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This memorandum is uncorrected and subject to revision before
publication in the New York Reports.

No. 209 SSM 43
The People &c.,
Respondent,
v.
Jose Rivera,
Appellant.

Submitted by Susan H. Salomon, for appellant.
Submitted by Karen Swiger, for respondent.

MEMORANDUM:

The order of the Appellate Division should be reversed
and a new trial ordered.

There was a reasonable basis in the evidence viewed in
the light most favorable to defendant for finding defendant not
guilty of criminal possession of a weapon in the second degree

(Penal Law § 265.03 [1] [possessing a "loaded firearm" "with intent to use the same unlawfully against another"]), and yet guilty of criminal possession of a weapon in the fourth degree, (Penal Law § 265.01 [1] [possessing any firearm]). (See People v Discala, 45 NY2d 38, 41-42 [1978]). Defendant's request for a lesser included offense charge should therefore have been granted.

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On review of submissions pursuant to section 500.11 of the Rules, order reversed and a new trial ordered in a memorandum. Chief Judge Lippman and Judges Ciparick, Graffeo, Read, Smith, Pigott and Jones concur.

Decided September 23, 2010