - - - it seemed to me  
16 that the arrest and the search all happened  
17 simultaneously.

18 Does that make a difference?

19 MS. GALLAGHER: The - - - well, what the  
20 People - - - what the People think is that if the  
21 arrest and the search are close in time, then you can  
22 presume that any exigent circumstance that existed at  
23 that time of the arrest continues to exist at the  
24 time of the search.

25 But we know from Arizona v. Gant said that

1           that kind of presumption leads to all kinds of  
2           unconstitutional searches. So we cannot make that  
3           presumption; we have to analyze the exigent  
4           circumstances at the time of the search. And so here  
5           - - -

6                    JUDGE RIVERA: Do the circumstances leading  
7           to the arrest and the search at all inform of the  
8           analysis about the exigencies?

9                    MS. GALLAGHER: The - - - well - - - what  
10          this court has done is we - - - is you examine the  
11          exigencies that exist at the time of the arrest. But  
12          the analysis doesn't stop there. If exigent - - - if  
13          exigent circumstances exist at the time of the  
14          arrest, you go on to determine if they continued to  
15          exist at the time of the search.

16                   JUDGE FAHEY: See, I kind of view it an  
17          officer safety exception also - - -

18                   MS. GALLAGHER: Well, that's one of the  
19          exigent circumstances, certainly.

20                   JUDGE FAHEY: Right. There's an officer  
21          safety exception. So if the arrest is - - - is - - -  
22          they're not going to - - - and the searches are never  
23          going to happen exactly simul - - - simultaneously,  
24          but if they happen - - - were one right on top of the  
25          other, then it seems to me that there's a stronger

1 argument, particularly in this situation where you  
2 have an object that could be conceivably construed as  
3 a weapon, then - - - then it seems it's a little bit  
4 - - - it's much different from which you had in  
5 Arizona. That - - - I thought that was a car - - -  
6 Arizona v. Gant is what we're talking about, right?

7 MS. GALLAGHER: Yes, yes.

8 JUDGE FAHEY: Right, and that - - - that  
9 was a car case, as I remember it. And it was a  
10 search in a grabable area with an unsecured person.  
11 This is close or more to our Jimenez case and whether  
12 not that applies, where a - - - and I think you have  
13 a more difficult problem here and - - - because now  
14 we're right into the - - - the time between the  
15 arrest and the search, and what's reasonable and what  
16 isn't.

17 MS. GALLAGHER: Well see, in Jimenez, I  
18 believe that you found there were no exigent  
19 circumstances at the time of the arrest. And so - -  
20 - but - - - but in - - - in other circumstances, if  
21 there are exigent circumstances at the time of the  
22 arrest, you continue and determine if there are  
23 exigent circumstances at the time of the search.

24 And here, we have a police officer stopping  
25 appellant, pulling up his hands behind him, the





1 law and fact?

2 MS. GALLAGHER: No, no, this isn't a mixed  
3 question of law and fact at all, because the question  
4 is: what's the correct standard to be applied? And  
5 the question of what the correct standard should be  
6 is never a mixed question of law and fact. And the  
7 question here is - - -

8 JUDGE STEIN: What about the question of  
9 whether they were exigent circumstances?

10 MS. GALLAGHER: But we're saying - - -

11 JUDGE STEIN: To determine the correct  
12 standard was applied, then - - - then the - - -

13 MS. GALLAGHER: Well, the exigent - - - the  
14 question of exigency, if - - - if you apply the  
15 exigent circumstances in Gant, then he's secured at  
16 the time of the search, and the search is therefore  
17 unjustified.

18 JUDGE ABDUS-SALAAM: Counsel, could I just  
19 ask you to explain what you consider exigent  
20 circumstances? Because it sounds to me like any  
21 Terry stop where the police can frisk for weapons  
22 becomes an exigent circumstance in your view. Is  
23 that correct?

24 MS. GALLAGHER: I - - - I - - - I guess I'm  
25 not - - - I'm not following. They - - -

1 JUDGE ABDUS-SALAAM: I just want you to - -  
2 - to define exigent circumstances.

3 MS. GALLAGHER: Well, exigent circumstance  
4 is - - - occurs when the Pe - - - the police have a  
5 reasonable fear for their safety because they - - -  
6 they believe that - - - have a reasonable belief that  
7 he can reach for a weapon or that he can destroy  
8 evidence.

