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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

NO. 43

OMAR A. SMALLING,

Appellant.

20 Eagle Street
Albany, New York
March 23, 2017

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE ROWAN D. WILSON
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 CHIEF JUDGE DIFIORE: The next appeal on this
2 afternoon's calendar is appeal number 43, the People of the
3 State of New York v. Omar Smalling.

4 Good afternoon, counsel.

5 MS. YOUNES: Good afternoon, Your Honors. I'm
6 Jenin Younes from Appellate advocates. I'm representing
7 Mr. Smalling, the appellant.

8 If possible, I'd like to reserve two minutes for
9 rebuttal.

10 CHIEF JUDGE DIFIORE: It is possible; you have
11 two minutes.

12 MS. YOUNES: Thank you, Your Honor.

13 Your Honors, Mr. Smalling was deprived of a fair
14 trial by the court's response to a jury note that provided
15 a new ground for finding guilt. The defend - - -

16 CHIEF JUDGE DIFIORE: Counsel, I just want to ask
17 a very basic question here. So if the jury is charged on
18 the definition of possession, there's no objection by
19 anyone, particularly defense counsel, and the jury sends
20 out a note asking the judge to - - - to qualify something
21 in - - - in the instruction. Why should the court be
22 prevented from giving a meaningful response to the jury?
23 I'm not - - -

24 MS. YOUNES: I - - - I assume that you're
25 referring specifically here to the dominion and control - -

1 -

2 CHIEF JUDGE DIFIORE: Correct.

3 MS. YOUNES: - - - definition.

4 The court was able to give a meaningful response
5 to the jury note without issuing the - - - constructive
6 possession and acting in concert charge.

7 CHIEF JUDGE DIFIORE: What would that have been?

8 MS. YOUNES: Well, there are numerous options.
9 For instance, ideally, the court could have said, I'm
10 sorry, I shouldn't have mentioned the terms dominion and
11 control, those are actually irrelevant to this case; this
12 is simply about physical possession, and repeated the
13 physical possession instruction.

14 Another option would have been to continue, but
15 with the second part of the - - - the - - - the second part
16 of that charge that talks about constructive possession,
17 but not talked about property not in physical possession.

18 JUDGE RIVERA: Did the defendant offer these
19 options?

20 MS. YOUNES: The defendant did not specifically
21 offer these options.

22 JUDGE RIVERA: So is the case really about
23 ineffective assistance?

24 MS. YOUNES: That is not how we see it. Defense
25 counsel did amply preserve this issue. As soon as the

1 judge issued the erroneous instruction, he protested - - -
2 he offered what would have been a perfectly reason - - -

3 JUDGE RIVERA: Well - - - well, what - - -

4 JUDGE GARCIA: - - - object immediately, right.
5 I mean, there's a dominion and control - - - I guess some
6 part of that is exercise, but the dominion and control
7 language which goes in without objection.

8 MS. YOUNES: Sure, yes.

9 JUDGE GARCIA: And then I think it's on the
10 second or the third where they're coming out and asking
11 about it, then there is an objection. And I think that's
12 the Chief Judge's point. So it's charged as dominion and
13 control, and there's no objection.

14 MS. YOUNES: That's correct, Your Honor. He does
15 use the terminology "dominion and control", but it's also
16 worth noting that the CPL 265.03(3) uses the term "dominion
17 and control" in it when describing possession. And then in
18 a footnote, it states that the rest, the constructive
19 possession should be a charged were appropriate.

20 JUDGE GARCIA: Can I ask - - -

21 JUDGE RIVERA: So perhaps I've misunderstood the
22 - - - your argument, and counsel's argument below. I
23 thought the point was that the only theory available on the
24 table was possession, physical possession of the gun.

25 MS. YOUNES: That's - - -

1 JUDGE RIVERA: Is that true?

2 MS. YOUNES: That's correct.

3 JUDGE RIVERA: Okay. So - - - so that's the
4 first part of the instruction. And then doesn't it, in the
5 disjunctive say, "or dominion and control"?

6 MS. YOUNES: Yes, Your Honor.

7 JUDGE RIVERA: Okay. So what was defense counsel
8 thinking was appropriate about this additional language?
9 If you've got already the - - - the whole - - - what
10 counsel says is a theory, physical possession, why - - -
11 why would counsel not be objecting to this additional
12 language? I don't understand the point of that language.

