

To Be Argued by:  
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Supreme Court of the State of New York  
Appellate Division: First Department

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The People of the State of New York,  
  
Respondent,  
  
— against —  
  
Jose Rodriguez,  
  
Defendant-Appellant.

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Brief for Defendant-Appellant

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Supreme Court of the State of New York  
Appellate Division: First Department

The People of the State of New York,

Respondent,

— against —

Ind. No. 2839-2011

Jose Rodriguez,

Defendant-Appellant.

**PRELIMINARY STATEMENT**

This is an appeal from a judgment rendered on July 25, 2013, by Supreme Court, Bronx County. Jose Rodriguez was convicted, after trial, of menacing in the second degree, N.Y. Penal Law § 120.14(1), and criminal possession of a weapon in the fourth degree, N.Y. Penal Law § 265.01(2). Mr. Rodriguez received a sentence of time-served and a fine of \$1,000.

Justice Frank P. Milano presided over the trial and sentencing. Timely notice of appeal was filed. No stay of execution has been sought.

## **QUESTIONS PRESENTED**

1. Where Mr. Rodriguez expressly declined to waive his *Antommarchi* rights, did the trial court's sidebar conference with a prospective juror, outside of Mr. Rodriguez's presence, where the juror was questioned extensively about his experiences and potential bias, violate Mr. Rodriguez's fundamental right to be present for all material stages of trial?

2. Where the inconsistent and incredible trial testimony failed to establish that Mr. Rodriguez possessed a firearm, or what appeared to be a firearm, or consciously displayed a firearm, was the verdict against the weight of the evidence?

## **INTRODUCTION**

Jose Rodriguez's conviction rests on the bizarre, inconsistent, and implausible testimonies of two complainants and one responding officer that Mr. Rodriguez pulled a gun out of a trash can and fired it on the street because the superintendent of his apartment building, Beldemar Prieto-Ramos, would not unlock the lobby door to let Mr. Rodriguez in. In addition, a security video purporting to show the incident was inexplicably missing 16 minutes of footage, and otherwise did not clearly show what transpired between Mr. Rodriguez and the complainants, Mr. Prieto-Ramos and Nelson Vargas. The video also did not show anything identifiable as a gun.

Due to the lack of credibility of the prosecution witnesses, a suspicious security video that did not support the complainants' allegations, and the lack of any physical evidence of a gun, the evidence did not prove that the complainants actually perceived a conscious display of what appeared to be a firearm. Nor did the evidence prove that Mr. Rodriguez possessed a firearm or dangerous instrument with unlawful intent. Accordingly, the conviction was against the weight of the evidence.

\* \* \* \*

The theory of the prosecution was that Mr. Rodriguez pulled a firearm from a nearby garbage can, threatened Mr. Prieto-Ramos when he would not unlock the

building door, and then fired the gun into the ground. Yet there was no corroborating evidence whatsoever of a gun. The complainants repeatedly testified that what they saw was a “black plastic bag,” not a gun. The arresting officer James DeStaso found no physical evidence of a gun, such as bullet fragments, casings, slugs, or strike marks in the pavement. Moreover, Mr. Prieto-Ramos said that the police arrived 10 minutes after the gun was allegedly fired, but DeStaso did not remember hearing a gunshot, even though he was just one block away. Finally, despite claiming they were hit by a bullet, the complainant’s injuries were nothing more than scratches and bruising, and they refused medical attention.

A purported video of the incident was inexplicably missing 16 minutes of footage in the middle; and what was on the video was equivocal. A man identified by the complainants as Mr. Rodriguez is seen in the video holding what appears to be a black object in his hand, but nothing else about the object is discernible. And, at a time that Mr. Rodriguez was alleged to be threatening to kill Mr. Prieto-Ramos, both complainants are shown to be standing perfectly still without any visible reaction. At the time the complainants claimed the gun fired, Mr. Prieto-Ramos initially has no visible reaction, until he actually walks up to Mr. Rodriguez and pushes him, even though Mr. Rodriguez allegedly still had a gun. Several passersby walk between Mr. Rodriguez and Mr. Prieto-Ramos, apparently not noticing anything out of the ordinary. The complainants also alleged that Mr.



Rodriguez pointed the gun at the ground, but no such pointing gesture clearly appears in the video. In sum, the prosecution witnesses' testimonies strongly suggested that they were exaggerating when they claimed that Mr. Rodriguez had a gun.

Officer DeStaso also made concerning, and inexplicable, changes to his original accounting of the events at issue. He testified that, at the time of the incident he believed that Mr. Rodriguez had fired a pellet gun. Yet at trial, he claimed that after reviewing the video, he was now of the opinion that it was an actual firearm and not a pellet gun, even though the video shows only an indistinct black object, and no evidence of a gun was ever recovered.

Collectively, the testimony against Mr. Rodriguez simply did not make sense. The credibility of the complainants was too damaged to credit their claims that they actually perceived a conscious display of a weapon, or that Mr. Rodriguez possessed a weapon with unlawful intent. There was little if any support from the security video and no physical evidence. The verdict convicting Mr. Rodriguez of second degree menacing and fourth degree criminal possession of a weapon must therefore be reversed as against the weight of the evidence.

In a separate error, the trial court violated Mr. Rodriguez's right to be present at all material stages of trial by conducting a sidebar with a potential juror about that juror's background and potential bias in Mr. Rodriguez's absence.

Because Mr. Rodriguez was absent from this material stage of trial, the Court must reverse his conviction and order a new trial.

## **STATEMENT OF FACTS**

### **A. Mr. Rodriguez is charged with assault, menacing, criminal possession of a weapon, and reckless endangerment based on “what appeared to be a firearm.”**

Jose Rodriguez was charged with eight counts of assault and attempted assault in the first, second and third degrees, second degree menacing, criminal possession of a weapon in the fourth degree and second degree reckless endangerment. *See* Indictment 2839-2011 (hereinafter, “Indictment”) at 1. The charges stemmed from allegations by Beldemar Prieto-Ramos and Nelson Vargas that Mr. Rodriguez fired a gun at them in front of the building where Mr. Rodriguez lived and where Mr. Prieto-Ramos is the superintendent. *See* Criminal Complaint at 1.

Before trial, defense counsel David Farman moved to dismiss four counts of the indictment that charged crimes requiring use of a “deadly weapon or dangerous instrument,” yet the indictment alleged that Mr. Rodriguez possessed an item that merely “appeared” to be a firearm. *See* Indictment at 2-3; Affirmation in Support of Motion to Dismiss Counts 1-4, dated Nov. 8, 2012. Justice Ethan Greenberg denied the motion to dismiss, concluding that the prosecution intended to prove it was an actual gun. *See* Decision and Order, dated Feb. 11, 2013. But the issue of what, exactly Mr. Rodriguez was holding in his hand on the day of the incident was hotly contested throughout trial. Before a *Dunaway/Wade* hearing to determine whether the court should suppress the identifications of Mr. Rodriguez

by Mr. Prieto-Ramos and Mr. Vargas, defense counsel argued that, given Justice Greenberg’s decision, the prosecution should not be permitted to argue at trial that Mr. Rodriguez possessed what “appeared” to be a gun. The motion was denied as premature.