9 JUDGE ABDUS-SALAAM: Right, so in - - - in  
10 this case, they stop him because they've seen him  
11 with something; they're not sure it's a weapon, I  
12 guess, but they stop him. Are you suggesting that -  
13 - -

14 MS. GALLAGHER: I - - - I think they didn't  
15 see anything; they saw him making motions.

16 JUDGE ABDUS-SALAAM: They saw him making  
17 motions, right - - -

18 MS. GALLAGHER: Near bicycles.

19 JUDGE ABDUS-SALAAM: - - - so they stop  
20 him, and then they frisk him. Is that an - - - are  
21 you saying that's an exigent circumstance?

22 MS. GALLAGHER: I mean, the court below  
23 found the exigent circumstances - - -

24 JUDGE ABDUS-SALAAM: No, I'm - - - I'm not  
25 - - - I'm not asking you what the court below found.

1 I'm trying to find out what you would think is an  
2 exigent circumstance.

3 MS. GALLAGHER: Well, I would say that at  
4 the time of the search, there was no exigent  
5 circumstance because he was secured.

6 JUDGE ABDUS-SALAAM: Okay.

7 MS. GALLAGHER: Am I not answering your  
8 question?

9 JUDGE ABDUS-SALAAM: No, I - - - I think  
10 you have.

11 MS. GALLAGHER: Okay. And in light of  
12 Arizona v. Gant, we'd like this court to revisit  
13 language in Smith, because in Smith - - - in Smith  
14 there's language that I don't think was good law at  
15 the time, and that is certainly not good law at the  
16 time of Arizona v. - - - after Arizona v. Gant,  
17 because it says that even if the person is secured,  
18 even if the bag is inaccessible to him, as long as  
19 the search and the arrest are close in time, the  
20 search is - - - is reasonable. And that's just - - -  
21 that's just conflict - - - it conflicted with  
22 Chadwick at that time and it conflicts with Gant now.

23 Thank you.

24 CHIEF JUDGE DIFIORE: Thank you.

25 Counsel?

1 MR. SEEWALD: May it please the court,  
2 Andrew Seewald for the People. Good afternoon, Your  
3 Honors.

4 Your Honors, the - - - the issues that the  
5 defendant raises in this case are unpreserved for  
6 this court's review. The arguments that the  
7 defendant made at the suppression hearing were just  
8 about credibility, whether there was probable cause  
9 to arrest the defendant. The - - - the defendant - -  
10 -

11 JUDGE ABDUS-SALAAM: Counsel says that the  
12 court below preserved this issue for defendant by  
13 deciding there were exigent circumstances.

14 MR. SEEWALD: That's simply not the case.  
15 The court never said anything about exigent  
16 circumstances. The court did say that this was a  
17 search incident to a lawful arrest. The issue the  
18 court was trying to decide was whether this was a  
19 lawful arrest; that was the issue that the defendant  
20 raised. The defendant challenged, and the protest of  
21 the party that the court was responding to was the  
22 defendant's challenge to the officer's credibility.  
23 And - - -

24 JUDGE ABDUS-SALAAM: And so in order to  
25 have this issue preserved, counsel has to argue, as

1 she has, that the court found there were exigent  
2 circumstances?

3 MR. SEEWALD: That's right, and the court -  
4 - - but also the court - - - in order to have  
5 preserved this issue for defendant, with defendant  
6 not raising at all, the court would have had to  
7 specifically address the arguments that the defendant  
8 is raising now on appeal. And if this court looks at  
9 its decision People v. Passino from 2009, I think  
10 that case - - - that decision is the most succinct  
11 decision on point for this case. And in - - - in  
12 that case, the - - - the defendant below didn't raise  
13 any Miranda claims, but the court itself made a  
14 Miranda ruling. But this court said that that  
15 Miranda ruling didn't preserve the defendant's  
16 appellate arguments because it didn't address any of  
17 the arguments that he was making an appeal.

18 So just because the court here said that  
19 this was a search incident to arrest, doesn't mean  
20 that the court addressed any of the arguments that  
21 the defendant made about exigent circumstances. And  
22 in particular the - - - all these arguments about  
23 what the timing was between the application of the  
24 handcuffs and the - - - the time that the officer  
25 went into the satchel that was on the defendant's

1 body, there - - - there were no arguments about that  
2 below, and there were no findings about that by the  
3 court. The court's decision didn't address any of  
4 those issues and - - -

5 JUDGE FAHEY: Isn't the logic, though, that  
6 the court says, I'm making that decision on - - - on  
7 search incident to lawful arrest. There's only two  
8 bases for him to say that. It's either got to be  
9 officer safety or destroying evidence, right?