13 MS. YOUNES: It would have been better if he
14 hadn't, but given that the - - -

15 JUDGE RIVERA: Well, it may have been
16 incompetence. That's why I'm asking you.

17 MS. YOUNES: Well, the CPL for that provision
18 uses the term "dominion and control" when defining
19 possession. And I think that's typically read even when
20 constructive possession isn't the theory of the case.
21 However, this was a unique situation where they had spec -
22 - -

23 JUDGE RIVERA: No, what I - - - I get what that -
24 - - I get that point. I understand - - -

25 MS. YOUNES: Yes.

1 JUDGE RIVERA: - - - fully that point. But
2 again, I thought that what defense counsel and you, now,
3 appellate counsel, are arguing is that the only theory is
4 physical possession, qua physical possession.

5 MS. YOUNES: Yes.

6 JUDGE RIVERA: And so once you've got this
7 additional language, isn't that, counsel, allowing for
8 exactly what happened here, which is the jurors saying,
9 well, if it's not physical possession, what does this "or
10 dominion and control" possibly mean? It must mean
11 something other than physical possession.

12 MS. YOUNES: As I said, it would have been better
13 if counsel had objected to that language prior to the
14 instruction being read, or at least prior to it being read
15 again. However, given that he didn't, it was, at that
16 point, the court's responsibility, seeing that they were
17 focusing on this dominion and control language, which is
18 just about constructive possession, it was the court's
19 responsibility to ensure that they didn't seize on that and
20 continue with a constructive poss - - -

21 JUDGE FAHEY: Well, what - - - what about if - -
22 - if the court had done what - - - what happened in the
23 People v. Pilgrim case, the Second Department case; are you
24 familiar with that?

25 MS. YOUNES: Yes.

1 JUDGE FAHEY: Oh, okay. So - - - so if - - - if
2 the court had - - - had done there, which is said, oh, I
3 made a mistake, I shouldn't have limited the charge to
4 simply physical possession, and he corrected the mistake,
5 gave instruction to the jury and went forward, would you
6 say that would be error?

7 MS. YOUNES: That would be the solution, the
8 ideal solution that I would have proposed.

9 JUDGE RIVERA: Okay. So - - - but let's take a
10 step back here. Let's assume for a moment that since you
11 didn't object, by I mean you, I mean your side didn't
12 object to three different times when the court read out the
13 charge dominion and control, and only the last time when
14 the jury came, you didn't object during the jury charge
15 conference when the charge was read, and then the two notes
16 before you didn't object.

17 It wasn't until the third time out that - - -
18 that there was finally an objection, and at that point, the
19 court felt that they had to - - - the court had to respond
20 to a jury note, which, I think you are hard pressed to
21 argue that a court shouldn't respond to a jury note when
22 there's a direct question from a juror that want something
23 that has been told to them three times and not been
24 objected to.

25 So at that point, I think, isn't - - - doesn't

1 the issue really become whether or not that the summation
2 issue, where the defendant was arguably deprived of a right
3 to pursue a particular theory in summation, that seems to
4 me to be the stronger, more viable argument from your point
5 of view. I think you should address that.

6 MS. YOUNES: Well, that's certainly the harm, was
7 that the defense didn't have the opportunity to address
8 this constructive possession theory of the crime, for which
9 there was some evidence that the jury could have - - -

10 CHIEF JUDGE DIFIORE: But wasn't - - - wasn't his
11 theory of defense that it wasn't him?

12 MS. YOUNES: Sorry?

13 CHIEF JUDGE DIFIORE: Wasn't his theory of
14 defense that it wasn't him - - -

15 MS. YOUNES: That it wasn't him.

16 CHIEF JUDGE DIFIORE: - - - somebody outside the
17 car?

18 MS. YOUNES: Well, I think there was some
19 implication that it also could have been somebody inside
20 the car. But - - -

21 CHIEF JUDGE DIFIORE: Did they argue that in
22 summation?

23 MS. YOUNES: He didn't expressly argue that it
24 was somebody inside the car, no. He said if - - - the
25 argument was that it was somebody outside. But if he had

1 known that this constructive possession theory would be
2 charged, presumably - - - defense counsel even said
3 something about, you know, we would have said - - - blame
4 this on - - - we could have blamed this on Francis, the
5 bullets were found in the back seat with Francis, there was
6 - - - there were credibility issues with regard to both
7 Coley and Francis, the witnesses against the defendant both
8 had motives to lie, and both had told the police different
9 stories right after the - - - after the arrest.