**B. At the *Dunaway/Wade* hearing, the arresting officer testified that he arrested Mr. Rodriguez on the basis of a hand gesture made by a complainant.**

Arresting officer James DeStaso was the only witness at the *Dunaway/Wade* hearing. He testified that about 6:40 p.m., he received a report of a man with a gun in front of 2301 Creston Avenue. H. 30-31. When he arrived, he claimed that Mr. Prieto-Ramos and Mr. Vargas immediately approached him. He stated that Mr. Prieto-Ramos spoke little English and Mr. Vargas spoke none at all. H. 33-34.<sup>1</sup> Officer DeStaso explained that he understands only a “very tiny bit” of Spanish. H. 42. He said Mr. Prieto-Ramos pointed out Mr. Rodriguez by “making the description of a firearm with his finger.” H. 33. He also testified that Mr. Rodriguez was only about 20 feet away, among “a couple people hanging out in front of [the] building.” H. 41-42. None of these people, including Mr. Rodriguez, were running away. *Id.* He stated that only Mr. Prieto-Ramos showed him injuries, but not Mr. Vargas. H. 45. Officer DeStaso did not testify to hearing an actual

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<sup>1</sup> Citations preceded by H. refer to the hearing on May 20, 2013; citations preceded by VD. refer to *voir dire* proceedings on May 20-21, 2013; citations preceded by T. refer to trial proceedings on May 22-24, 2013; and citations preceded by S. refer to the sentencing proceedings on July 25, 2013.

gunshot although he arrived at the building in “two minutes” from “one block away” after he received the radio call. H. 31. Based solely on Mr. Prieto-Ramos’ gesture, Officer DeStaso arrested Mr. Rodriguez. H. 34-36. He also searched the area for evidence of a gun. H. 47. Officer DeStaso testified that he did not find a gun, cartridges, shells, or slugs of any kind. H. 47, 48-49. He claimed that all he found was a dent in a car that could have been from “some hard object that could have struck the vehicle.” H. 47. When defense counsel asked if it could have been a rock that struck the vehicle, Officer DeStaso stated, “[i]t could have been anything.” H. 47. The court denied Mr. Rodriguez’s motion to suppress the identification. H. 53.

**C. During *voir dire*, Mr. Rodriguez declines to waive his right to be present during the questioning of jurors, but the Court examines jurors outside his presence anyway.**

At the start of *voir dire*, Justice Frank Milano asked Mr. Rodriguez whether he wanted to waive his rights under *People v. Antommarchi*, 80 N.Y.2d 247 (1992), to be present during sidebars with prospective jurors. VD. 7. Justice Milano told Mr. Rodriguez that, “You have the right to come up here when I do a sidebar. I’ll ask the lawyers to come up here and talk to me up here so the jury can’t hear.” J.7. He asked Mr. Rodriguez to “consider [...] signing a waiver that says, ‘On run-of-the-mill legal questions, I’m okay with just my lawyer coming up and I’ll stay at the table.’” VD. 7. Justice Milano directed defense counsel to

“consult with the client and ask him if he’d like or be willing to sign the *Antommarchi* waiver.” VD. 7. During this exchange, Mr. Rodriguez said nothing.

Immediately after an off-the-record discussion, Mr. Rodriguez declined to sign the waiver through his counsel:

MR. FARMAN: Okay. No.

THE COURT: So the client declines to sign the waiver.

MR. FARMAN: No. He declines to sign it, yes.

THE COURT: That’s what I asked. Okay, no problem. If he wishes to execute it at a later point, just let the Court know.

VD. 8. At no point following this exchange did Mr. Rodriguez waive his right to be present, nor was the issue raised again.

Despite Mr. Rodriguez declining to waive his *Antommarchi* rights, Justice Milano questioned prospective juror Michael Cooper about his background and ability to weigh the evidence, outside of Mr. Rodriguez’s presence. VD. 287-293. The transcript affirmatively notes that Mr. Rodriguez was not present while the court and counsels questioned Mr. Cooper extensively on his potential bias. VD. 287-293.

In response to the court’s question of whether any juror had been convicted of a crime or been a victim of a crime such that “it would impair your ability to be fair and impartial here[.]” VD. 287, Mr. Cooper asked to come up to the bench because he did not want to speak publicly. Justice Milano instructed Mr. Cooper to

approach, at which time the record noted, “Whereupon, there is a discussion held on the record at sidebar among the prospective juror, both assistant district attorneys, defense counsel and the Court as follows. The defendant is not present[.]” VD. 287.

At sidebar, Mr. Cooper said that an unknown person had shot him in the stomach outside a nightclub. VD. 287-288. Mr. Cooper believed that the NYPD had not properly investigated the crime. VD. 288. He noted that the police failed to collect security video, and that he believed the police did not give him the “entire truth” as to whether any video existed. VD. 288-291. The trial court later dismissed Mr. Cooper after suggesting that he should be dismissed for cause, to which defense counsel consented. VD. 332.

**D. The prosecution’s case relies on inconsistent and incredible testimony and a video inexplicably missing 16 minutes.**

At trial, the prosecution argued that Mr. Rodriguez had possessed a gun. The prosecutor argued in his opening statement that Mr. Rodriguez “brandished this firearm” and threatened Mr. Prieto-Ramos saying, “I’m going to shoot you with a gun for not letting me in the building.” T. 364. Three witnesses testified for the prosecution: the two complainants, Mr. Prieto-Ramos and Mr. Vargas, and Officer DeStaso.

**1. Officer DeStaso testifies that he arrested Mr. Rodriguez upon the complainants' identification, despite not finding any evidence of a gun.**

Officer DeStaso testified that he received a radio run of a man with a gun in front of 2301 Creston Ave. T. 5-6. He stated that he arrived at 6:42 p.m., from just one block away. T. 7. Officer DeStaso did not remember hearing a gunshot despite being only a block away. T. 46. Mr. Prieto-Ramos and Mr. Vargas approached Officer DeStaso, pointed to Mr. Rodriguez and indicated that he had shot a gun at them. T. 7-8. When Officer DeStaso arrived, Mr. Rodriguez was "standing right in front of the building." T. 10.