10 MR. SEEWALD: Right.

11 JUDGE FAHEY: So you're saying that - - -  
12 so - - - so therefore it's not sufficient.

13 MR. SEEWALD: It's not sufficient for - - -  
14 for preservation purposes, because the - - - one of  
15 the main justifications or one of the - - - the  
16 important reasons for the preservation rule is to  
17 give the other side a chance to address - - -

18 JUDGE FAHEY: Sure.

19 MR. SEEWALD: - - - the basis for the  
20 ruling. And it's clear, I think, in the - - - the  
21 rationale for the - - - allowing a court to  
22 effectively preserve an issue for a party by  
23 expressing - - - expressly deciding it in response to  
24 a protest - - -

25 JUDGE FAHEY: So the - - - the distinction

1           between the time of arrest and the time of the search  
2           wasn't brought up at all?

3                       MR. SEEWALD: To the extent it was brought  
4           up, it supported the - - - the decisions below that  
5           this was a contemporaneous search - - - the search  
6           was contemporaneous with the arrest. The record  
7           support or - - - or the record supports the  
8           decisions, excuse me, that the - - - that this was a  
9           search incident to arrest that could have fallen  
10          within the exigent circumstances exceptions.

11                      There was no discussion below about whether  
12          the - - - the satchel was removed from the defendant.  
13          The defendant never made the argument that the  
14          satchel was removed somewhere. It was nothing like  
15          the situation in Gant, that the defendant is now - -  
16          - is now relying on, where the defendant was locked  
17          in the back of a patrol car when the police went and  
18          searched the - - - searched a different car for  
19          evidence - - -

20                      JUDGE STEIN: So are - - - are you saying  
21          that we don't need to decide the question of whether  
22          we have to view the circumstances at the time of the  
23          search or at the time of the arrest because they were  
24          - - - they happened virtually at the same time?

25                      MR. SEEWALD: I'm saying that the - - - the



1 best way to decide this case would be on preservation  
2 grounds because - - -

3 JUDGE STEIN: I understand, but if we get  
4 beyond that - - -

5 MR. SEEWALD: If - - -

6 JUDGE STEIN: - - - is that your position  
7 that we don't need to decide that issue because, for  
8 all practical purposes, they happened simultaneously?

9 MR. SEEWALD: Yes; but even further than  
10 that. You know, counsel said in her argument that -  
11 - - in response to Judge Rivera's question about  
12 whether the bag was still on him that she couldn't  
13 answer whether the bag even was still on him. The -  
14 - - the - - - and - - - and that illustrates the  
15 difficulty that this court should have in even  
16 reaching the merits of - - - of the case. That - - -  
17 that illustrates perfectly that the - - - the  
18 preservation rule should control and then beyond  
19 that, the - - - if the court wants to get out the - -  
20 - the merits of the - - - of the claim, this is a  
21 mixed question of law and fact. And whether exigency  
22 exists is a mixed question of law and fact.

23 There's - there is no - - - this would not  
24 be the right case for the court to revisit the  
25 standard on exigency - - - on exigent circumstances

1 and - - - and certainly not an appropriate case for  
2 the court to write a new rule that as soon as  
3 handcuffs have been applied to a suspect that there  
4 can no longer ever be an - - - any exigent  
5 circumstances.

6 This would just not be the right case to do  
7 that. And - - - and that - - - and it always comes  
8 back to preservation, because we don't know, was - -  
9 - and - - - we don't know exactly where the bag was  
10 when it was searched. We don't know exactly how many  
11 officers were present when the bag was searched.  
12 Counsel suggested that the second officer was already  
13 on the scene; that's not clear from the record. The  
14 - - -

15 JUDGE RIVERA: Was there any doubt he's  
16 handcuffed?

17 MR. SEEWALD: There's no doubt that he was  
18 handcuffed.

19 JUDGE RIVERA: Okay, so - - - so how is he  
20 going to get to anything in that bag - - - let's  
21 assume for a moment it's on him.

