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

\* \* \* \* \*

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