Officer DeStaso claimed that he initially believed Mr. Rodriguez possessed a pellet gun because the injuries Mr. Prieto-Ramos showed him were "cuts with some bruising." T. 14. During cross-examination, he described them as scratches or lacerations. T. 33. He further noted that he canvassed the area to recover evidence of a gun, such as bullet casings, slugs, or bullet fragments, but did not find any. T. 12, 14, 36. He testified that, "[o]n the day when it first happened, judging by the injuries, uhm, and you know, the lack of casings, shell casings, from a firearm, I did believe that [it was a pellet gun.]" T. 14.

But Officer DeStaso claimed at trial that he had changed his mind and was certain that Mr. Rodriguez had possessed an actual gun, despite the fact that no physical evidence of a gun had surfaced. He said he thought Mr. Rodriguez



actually had a gun “after reviewing the video.” T. 15. Defense counsel objected to this statement, which the trial court sustained. Defense counsel also objected vehemently to Officer DeStaso’s even being allowed to testify to his opinion about whether it was really a gun based merely on his training to fire a gun as police officer and the fact that he lived upstate and had “been hunting.” T. 15-19. The court allowed some further inquiry into Officer DeStaso’s training with firearms. *Id.* The court then allowed Officer DeStaso to testify as to “whether, viewing the videotape, based upon his experience as a police officer, if he thought it was a pellet gun or a firearm.” T. 18. The court did not allow any characterization of Officer DeStaso as a “ballistics expert.” *Id.*

Defense counsel cross-examined Officer DeStaso at length about what made him believe it was firearm and not a pellet gun. T. 36. Officer DeStaso found “no evidence whatsoever that a gun had been fired.” *Id.* Officer DeStaso was also unaware of any tests performed to determine if gun powder residue was present on Mr. Rodriguez. T. 38. The only evidence that could conceivably have indicated a weapon was fired was a dent in a nearby car. T. 37. Yet, Officer DeStaso conceded that the dent could have been “caused by anything at a high velocity.” T. 37-38. Officer DeStaso also filled out two “aided cards” stating that the complainants had been injured but refused medical attention. T. 52.

**2. Mr. Prieto-Ramos testifies that Mr. Rodriguez threatened him with a “black bag” that he claimed he knew contained an actual gun, because Mr. Prieto-Ramos would not let Mr. Rodriguez in the building.**

Mr. Prieto-Ramos was the superintendent at 2301 Creston Ave. T. 56. He said that on August 22, 2011, he was in front of the building at around 5 p.m. when Mr. Rodriguez asked him to open the door. T. 59, 77. Mr. Prieto-Ramos explained that he could not give Mr. Rodriguez access because he had given his key to a new tenant who had just moved in. T. 59. Mr. Rodriguez then began digging through a nearby garbage can. T. 61.

Mr. Prieto-Ramos was equivocal about what he claimed to observe in Mr. Rodriguez remove from the garbage can. T. 63, 101. He claimed that he saw Mr. Prieto-Ramos remove a “black plastic bag” from the can, that he then held in his right hand. T. 62. He referred to it as a “plastic bag” three times in his testimony. T. 62, 63, 101. When asked what else he observed about the black plastic bag, he simply stated, “[a] weapon.” *Id.* The prosecution on direct examination asked Mr. Prieto-Ramos why he believed it was a weapon. In response, Mr. Prieto-Ramos did not claim he actually saw a gun, but that he believed it was a weapon “because it fired.” *Id.*

On cross examination, Mr. Prieto-Ramos agreed that what he earlier referred to as a weapon was actually a black plastic bag. T. 101. He gave a contradictory answer to the same question he was asked during direct examination about why he

thought it was a gun if what he saw was a plastic bag. He said that he knew it contained a weapon because “he could see it on the bag.” T. 101.

Mr. Rodriguez walked to the front door of 2301 Creston and demanded that Mr. Prieto-Ramos open the door while “[Mr. Rodriguez] had something in his hand.” T. 62. Mr. Rodriguez stood about eight to nine feet from Mr. Prieto-Ramos at this time. *Id.* According to Mr. Prieto-Ramos, Mr. Rodriguez pointed the bag in his hand at him, threatened to kill him and used abusive language while “waving his hand from side to side ... like towards where I was at.” T. 64.

Mr. Prieto-Ramos claimed Mr. Rodriguez fired a weapon. He said that he heard a “strong sound, loud,” so that “the people that were there, you know, were shocked.” T. 65-66. Mr. Prieto-Ramos stated that he did not leave the area because he was afraid. Even though Mr. Rodriguez “still had the weapon,” Mr. Prieto-Ramos approached Mr. Rodriguez. He “went towards where he was at” and explained again that he did not have a key. T. 66. Mr. Rodriguez then put the object back in the garbage can.

A few minutes later, Mr. Prieto-Ramos claimed that he noticed that he had an injury to his arm and his buttock. T. 69. On cross examination, Mr. Prieto-Ramos stated that there was a third person standing between him and the other complainant, Mr. Vargas. T. 97, 102-103. Mr. Prieto-Ramos identified this man as Rafael Frias. *Id.* Mr. Frias was apparently uninjured, because Officer DeStaso

filled out only two aided cards that Mr. Vargas and Mr. Prieto-Ramos had been injured. T. 22-23. Mr. Prieto-Ramos refused medical assistance and also said that he did not initially feel the injury. T. 99, 116. He also said no fragments or particles were removed his injuries. *Id.*

Mr. Prieto-Ramos claimed that only 10 minutes passed between the alleged shot and the arrival of the police, at which time he pointed out Mr. Rodriguez. T. 68. But he stated that this incident occurred around 5p.m., not at 6:42 p.m. as Officer DeStaso claimed. T. 77. And, despite believing someone fired a gun at him, Mr. Prieto-Ramos denied calling 911. T. 104-105. He stated that he “didn’t know they [the police] were coming. I didn’t know if they had called, but I wanted them to get there.” T. 115. No 911 call was entered into evidence or preserved. T. 117.

**3. Nelson Vargas testifies that he also saw “a black bag” in Mr. Prieto-Ramos’s hand.**

Mr. Vargas said he stopped to talk to Mr. Prieto-Ramos on his way home from work. T.123. He said he saw Mr. Rodriguez stick his hand into a garbage can and pull out what he described four times as a “bag” or “black bag.” T. 123, 125, 126, 127. He claimed that he saw Mr. Rodriguez point the “black bag” (the manner of which is not clearly described in the record) and then “fire[] towards the floor.” T. 123. Mr. Vargas claimed that he heard a “pang,” but when he asked when he actually heard this sound after Mr. Rodriguez pointed the black bag, he then

claimed, “[t]here was no sound.” T. 127. He then stated that the “bang” was from when Mr. Rodriguez “stuck his hand back in and he took out a black bag.” T. 127.