22 MR. SEEWALD: Well, people can do a lot of  
23 things even while they're still handcuffed. They're  
24 not straitjackets. There's - - - and, you know, we  
25 don't know exactly how the bag was positioned in

1 relation to where his hands were. We don't know how  
2 - - - you know, whether there was some way for him to  
3 have gotten into that bag even while he was  
4 handcuffed. And that's why in all of these cases  
5 dealing with exigent circumstances, there are a host  
6 of factors that the court can consider including how  
7 many officers - - -

8 JUDGE RIVERA: Was the bag closed?

9 MR. SEEWALD: The bag was closed.

10 JUDGE RIVERA: Again. How is he going to  
11 get in that bag with his hands handcuffed? Let's  
12 assume the bag is next to his hands that are  
13 handcuffed.

14 MR. SEEWALD: Well, it's his bag. He - - -  
15 I'm sure he would know how to open it. And we don't  
16 know how - - - we don't know how difficult it would  
17 have been to open and - - -

18 JUDGE RIVERA: Do you know how it's sealed?

19 MR. SEEWALD: I'm sorry.

20 JUDGE RIVERA: Do you know how it's sealed?  
21 Is it zipper, is it a flap, is it buttons? Do we  
22 know anything - - - anything about the bag?

23 MR. SEEWALD: I'm not sure. I think we - -  
24 - we just know that it was closed, but we - - - we  
25 don't know - - - we don't know exactly how and - - -

1                   JUDGE ABDUS-SALAAM: How - - - how exactly  
2 do we know it was closed? I'm looking at the  
3 testimony from the detective where he was asked:  
4 "And the satchel bag was closed, correct?"

5                   And he - - - the detective answers: "As  
6 closed as a satchel can be." What does that mean?

7                   MR. SEEWALD: I'm not sure. I'm not sure.  
8 I mean, we don't know whether it was zip closed - - -  
9 I mean, look, if the defendant wanted to make some  
10 argument that this bag was so well sealed that he  
11 never possibly could have gotten into it and - - -  
12 and so - - - and let's go further than that, that the  
13 police officers, it would have been obvious to them  
14 that this bag was completely inaccessible from the  
15 moment they - - - they saw it, he should've at least  
16 made that argument. And without making that  
17 argument, it's really inappropriate for - - - for  
18 this court, in particular, to now kind of comb  
19 through these facts and reach a conclusion contrary  
20 to the conclusion of the courts below, that were able  
21 to examine this record and find support in the record  
22 for - - - for the facts that this search was roughly  
23 contemporaneous with the arrest, that it was only one  
24 officer on the scene, unlike this court's recent  
25 decision in Jimenez, which I would just point out was

1 after Gant, and so could certainly have taken into  
2 account any change in thinking that might've - - -  
3 might be suggested by Gant.

4 This court in Jimenez took into account how  
5 many officers were on the scene, whether the bag had  
6 been removed from the defendant's person, and  
7 essentially took into account whether the police  
8 officers had complete control of the situation. And  
9 it's really - - - and - - - and those are the - - -  
10 the - - - that's - - - that's really kind of the  
11 controlling concept in these exigent circumstances  
12 cases: whether the police have complete control of  
13 the situation, do they - - - is there an overwhelming  
14 number of police officers, have they removed the - -  
15 - the container from the defendant and - - - and  
16 brought it somewhere where it's locked inside a car,  
17 where it's around the corner, where it's in someone  
18 else's hands.

19 And once all of those things have happened  
20 then the exigency would not apply anymore. But here,  
21 where the events happened simultaneously, where the  
22 satchel may have still been on his body, where he had  
23 just thrown down a hacksaw, it was nighttime, this  
24 police officer had watched him go after one bicycle  
25 after another with some kind of tools; he doesn't

1 know exactly what kind of threat he's facing. He  
2 testified to his - - - his fear for his own safety  
3 and that of his - - - his partner. And I would point  
4 out that was something else that was missing in  
5 Jimenez. There the officer said they never testified  
6 to having any fear. So under all of these  
7 circumstances here - - -

8 JUDGE RIVERA: Well that's - - - that's - -  
9 - that's why they've handcuffed him, no? Isn't that  
10 why they handcuffed him?