10 JUDGE GARCIA: Chief, may I just ask one question
11 - - -

12 CHIEF JUDGE DIFIORE: Yes.

13 JUDGE GARCIA: - - - I know the light is on.

14 Different topic. Is it your view that there - -
15 - there was a reasonable view of the evidence where the
16 jury could have convicted on constructive possession?

17 MS. YOUNES: There was - - - there was sufficient
18 evidence in the record, I think, that they could have
19 seized on that. And indeed, it's really important to - - -
20 to remember that there are notes indicated that it looked
21 as though that's - - - that what they were finding guilt
22 on. They kept asking about area, dominion - - -

23 CHIEF JUDGE DIFIORE: Is this a case about
24 constructive possession, or is it a case more about
25 accessorial liability?

1 MS. YOUNES: They sort of blend together. So
2 it's constructive possession and accessorial liability.
3 But because the theory of constructive possession would be
4 - - - the idea, I think, is that the gun, if - - - if it
5 was Francis's gun in the car, the jury might have
6 erroneously thought that that was sufficient to find the
7 defendant guilty.

8 And if defense counsel had known that that - - -
9 that would be sort of where they were going with this, or
10 that the court would have allowed a finding of guilt on
11 that basis, he would have explained in summation, and maybe
12 even asked questions on cross-examination to bring out that
13 Francis having a gun in the car with the defendant was
14 insufficient to constitute criminal liability for the gun.

15 CHIEF JUDGE DIFIORE: Thank you, counsel.

16 MS. YOUNES: Thank you.

17 CHIEF JUDGE DIFIORE: Counsel.

18 MS. GROSS-MARKS: Good afternoon. Jill
19 Gross-Marks for the People.

20 A couple of quick points. Number one, the court
21 did offer defendant a partial verdict and mistrial when it
22 became clear that there was evidently one holdout juror.
23 The court was told that the jurors were split eleven to
24 one, and it seemed that there was just one juror who was
25 very fixated on this question of what does dominion and

1 control mean.

2 And what we also know is that after that, after
3 it was rejected, the partial verdict, and then the Allen
4 charge was given, what happens is then the jury asks for a
5 readback on what - - - where the bullets were found. And
6 we know that the extra bullets, the live bullets, were
7 found only after an inventory control, where the back seat
8 is removed. So what that tells us is that - - -

9 JUDGE FAHEY: But see, I don't - - - all those
10 things are true, and they craft arguments for both sides in
11 the case. But the fundamental principle, as I understand
12 it being put forward is, when you do your summation, you
13 should know what the court is going to charge. And if the
14 charge changes, then your summation could not have
15 addressed that.

16 That's just the fundamental principle. The
17 sequence is always the same. You always get a jury charge,
18 it's a - - - you get a charge conference, and after the
19 charge conference, your case is geared to whatever comes
20 out of that charge conference; you know what's going to
21 happen there. And here, you were told, we're going to
22 charge constructive possession.

23 I - - - I frankly don't understand the
24 accessory liability and how that even applies in this
25 case, to be honest. But I could just be wrong, which has

1 happened before. But I - - - I don't see how someone can
2 be denied the right to have - - - know what charge they're
3 going to have in front of them, have that charge changed,
4 and have it not affect their summation.

5 MR. GROSS-MARKS: Understood. As I - - - I
6 didn't focus on this, because it seemed the panel
7 understood where we were going with that. But dominion and
8 control was before the - - - was before defense counsel
9 three different times. I don't think counsel - - -

10 JUDGE GARCIA: But was it at the charging
11 conference?

12 MR. GROSS-MARKS: It was not.

13 JUDGE GARCIA: Did the judge indicate he was
14 going to charge dominion and control to the jury?

15 MR. GROSS-MARKS: It was not. And - - - but what
16 happens there is now defense counsel does not ask to see
17 the redacted charge, he does not ask what the redacted
18 charge will be.

19 JUDGE ABDUS-SALAAM: Well, counsel, wasn't it the
20 People's position that they did not want a constructive
21 possession charge?