Mr. Vargas said that he felt something strike him in the abdomen. T. 127-28. He said it caused lacerations which required him to take “muscle relaxers” because he was in “a lot of pain.” T. 128. But Mr. Vargas also refused medical attention after the police arrived. T. 52, 129. On cross-examination, Mr. Vargas admitted that he “couldn’t really tell what was in the bag.” T. 155. He did not know who called 911, but he denied calling himself. He also denied knowing Rafael Frias. T. 151-152. He also stated that he was in a nearby bodega buying a bottle of water because he was nervous when he came out to find Mr. Rodriguez already under arrest. T. 135, 157. He claimed that he only came out later to see Mr. Rodriguez already being placed under arrest. T. 153-155. This contradicted Officer DeStaso’s testimony that both Mr. Vargas and Mr. Prieto-Ramos had identified Mr. Rodriguez together. *See* T. 7-8. Mr. Vargas also reiterated that Mr. Rodriguez was not pointing the black bag at them, but rather he “shot towards the bottom.” T. 159. But when defense counsel asked whether that meant “he fire[d] towards the ground away from you,” Mr. Vargas said, “No.” T. 160.

The trial court refused to allow defense counsel to impeach Mr. Vargas on his grand jury testimony about where he lived. T. 139-143. In the grand jury Mr. Vargas stated that he lived in Brooklyn at the time of the incident. T. 139-40. But

at trial, he stated that he was living in the Bronx. T. 137. When defense counsel pointed out this inconsistency, Mr. Vargas denied making the statement. T. 140. At a lengthy sidebar, defense counsel argued that the issue of where Mr. Vargas lived was relevant considering that Mr. Prieto-Ramos had some control over who rented apartments, and had been friends with Mr. Vargas since 2004. T. 140-143. But the trial court did not allow defense counsel to inquire further. T. 143.

**4. A security video with 16 minutes of inexplicably missing footage and that does not corroborate the complainants' testimony, was admitted into evidence.**

The prosecutor entered into evidence a security video that had been collected by the NYPD. T. 73- 74. Mr. Prieto-Ramos testified that, as the superintendent, the equipment for the cameras is kept in his apartment. T. 73. Mr. Prieto-Ramos stated that he is responsible for maintenance and operation of the system, and he had the ability to cut off the footage. T. 99-100.

The video appeared to show Mr. Rodriguez and the complainants in front of the building with a time stamp beginning at 16:32:52, or 4:32 PM. T. 76. However, Mr. Prieto-Ramos claimed that the video actually began around 5 p.m. because the “camera had a problem as far as the time,” although he stated the camera was off by an hour, not half an hour. T. 77. Notably, this timeframe also contradicted Officer DeStaso’s testimony that he arrived after 6:40 p.m. *See* T. 7.

The video appears to show a man in a white shirt, baseball cap, and dark pants leaving a building, and conversing with other people on the sidewalk in front. T.

81. Video Camera Recording of 2301 Creston Ave., People's Exhibit 3

(hereinafter, "Video") at 16:37:00. This person was identified as Mr. Rodriguez. *Id.*

After a few minutes, the video then skips from approximately 16:37:00 to

16:53:00, creating a gap of about 16 minutes, from 4:37 p.m. to 4:53 p.m. T. 82.

There was no explanation for the gap.

After the 16 minute gap, the video showed Mr. Prieto-Ramos and Mr. Vargas leaned against a parked SUV with a third man, who was identified by Mr. Prieto-Ramos as Mr. Frias. T. 83. The man identified as Mr. Rodriguez walked to the garbage cans and began digging through the garbage and removed black or dark-colored object. T. 64, 83-84. Video at 16:54:40. Other than its color, it is not clear what the object is. Video at 16:56:17.

The person in the white shirt then walks to the front of the building, turns around, and begins speaking and gesturing in the direction of the three men, Mr. Prieto-Ramos, Mr. Vargas, and Mr. Frias<sup>2</sup>, who leaned against the SUV. Video at 16:56:17-16:56:36. Mr. Prieto-Ramos testified that, at this point, Mr. Rodriguez threatened to kill him, and Mr. Prieto-Ramos claimed that he could see a gun in the bag. T. 84-85. The video did not show any of the three men or move or react.

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<sup>2</sup> Mr. Frias was identified in the video by Mr. Prieto-Ramos. T. 103.

Video at 16:56:17-16:56:36. The video also showed at least four people nearby on the street other than the complainants leaning against the SUV, yet none of them are reacting as if anything unusual is happening. *Id.*

On the video, the person identified as Mr. Rodriguez could be seen walking slowly back towards the garbage can, and then turning to speak while facing the three men leaned against the SUV. *Id.* at 16:56:36-16:56:59. The man can be seen moving the black object around. *Id.* At some point, some people standing nearby appear to be startled. *Id.* The headlights of the SUV against which the complainants leaned activate and begin to flash. *Id.*

The person Mr. Prieto-Ramos identified as himself does not move for a few seconds. Then he walks up to the person in the white shirt, who is still holding the black object in his hand. *Id.* at 16:56:36-16:56:49. They appear to converse at a close distance, and the person identified as Mr. Rodriguez places the object back into the garbage can after approximately 8-10 seconds. *Id.* at 16:56:49-16:56:56. Mr. Vargas comes up to the white-shirted man and lifts his shirt to show him his abdomen. T. 133. Mr. Prieto-Ramos again approaches the person in the white shirt and the two men appear to exchange words near the garbage can. Video at 16:56:56-16:57:13. Mr. Prieto-Ramos pushes him twice over the course approximately 15 seconds. *Id.* As they are engaged in this exchange, several more passers-by walk along the sidewalk into and out of view. *Id.* The white-shirted man



is then shown removing a black object from the garbage can and handing it to someone else, who takes the object and walks out of view. 16:58:50–16:59:09.

The video continues for five to seven minutes. Officer DeStaso had earlier testified that he arrived two minutes after receiving radio report of a man with a gun. T. 5-6. However, Mr. Prieto-Ramos said that Officer DeStaso arrived 10 minutes after the incident. T. 68. Officer DeStaso is not depicted on video. Instead, the video shows Mr. Vargas and Mr. Prieto-Ramos both return to leaning against the SUV and neither leaves the area visible in the video until after 17:00:00. The video ends at 17:02:05.

**5. Mr. Rodriguez testifies that the video has been manipulated by the superintendent to incriminate him.**

Mr. Rodriguez testified that he was talking to his wife Rosalia Martinez and a friend Minerva Negrón Franciona in front of the building at about 4:30 p.m. T. 217-18. He said that, at some point between 6 and 7 p.m. the police arrived and abruptly arrested him for no apparent reason.<sup>3</sup> T. 217-18. He stated that it was two officers, not one officer, and they arrived by van, not on foot. T. 217-218.