11 MR. SEEWALD: I - - - absolutely.

12 JUDGE RIVERA: To secure him so they would  
13 not have to worry about their safety?

14 MR. SEEWALD: Absolutely, but - - - but  
15 it's - - - it's never been the case that handcuffs  
16 alone end the - - - the inquiry. Certainly handcuffs  
17 are an important factor that the court should take  
18 into account, any court should take into account, in  
19 deciding whether there really is a threat still and  
20 any possibility that someone could get at that  
21 container.

22 And so I'm not asking that it be  
23 disregarded, but it also needs to be considered under  
24 all the circumstances, and there shouldn't be some  
25 new rule that would restrict police officers from

1 being able to preserve their own safety, preserve  
2 evidence, when acting in the context of a - - - of a  
3 street encounter, where they don't know exactly what  
4 circumstances they're - - - they're up against at the  
5 moment that they're developing. And so for all of  
6 these reasons, but again, primarily for just the  
7 simple preservation reason, I ask this court to  
8 affirm the decisions below.

9 CHIEF JUDGE DIFIORE: Thank you, sir.

10 MR. SEEWALD: Thank you.

11 MS. GALLAGHER: Whether or not the bag is  
12 on him at the time of the search, is totally  
13 irrelevant under Gant, because the defendant is - - -  
14 is secured and so - - - and - - - and also, if the  
15 People think these - - - these facts were so  
16 important, it was their responsibility, it's they - -  
17 - they have the burden of overcoming the presumption  
18 of unreasonableness at the hearing and demonstrating  
19 that a search incident arrest to - - - to the  
20 exception to the warrant requirement applies.

21 JUDGE PIGOTT: Do - - - do you get the  
22 point that he's making that you didn't argue the  
23 cases that you're now arguing in front of the trial  
24 court or the suppression court?

25 MS. GALLAGHER: But that's always true in a

1           470.052 - - - in a 470.052-type of preservation that  
2           the defense counsel didn't make the arguments that  
3           are being made on appeal, but that the - - - the  
4           court - - - the court's decision preserves the issue.

5                     I mean, look at Prado, for example, decided  
6           by this court. All the defense counsel did was move  
7           to dismiss for lack of sufficiency, and the court  
8           below makes a decision based on confession  
9           corroboration; and confession corroboration is the  
10          issue on appeal. I mean, you know, no - - - no  
11          arguments were made by counsel below, and that's - -  
12          - that's just universal universally true with this  
13          type of preservation.

14                    And as far as Jimenez, he - - - they did -  
15          - - you didn't have to consider Gant because this  
16          court found that there were no exigencies at the - -  
17          - at the time of the arrest, so you didn't have to  
18          proceed. You do have to proceed, though, if there  
19          are exigencies at the time of the stop, then you have  
20          to continue to proceed and determine whether there  
21          are exigencies.

22                    JUDGE PIGOTT: Mr. Seewald's other argument  
23          is, you know, the forst - - - the First Department -  
24          - - the Appellate Term said: "The defendant concedes  
25          it was a lawful arrest. The arrest and search were



1           contemporaneous. The bag pack was large enough to  
2           contain a weapon and was within the defendant's grab-  
3           able area at the time of his arrest soon after police  
4           saw him discarding a hacksaw, and surrounding  
5           circumstances supported the reasonableness of the  
6           officer's stated fear for his safety."

7                         How do we challenge that?

8                         MS. GALLAGHER: Because they're looking at  
9           the time of the arrest and they should have proceeded  
10          to also examine the time of the search when the  
11          person was secured and when - - -

12                        JUDGE STEIN: Do we know what the  
13          difference in time was between the - - - when he was  
14          arrested - - - arrested and when he was searched?

15                        MS. GALLAGHER: I don't know that we know  
16          the - - - these - - -

17                        JUDGE STEIN: So how do we know that there  
18          is any meaningful difference?

19                        MS. GALLAGHER: Yes, we know - - - we know  
20          that they pull his hands up behind him; say stop  
21          police; place and down on the hood of a car. Another  
22          officer comes from across the street; they handcuff  
23          him; they then search the bag. It's not, you know,  
24          all at one time.

25                        And Gant tells us you cannot presume that

1           exigent circumstances that exist at the time of the  
2           stop continue at the time of the search.

3                       CHIEF JUDGE DIFIORE: Thank you, counsel.

4                       MS. GALLAGHER: Thank you.

5                       (Court is adjourned)

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

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Nelson Miranda, No. 33 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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