22 MR. GROSS-MARKS: It was the People's position.

23 JUDGE ABDUS-SALAAM: And so when the court gave
24 that charge, the People had no obligation to say, Judge, we
25 didn't ask for that?

1 MR. GROSS-MARKS: I don't think it's the People's
2 obligation. I think defendant's attorney is the one who is
3 zealously charge with focusing on defendant's concerns.
4 And if defendant is concerned that by introducing that
5 language we're now getting into an area where - - -

6 JUDGE ABDUS-SALAAM: But the reason we're here is
7 that nobody - - -

8 MR. GROSS-MARKS: Nobody - - -

9 JUDGE ABDUS-SALAAM: - - - objected, right?

10 MR. GROSS-MARKS: That's correct.

11 JUDGE ABDUS-SALAAM: So we wouldn't be here if
12 the People at said, oh, excuse me, Judge, we didn't want
13 that charge.

14 MR. GROSS-MARKS: We don't know why nobody
15 objected. But what we do know - - -

16 JUDGE RIVERA: What - - -

17 MR. GROSS-MARKS: - - - is that it's defend - - -

18 JUDGE RIVERA: What did the judge say initially
19 about that - - -

20 MR. GROSS-MARKS: All that - - -

21 JUDGE RIVERA: - - - about constructive
22 possession and charging on that - - -

23 MR. GROSS-MARKS: Initially - - -

24 JUDGE RIVERA: - - - for after the first request
25 from the jury, both times?

1 MR. GROSS-MARKS: Initially, when the jury says,
2 what does dominion and control mean, or when the judge - -
3 - when they ask what does possession mean?

4 JUDGE RIVERA: Both.

5 MR. GROSS-MARKS: First time he says, okay, I'm
6 going to define possession, he says - - - and he gives - -
7 - he gives it, and then the next time, he says, but not
8 constructive possession. Now, interestingly, when he
9 defines dominion and control, he doesn't now say, but not
10 constructive possession, which should have been a tip-off
11 to defense counsel that now we're getting into constructive
12 possession. I mean - - -

13 JUDGE RIVERA: But doesn't that - - -

14 JUDGE WILSON: But isn't - - -

15 JUDGE RIVERA: - - - doesn't that indicate that
16 the judge knows that that's not what the charge should
17 include?

18 MR. GROSS-MARKS: The judge knew that, yes. But
19 unfortunately, once we're into - - -

20 JUDGE RIVERA: So how is it a meaningful
21 response, knowing that the charge should not refer or
22 include constructive possession?

23 MR. GROSS-MARKS: It is a meaningful response. I
24 don't think anyone can argue it's not a meaningful response
25 when the jury wants to know. The issue is, was it an abuse

1 of his discretion.

2 JUDGE RIVERA: Well, but if they want to know
3 about something that is off the table, is - - - isn't then
4 defense counsel - - - Appellate counsel correct that, fine,
5 you have to explain to them what they are trying to
6 determine, but you have to clarify that it's physical
7 possession.

8 MR. GROSS-MARKS: The court believed that that
9 was going to confuse the jury further, and as the
10 subsequent notes showed, we had an eleven/one split, there
11 was really just one juror who was a little bit confused
12 about dominion and control, and the reason I bring up that
13 reread is once the reread testimony comes out, it becomes
14 clear.

15 There's really no evidence, none, summation, what
16 have you. There's no evidence that the guy in the back
17 seat had the gun. None. His window is up, he's texting
18 his girlfriend; we know that. He tells the police right
19 away - - -

20 JUDGE FAHEY: But - - - but - - -

21 MR. GROSS-MARKS: - - - my girlfriend is deaf - -
22 -

23 JUDGE FAHEY: - - - there was - - - there was
24 evidence - - - there was evidence for constructive
25 possession. I - - - he handed the gun to his wife, she had

1 it, he had dominion and control over it and told her to
2 throw it out the window. If we had just accepted the proof
3 at that, that seems like a constructive possession.

4 MR. GROSS-MARKS: There's no evidence that he
5 constructively possessed it and did not physically possess
6 it. There's no evidence that he exclusively constructively
7 possessed it and didn't physically possess it.