Addressing the video, Mr. Rodriguez took issue with the complainants' claims that the video depicted him engaging in threatening behavior. T. 217-227. He also testified that he had his own key to the building and did not need one to

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<sup>3</sup> Ms. Martinez also testified. During her testimony, she stated that she and Ms. Franciona had been outside of the building at the time Mr. Rodriguez was arrested for no apparent reason. T. 190-92.

enter the building. T. 225. He believed that, since Mr. Prieto-Ramos had control of the security footage, he and another friend had manipulated the video to make it appear as though he was in the video after the missing 16 minutes, and to make it appear as though it was recording at a different time than the time markers indicated. T. 234-35.

**6. At the charge conference, the prosecution is granted an expanded intent charge, and the defense is granted an adverse inference charge due to the missing security footage.**

At the charge conference, the court granted the prosecutor's application for an expanded intent charge that unlawful intent could be formed at the moment the act was committed. T. 259-63. Defense counsel objected, arguing that the instruction would be inappropriate considering that the prosecution's theory was that he placed the gun in the garbage in anticipation of a dispute over the key. *Id.*

The court granted defense counsel's request for an adverse inference charge for the missing 16 minutes of footage, over the prosecution's objection, that the jury could, but were not required to, draw a negative inference that the video did not support the prosecution's case. T. 278-81.

Defense counsel was denied a missing witness charge for Mr. Frias, the third uninjured man standing between the two complainants. T. 284-85. The court also denied defense counsel's request to instruct the jury that a pellet gun was not a deadly instrument. T. 281-84.

**E. The jury convicts Mr. Rodriguez of menacing and criminal possession of a weapon.**

The jury found Mr. Rodriguez guilty of menacing in the second degree, and criminal possession of weapon in the fourth degree. T. 417-18. They acquitted him of the assault, attempted assault, and reckless endangerment charges. *Id.* The Court sentenced Mr. Rodriguez to time served on both counts and a fine of \$1,000 on the menacing charge. S. 12.

## **ARGUMENT**

### **POINT I**

**REVERSAL IS REQUIRED WHERE MR. RODRIGUEZ EXPRESSLY DECLINED TO WAIVE HIS RIGHT TO BE PRESENT DURING THE QUESTIONING OF PROSPECTIVE JURORS ABOUT THEIR BACKGROUND AND POTENTIAL BIAS AND THE COURT NEVERTHELESS HELD A SIDEBAR CONFERENCE WITH A PROSPECTIVE JUROR OUTSIDE OF MR. RODRIGUEZ’S PRESENCE.**

Every person charged with a crime has a fundamental right to be present at all material stages of their trial. N.Y. Crim. Proc. Law § 260.20; *People v. Roman*, 88 N.Y.2d 18, 25-26 (1996); *People v. Favor*, 82 N.Y.2d 254, 262-65 (1993). A sidebar discussion with a prospective juror regarding his or her background, bias, or ability to be impartial is a material stage of trial. *People v. Antommarchi*, 80 N.Y.2d 247 (1992); *see also People v. Maher*, 89 N.Y.2d 318, 324 (1996); *People v. Williams*, 52 A.D.3d 94, 96 (1st Dep’t 2008). Exclusion of a defendant from such a discussion without first obtaining a knowing, intelligent, and voluntary waiver of the defendant’s right to be present constitutes *per se* reversible error where the prospective juror is either seated on the jury, or is excused as a result of a discretionary decision by defense counsel, such as excusal with the consent of defense counsel. *See People v. Davidson*, 89 N.Y.2d 881, 882 (1996); *Roman*, 88 N.Y.2d at 28-29; *Antommarchi*, 80 N.Y.2d at 250; *Williams*, 52 A.D.3d at 96; *see also People v. Mehmedi*, 69 N.Y.2d 759, 760-61 (1987); *People v. McAdams*, 22

A.D.3d 885, 885-86 (3d Dep’t 2005); *People v. Francisco*, 212 A.D.2d 628, 629 (2d Dep’t 1995).

**A. Mr. Rodriguez explicitly declined to waive his *Antommarchi* rights.**

Since the right to be present at all material stages of trial is fundamental, waiver cannot be inferred from a silent record or the fact that defense counsel participated in a sidebar without objection from Mr. Rodriguez. *Williams*, 52 A.D.3d at 95-96; *see also Antommarchi*, 80 N.Y.2d 247 at 250 (“[B]ecause defendant had a fundamental right to be present, his failure to object to being excluded from the side-bar discussions is not fatal to his claim.”).

As an initial matter, the court incorrectly explained the nature of Mr. Rodriguez’s *Antommarchi* rights. J.7-8. Prior to *voir dire*, Justice Milano explained the *Antommarchi* right to Mr. Rodriguez as follows:

THE COURT: On the record.

Mr. Rodriguez, you've been asked to consider signing what's called an “Antommarchi waiver.” You have the right to come up here when I do a sidebar. I’ll ask the lawyers to come up here and talk to me up here so the jury can’t hear.

You have the right to come up any time you want. What I’m asking you to consider is signing a waiver that says, “On run-of-the-mill legal questions, I’m okay with just my lawyer coming up and I’ll stay at the table.”

Now, if you sign that waiver, you can revoke it at any time. And not only that, even if you sign the waiver, if

there's something you really want to hear, you can come up at any time.

VD. 7.

First, the court did not explain that *Antommarchi* relates to jury selection. According to the court, a sidebar is when “the lawyers come up and talk me ... so the jury can’t hear” – a description that applies equally well to a trial sidebar as it does to jury selection. The court implied that the Mr. Rodriguez would be waiving merely the right to hear “run of the mill legal questions.” when “the lawyers come up...” This gave the impression that Mr. Rodriguez would be waiving his right merely to listen to his lawyers go through perfunctory or ministerial legal details with the judge, leaving little reason for Mr. Rodriguez himself to participate because he would have nothing substantive to add. From this explanation Mr. Rodriguez could not have understood that *Antommarchi* protected his right to make a meaningful contribution to jury selection, or that he had any right to participate in jury selection at all. The court’s explanation here also implied that Mr. Rodriguez has only a “right to come up when [the court does] a sidebar,” not a broader right of presence at “any material stage of trial.” *Antommarchi*, 80 N.Y.2d at 250.

Following this incorrect explanation, Mr. Rodriguez, through counsel, explicitly declined to waive his *Antommarchi* rights. Mr. Rodriguez said nothing in response to the court’s explanation. Immediately after an off-the-record discussion,

defense counsel informed the court that Mr. Rodriguez was not interested in signing the waiver:

[DEFENSE COUNSEL]:       Okay. No.

THE COURT:                So the client declines to sign the waiver.

[DEFENSE COUNSEL]:       No. He declines to sign it, yes.

THE COURT:                That's what I asked. Okay, no problem. If he wishes to execute it at a later point, just let the Court know.