8 JUDGE FAHEY: So you don't say that's
9 constructive possession when he hands the gun to - - - to
10 his spouse and tells her to throw it. She's got it, and
11 then she throws it out the window.

12 MR. GROSS-MARKS: It doesn't matter to me,
13 because - - -

14 JUDGE FAHEY: No, no, that's not my quest - - -

15 MR. GROSS-MARKS: - - - I have physical
16 possession.

17 JUDGE FAHEY: - - - that's my question, is that
18 constructive possession, in your mind? Does that meet the
19 statutory requirements under the Penal Law?

20 MR. GROSS-MARKS: Is defendant constructively
21 possessing the weapon when my wife is holding it?

22 JUDGE FAHEY: No, he gives it to her to throw it
23 out the window.

24 MR. GROSS-MARKS: Okay. Is that - - - am I
25 constructively - - -

1 JUDGE FAHEY: Yeah.

2 MR. GROSS-MARKS: Theoretically, yes.

3 JUDGE GARCIA: But is it your point that you
4 can't find that without also finding actual possession?

5 MR. GROSS-MARKS: Yes. That is correct. And
6 under Badalamenti and the other case law, there's no
7 evidence to support - - -

8 JUDGE RIVERA: Well, because your theory was, he
9 had the gun in his hands, and then gave it to her.

10 MR. GROSS-MARKS: That's correct.

11 JUDGE RIVERA: There's your physical possession.

12 MR. GROSS-MARKS: And the jury's verdict shows
13 that. They didn't believe he was outside shooting, but
14 they believed he had it, they believed he had the defaced
15 weapon, they believed he handed it to her.

16 JUDGE WILSON: Did - - - did you ever - - -

17 MR. GROSS-MARKS: They found not guilty on the
18 two possessory counts, for heaven sake. He got what he
19 wanted. He should have - - -

20 JUDGE RIVERA: So you're - - - you're saying - -
21 -

22 MR. GROSS-MARKS: - - - taken the partial
23 verdict.

24 JUDGE RIVERA: - - - there's no evidence - - -
25 there's no evidence by which the jury could have found that

1 the person in the back seat, Francis, had the gun?

2 MR. GROSS-MARKS: That's correct. That is
3 correct.

4 JUDGE RIVERA: Because?

5 MR. GROSS-MARKS: The window was up, it was the
6 little of January, their windows were down, they were
7 smoking. He's texting his girlfriend, his girlfriend is
8 deaf, he says. He's texting her.

9 JUDGE RIVERA: Well, that - - - that assumes the
10 shooting from the car, right?

11 MR. GROSS-MARKS: Right. Okay. So if it's not
12 shooting from the car, then there's no evidence to give it
13 to Francis. Why? The live ammunition under the seat, it's
14 nailed down.

15 JUDGE RIVERA: Um-hum.

16 MR. GROSS-MARKS: The seat has to come out.

17 JUDGE FAHEY: I - - - I had thought that the
18 Appellate Division - - - did the People argue for
19 constructive possession at the Appellate Division?

20 MR. GROSS-MARKS: In favor of a constructive
21 position?

22 JUDGE FAHEY: Yes.

23 MR. GROSS-MARKS: You mean in terms of the
24 sufficiency of the evidence, or - - -

25 JUDGE FAHEY: I thought that their briefs argued

1 that - - - that for the valid - - - that - - - that this -
2 - - that the facts supported a theory of constructive
3 possession.

4 MR. GROSS-MARKS: That may have been the argument
5 in terms of the harmless error. I happen to disagree with
6 that.

7 JUDGE FAHEY: Well, I could see that - - -

8 MR. GROSS-MARKS: And I don't think there's any
9 evidence of that.

10 JUDGE FAHEY: I see. So you've - - - it's a
11 different argument here.

12 MR. GROSS-MARKS: That's true. Everyone's
13 argument differed from the Appellate Division in this case
14 - - -

15 JUDGE FAHEY: That's fine.

16 MR. GROSS-MARKS: - - - to tell you the truth.

17 JUDGE FAHEY: It's fine. It's fine.

18 JUDGE GARCIA: Is there a difference between
19 dominion and control and constructive possession?

20 MR. GROSS-MARKS: They are the functional
21 equivalent; we've said that. I think - - - are they
22 identical? I suppose not. I mean, I suppose someone could
23 argue dominion and control means grabbable area.