VD. 8. At no point following this exchange resulting in Mr. Rodriguez declining to waive his right did Mr. Rodriguez choose to waive his right to be present; the issue is never mentioned again by anyone in the transcript.

Although the *voir dire* transcript does not note that Mr. Rodriguez attempted to participate in sidebars with potential jurors, waiver cannot be inferred from a silent record or from the fact that a sidebar took place without objection from Mr. Rodriguez, *Williams*, 52 A.D.3d at 95-96, especially when he had already expressed his explicit desire to retain his right to be present. Even could his lack of participation be construed as a waiver, it would be invalid; the court's erroneous explanation of the *Antommarchi* right foreclosed the possibility of such a waiver being knowing and intelligent. *Williams*, 52 A.D.3d at 96 (waiver is invalid unless knowing, intelligent, and voluntary).

**B. Reversal is required where prospective juror Michael Cooper was excused on consent by the defense and the prosecution following a sidebar that excluded Mr. Rodriguez and during which Mr. Cooper was questioned at length about his potential bias.**

The record demonstrates that Mr. Rodriguez was not present for the questioning of prospective juror Michael Cooper. VD. 287; *see People v. Velasquez*, 1 N.Y.3d 44, 47-48 (2003); *Maher*, 89 N.Y.2d at 325 (for appellate review, record must establishing defendant's exclusion from a material stage of trial). Justice Milano asked if any juror had been convicted of a crime or had been a victim of a crime such that "it would impair your ability to be fair and impartial here[.]" VD. 287. Mr. Cooper said that he did not want to speak publicly, and Justice Milano invited Mr. Cooper to come up to speak "privately," at which time the record noted, "[w]hereupon, there is a discussion held on the record at sidebar among the prospective juror, both assistant district attorneys, defense counsel and the Court as follows. *The defendant is not present[.]*" VD. 287 (emphasis added).

What followed during Mr. Cooper's sidebar was a material stage of trial because Mr. Cooper was questioned about his possible biases against police and against Mr. Rodriguez as someone accused of a shooting. *Antommarchi*, 80 N.Y.2d 247 at 250. At the sidebar, Justice Milano and the attorneys questioned Mr. Cooper extensively about his potential bias. J.287-293. Mr. Cooper said that the police had not caught a person who had shot him outside of a nightclub, and stated that he did not think the police had done a "good job" in trying to find the shooter. VD. 287-



88. He specifically questioned whether the police had collected or reviewed potentially relevant evidence in his case. VD. 290. The court, the prosecution, and defense counsel all asked Mr. Cooper questions concerning the details of the shooting, what Mr. Cooper's relationship to the shooter was, and whether Mr. Cooper thought the police did a "good job in trying to find this person." VD. 288-91. Explaining the purpose of the questions, the court said to Mr. Cooper that the prosecution was concerned that Mr. Cooper was "ticked off at the police because they didn't put the guy who shot you behind bars," and defense counsel was concerned because "you were shot by a guy with a gun and [Mr. Rodriguez] is accused of having a gun." VD. 288-89.

Mr. Cooper was later excused on consent, the result of a discretionary decision by defense counsel. VD. 332. Justice Milano initially stated that, "subject to hearing argument," he wanted to "suggest" Mr. Cooper as one of "those jurors I believe should be dismissed on consent. And again, it's subject to hearing from both sides." *Id.* Then he said that this "would serve as our – both side's [sic] challenges for cause." *Id.* But he then referred to Mr. Cooper as one of those jurors who he thought "may be subject to consent dismissal," and asked, "Does anybody dispute that?" Neither the defense nor prosecution made argument as to why Mr. Cooper should be excused for cause:

[THE COURT: ...] Does anybody dispute that?

[DEFENSE COUNSEL]: No. I'll consent.

[PROSECUTOR]: Certainly not.

THE COURT: On consent.

VD. 332.<sup>4</sup>.

Mr. Rodriguez's absence denied him an essential opportunity to participate in this material stage of trial. Without Mr. Rodriguez's waiver, "[t]he court may not ... explore prospective jurors' backgrounds and their ability to weigh the evidence objectively unless [Mr. Rodriguez] is present." *Antommarchi*, 80 N.Y.2d 247 at 250. This is because Mr. Rodriguez might have had "valuable input on his counsel's apparently discretionary choice to excuse [Mr. Cooper]." *Roman*, N.Y.2d at 28. Specifically, Mr. Rodriguez might have instructed his counsel not to consent to Mr. Cooper's excusal. Mr. Rodriguez might have wanted a juror who had

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<sup>4</sup> A juror's excusal may be considered for cause when it is the court's "unvarying practice to immediately dismiss jurors who were unable to withstand a challenge for cause based on what was stated at the sidebar." *People v. Childs*, 247 A.D.2d 319, 323 (1st Dep't 1998). The record here demonstrates that the court's practice was to dismiss jurors for cause based on the juror's statements only if one side successfully argued that the juror should be dismissed, even if the juror initially appeared to be possibly unqualified. *See, e.g.*, VD. 97-102, 145-46, 213-14. When defense counsel did not oppose the prosecution's application to excuse the juror Ramona Otero for cause, Justice Milano said that "[i]t might have been a stretch to keep her," but he did not immediately dismiss her because "[he] was certainly willing to entertain argument." VD. 101-02. Defense counsel's arguments to keep jurors who might be subject to for-cause dismissal did make a difference to the court's decisions whether to excuse them. For example, the court denied the prosecution's requests to excuse three jurors for cause after defense counsel opposed the prosecution's applications, because while they appeared at first glance to be unqualified, the court found that they had been rehabilitated. VD. 99, 213-14, 216-18. In keeping with the court's practice, although the court did "suggest" Mr. Cooper as a juror who might be excused, the court was willing to entertain argument because Justice Milano said that his suggestion was "subject to hearing argument." VD. 332. Mr. Cooper was then dismissed "on consent" without argument. *Id.*

experiences that might lead him to keep an open mind about the soundness of the investigatory practices of the NYPD in a trial where inconsistent allegations of him firing a gun were unsupported by any specific evidence of a gun, especially since the prosecution relied so heavily on a video that had clearly been tampered with. “Defendants are entitled to hear questions intended to search out a prospective juror’s bias, hostility or predisposition to believe or discredit the testimony of potential witnesses...” *Antommarchi*, 80 N.Y.2d 247 at 250.

Reversal is required because the court excused Mr. Cooper, who was questioned about bias and impartiality in Mr. Rodriguez’s absence “as the result of discretionary judgment made by defense counsel.” *Davidson*, 89 N.Y.2d at 881. Discretionary judgments include excusals with defense counsel’s consent. *Id.*; *Roman*, 88 N.Y.2d at 27-28 (six panel members excused on consent by defense counsel each constituted *Antommarchi* violation requiring reversal); *Williams*, 52 A.D.3d at 96-97 (two jurors excused on consent by defense counsel each constituted *Antommarchi* violation requiring reversal). This Court must reverse the convictions unless the record “negates the possibility that [Mr. Rodriguez] could have meaningfully contributed to the sidebar[,]” such as when the juror is excused for cause. *Maher*, 89 N.Y. 2d at 325; *see also Favor*, 82 N.Y.2d at 267; *Roman*, 88 N.Y.2d at 28-29. *Davidson*, 89 N.Y.2d at 883.

Mr. Cooper would not necessarily have been dismissed for cause. He stated that he could be fair and evaluate testimony impartially. He said during his sidebar that he blamed the nightclub, and not the NYPD, for the fact that there was no arrest. However, he also said that he was sure that he could be fair and did not harbor any ill will against people accused of possessing a weapon. VD. 288. He was clear that he could impartially evaluate testimony and use his common sense to reach a verdict. VD. 313.

Had Mr. Rodriguez been present at the sidebar, defense counsel might have argued to keep Mr. Cooper when Justice Milano asked to “hear[] from both sides.” J.332. Combined with his statement that it was a “consent dismissal,” Justice Milano’s suggestion that he was open to argument about a for-cause challenge does not mean that Mr. Rodriguez could not have made a meaningful contribution. *Maher*, 89 N.Y. 2d at 325.

**C. This Court must reverse Mr. Rodriguez’s conviction.**

Because the trial court violated Mr. Rodriguez’s right to be present for a material stage of trial during jury selection, this Court must reverse Mr. Rodriguez’s convictions and order a new trial. *Maher*, 89 N.Y. 2d at 325; *Favor*, 82 N.Y.2d at 267; *Roman*, 88 N.Y.2d at 28-29; *Davidson*, 89 N.Y.2d at 883; *Williams*, 52 A.D.3d at 96-97.

## **POINT II**

### **THE VERDICT WAS AGAINST THE WEIGHT OF THE EVIDENCE WHERE THE EVIDENCE DID NOT ESTABLISH THAT MR. RODRIGUEZ POSSESSED A DANGEROUS INSTRUMENT OR HAD THE REQUISITE INTENT.**

This Court must review the weight of the evidence to determine whether, “based on all the credible evidence, a different finding would not have been unreasonable.” *People v. Bleakley*, 69 N.Y.2d 490, 495 (1987); *see also* N.Y. Crim. Proc. Law § 470.15(5). “[E]ven if all the elements and necessary findings are supported by some credible evidence, the court must examine the evidence further.” *People v. Cahill*, 2 N.Y.3d 14, 57-58 (2003) (quoting *Bleakley*, 69 N.Y.2d at 495). As the Court of Appeals has explained, “the weight of the evidence examination ... requires[] the court to affirmatively review the record; independently assess all of the proof; substitute its own credibility determinations for those made by the jury in an appropriate case; determine whether the verdict was factually correct; and acquit a defendant if the court is not convinced that the jury was justified in finding that guilt was proven beyond a reasonable doubt.” *People v. Delamota*, 18 N.Y.3d 107, 116-17 (2011) (internal citations omitted). When “the trier of fact has failed to give the evidence the weight it should be accorded, then the appellate court may set aside the verdict.” *Bleakley*, 69 N.Y.2d at 495 (citation omitted).

**A. The verdict for menacing in the second degree was against the weight of the evidence because there was no evidence that the complainants perceived a weapon.**

**1. The complainants testified that they perceived a black plastic bag in Mr. Rodriguez's hand, not a gun.**

To convict Mr. Rodriguez of second degree menacing, the prosecution needed to prove that he “intentionally place[d] or attempt[ed] to place the complainants in reasonable fear of physical injury, serious physical injury or death by displaying a deadly weapon, dangerous instrument or what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm.” N.Y. Penal Law § 120.14(1). The display element is satisfied only when it is proven that the complainant “actually perceived the display.” *People v. Lopez*, 73 N.Y.2d 214, 222 (1989); *see also People v. Baskerville*, 60 N.Y.2d 374, 381 (1983) (“Furthermore, the display must actually be witnessed in some manner by the victim, i.e., it must appear to the victim by sight, touch or sound that he is threatened by a firearm.”). Although both *Lopez* and *Baskerville* were robbery cases, New York courts have applied *Lopez* and *Baskerville* to interpret the display element in menacing cases identically to that of robbery cases. *See People v. Colon*, 116 A.D.3d 1234, 1236 (3d Dep’t 2014) (relying on *Lopez* to find that the evidence was sufficient to support a conviction for second-degree menacing where the display of a weapon was actually perceived).

Conversely, New York courts have consistently held in both robbery and menacing cases that when the complainant testifies that they did not actually believe the accused possessed what appeared to be a weapon, the display element is not proven. In *People v. Tineo*, 94 A.D.3d 507, 508 (1st Dep’t 2012), the evidence in support of the weapon display element for robbery charges was legally insufficient because “the victim testified that she did not see any weapons.” *Id.* In another case, the defendant actually used the weapon to threaten the complainant, and a nearby police officer observed a gun. *Matter of Tafari S.*, 83 A.D.3d 1084, 1085 (2d Dep’t 2011). However, the complainant herself did not see it because she was approached from behind. *Id.* The court held that the display element of second degree menacing was not proven because “the victim testified that...she did not know what caused the ‘poke’ which she felt in her side, that she did not see anyone with a gun, and that she only observed the gun after it was dropped to the ground as the arresting officer approached.” *Id.*

In this case, Mr. Prieto-Ramos claimed that Mr. Rodriguez removed a black bag from the trash, attempted to enter the building, threatened to kill him, moved back to near the garbage cans, and fired a weapon. Neither complainant, however, testified to seeing a weapon, but rather described only a plastic bag in Mr. Rodriguez’s hand. Mr. Prieto-Ramos testified that what he saw in Mr. Rodriguez’s hand was “black bag” or “black plastic bag” three times in his testimony. T. 62, 63,

101. Mr. Vargas referred to what he saw as a “bag” or “black bag” four times, T. 123, 125, 126, 127, and Mr. Vargas explicitly conceded on cross-examination that he did not know what was inside the bag he saw:

[DEFENSE COUNSEL]: Now, you said earlier that what Mr. Rodriguez appeared to have in his hand was a plastic bag; is that right?

[MR. VARGAS]: A black bag.

[DEFENSE COUNSEL]: You couldn’t really tell what was in the bag at that point; is that fair to say?

[MR. VARGAS]: No.