24 JUDGE GARCIA: Um-hum.

25 MR. GROSS-MARKS: I mean, theoretically. But in

1 terms of the CJII, the language that the court used - - -

2 JUDGE GARCIA: It's constructive possession.

3 MR. GROSS-MARKS: - - - it's - - - it defines
4 constructive possession. To having dominion and control
5 over something means I have constructive possession.

6 JUDGE RIVERA: Well, whether it does or doesn't
7 certainly as charged. What it mean - - - what it
8 definitely means, or what it definitely doesn't mean is
9 physical possession.

10 MR. GROSS-MARKS: It definitely doesn't mean
11 physical possession. And that's the only alternative
12 charge that's ever been proposed here.

13 And as I say, a mistrial was offered with a - - -
14 with a partial verdict, it was - - - and the other thing I
15 would like to point out, I don't think counsel was
16 ineffective. This defendant was acquitted of the top two
17 counts, and the only reason that we're here, which is noted
18 in their brief, is that this defendant, unfortunately, is
19 not a citizen, and he's facing removal if this top count is
20 not discharged - - -

21 CHIEF JUDGE DIFIORE: Thank - - -

22 MR. GROSS-MARKS: - - - vacated.

23 CHIEF JUDGE DIFIORE: Thank you, counsel.

24 MR. GROSS-MARKS: Thank you.

25 CHIEF JUDGE DIFIORE: Counsel.

1 MS. YOUNES: If I may, briefly, address the
2 mistrial issue. Those were two separate things. The court
3 offered the defense counsel a mistrial as a result of the
4 deadlock, not having to do with the erroneous instruction.

5 And counsel was entitled to this jury, that he
6 had a hand in selecting, he had a vested interest in it, he
7 wasn't - - - the fact that he did not choose to take the
8 mistrial at that point has no bearing on the question of
9 whether or not he was entitled to this curative
10 instruction.

11 As far as the - - -

12 JUDGE STEIN: But just on that, the - - - the
13 deadlock itself could have been related to - - - to this
14 instruction. So, I mean, it's really sort of hard to - - -
15 to separate the two out; isn't it?

16 MS. YOUNES: That's true. Although - - - yeah,
17 it does appear that that might have been what was going on,
18 since all the questions were about dominion and control.
19 But that again goes back to the issue of the evidence of
20 constructive possession, which is that if there really was
21 no evi - - - no reasonable way the jury could have found
22 constructive possession, that doesn't explain why they were
23 deadlocked. It was the jurors who assessed the credibility
24 of these witnesses, and - - -

25 JUDGE STEIN: But if - - - but if there was no

1 reasonable way that they could have found constructive
2 possession, doesn't that go to harmless error?

3 MS. YOUNES: Yes. But there was a way that they
4 could have found constructive possession. There was
5 sufficient evidence based on the - - - the bullets in the
6 back, based on the credibility issues of Francis and Coley,
7 along with the - - - I - - - I guess those are the things,
8 essentially, that - - - that could have allowed them to
9 find constructive possession.

10 And the fact that they were asking so many
11 questions about this shows, again, that it seemed that
12 that's what they thought. The acquittals were also - - -

13 JUDGE RIVERA: You mean that Francis was the one
14 - - -

15 MS. YOUNES: That Francis - - -

16 JUDGE RIVERA: - - - in possession of the gun.

17 MS. YOUNES: Yeah. Or at least they had a
18 reasonable doubt that it was Francis.

19 JUDGE RIVERA: How - - - how is the ammunition
20 found in the car?

21 MS. YOUNES: Sorry?

22 JUDGE RIVERA: How was the ammunition found in
23 the car?

24 MS. YOUNES: The - - - well, there was - - -
25 there was the sock full of bullets in the back under the

1 seat, and then - - - I assume that's what you're referring
2 to.

3 JUDGE RIVERA: Well, she's mentioning something
4 else.

5 MS. YOUNES: There was also a shell casing
6 between the seats, but that really doesn't - - - that
7 doesn't have any bearing on - - - or it doesn't show either
8 way. It could - - - who fired the gun or who had the gun.

9 CHIEF JUDGE DIFIORE: Thank you, counsel.

10 MS. YOUNES: Thank you.

11 (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. Omar A. Smalling, No. 43 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

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