T. 155.

Moreover, the video does not support a finding that Mr. Vargas or Mr. Prieto-Ramos actually perceived Mr. Rodriguez to be holding anything but a black plastic bag. At the point where Mr. Prieto-Ramos and Mr. Vargas claimed that Mr. Rodriguez was threatening Mr. Prieto-Ramos while “pointing” the plastic bag, neither Mr. Prieto-Ramos nor Mr. Vargas can be seen demonstrating any visible reaction. Video at 16:56:17-16:56:36. Mr. Prieto-Ramos claimed that Mr. Rodriguez was also “shouting” and “cursing” T. 84. Although there is no audio, the person the complainants identified as Mr. Rodriguez does not appear visibly “aggressive or upset” as Mr. Prieto-Ramos described Mr. Rodriguez at this time. T. 65; Video at 16:56:17-16:56:36. The video also shows several passersby who walking along the sidewalk between the white shirted man holding the black object



and the complainants, yet none of them react as if anything unusual is happening at all. Video at 16:56:17-16:56:36. After the Mr. Rodriguez allegedly fired, Mr. Ramos actually walked “towards where [Mr. Rodriguez] was at,” while “[h]e still had the weapon.” T.66. The person identified as Mr. Rodriguez in the video is still holding an object in his hand. Video at 16:56:56-16:57:13. Although he claimed “wanted to cover the garbage can so he couldn't approach the weapon again,” T. 66, Mr. Prieto-Ramos apparently did not think this was necessary after only a few seconds later after 16:57:56, when he returned to leaning against the SUV. The person who he identified as Mr. Rodriguez remained within a few feet of the garbage cans. *Id.*

Even when Mr. Prieto-Ramos and Mr. Vargas claimed that the gun fired, their testimonies were inconsistent. On direct examination, Mr. Prieto-Ramos stated not that he believed it was a weapon *not* because he actually saw a gun, but because he thought what was in Mr. Rodriguez’s hand fired:

[PROSECUTOR]:                      And what, if anything, did you observe about that black plastic bag that he was holding in his right hand?

[MR. PRIETO-RAMOS]:              A weapon.

[PROSECUTOR]:                      Well, what, sir, led you to believe that was a weapon?

[MR. PRIETO-RAMOS]:              Because it fired.

T. 63. However, on cross examination, Mr. Prieto-Ramos agreed that what he earlier referred to as a weapon was actually a plastic bag, then contradicted his earlier stated reason why to he thought it was a gun, incredibly claiming that he could actually see a weapon through the black bag:

[DEFENSE COUNSEL]: Now, before, as you say, it was fired, why did you think it was a gun?

[MR. PRIETO-RAMOS]: Because you could see it on the bag.

T. 101.

Likewise, Mr. Vargas gave unclear testimony about what he heard and saw at the time of the alleged gunshot. He claimed that he heard a “pang,” but on cross-examination claimed “[t]here was no sound.” T. 127. Mr. Vargas also reiterated that Mr. Rodriguez was not pointing the black bag at them, but rather he “shot towards the bottom.” T. 159. But when defense counsel asked whether that meant “he fire[d] towards the ground away from you”, Mr. Vargas said, “no.” *Id.*

In attempting to prove that a gunshot took place, the prosecutor led Mr. Prieto-Ramos into stating that alarm on the SUV against which the video showed him standing had activated at the time of the alleged shot.

[THE PROSECUTOR]: Did you notice that the alarm activated on that vehicle?

[DEFENSE COUNSEL]:           Objection to form.

$$[\dots]$$

THE COURT: The objection is sustained. The answer is stricken.

[PROSECUTOR]. What, if anything, happened to that vehicle at that moment?

[MR. PRIETO]: With the impact of the sound, the alarm started.

T. 86. But the video clearly shows three people, Mr. Prieto, Mr. Vargas, and Mr. Frias, leaning against the SUV. Video at 16:56:47. Any one of them could have activated the car alarm by touching it.

Although the prosecution argued in summation that “you can see an object impact the concrete exactly where [Mr. Rodriguez] was pointing with the gun,” T. 312, there was no impact marking in the concrete even though the gun would only have been a few feet above the ground where it struck. Officer DeStaso said that he “canvassed the area for any type of ... bullet marks, any ricochet, maybe,” T. 12. But he found “no specific evidence that a gun had been fired.” T. 37.

**2. There was no corroborating evidence that Mr. Rodriguez had a weapon.**

In addition to canvassing for impact marks or ricochet marks, Officer DeStaso canvassed the area to recover other evidence of a gun, such as bullet casings, slugs, or bullet fragments, but found nothing T. 12, 14, 36. All he found that could conceivably have indicated a fired weapon was a lone dent in a nearby

car, which he admitted was not specific evidence of a gun because it “could have been caused by anything at high velocity.” T. 37.

In addition to finding no physical evidence, Officer DeStaso was nearby to the incident and did not remembering hearing a gunshot. T.46. Officer DeStaso said that he received a radio call of a man with a gun and arrived after one minute from only two blocks away to find Mr. Prieto-Ramos and Mr. Vargas:

[DEFENSE COUNSEL]:       Officer, you said when you received the radio-run, you were about how far away from 3201 Creston [sic]?

[OFFICER DESTASO]:       One block.

[DEFENSE COUNSEL]:       Did you hear a shot?

[OFFICER DESTASO]:       Not that I can recall.

T. 46. If Officer DeStaso was only a block away when Mr. Rodriguez fired a gun on the street, it seems impossible to believe that he would not have heard it. This was not a failure of memory because he also claimed to remember the incident well because “it was a major case, you know, bigger crime[,]” and he “remember[ed] running down the block and being the first one at the scene and everything else.” T. 51.

Furthermore, the injuries of the complainants were not consistent with being shot by a gun. They reported some scratching and bruising. T. 33. Mr. Prieto-Ramos said that he did not initially notice his injury at all. T. 116. Both refused

medical attention, and instead of going to the hospital accompanied the police to the precinct. T. 33, 52, 99, 129. Mr. Prieto-Ramos said no fragments or particles were removed his injuries. T. 116.

The lack of any evidence of gun is what led Officer DeStaso to initially believe that Mr. Rodriguez had a pellet gun, not a firearm:

[DEFENSE COUNSEL]:        Were you of the belief that a pellet gun was used in this incident?

[OFFICER DESTASO]:        On the day of when it first happened, judging by the injuries, uhm, and, you know, the lack of casings, shell casings, from a firearm, I did believe that.

[DEFENSE COUNSEL]:        And did you fill out some N.Y.P.D. paperwork to that effect?

[OFFICER DESTASO]:        I did.

T. 14. Over defense counsel's strenuous objection, Officer DeStaso was allowed to testify to his more recently formed opinion that Mr. Rodriguez had fired a gun. The court should not have allowed Officer DeStaso testify to this opinion at all because he stated that the basis of his knowledge of the difference between firearms and pellet guns was "Uhm, I went to the police academy. I've been trained to use a firearm. Since I've been younger—I live upstate—I've been hunting." T.15. This did not at all explain why "after having viewed that video" Officer DeStaso was no

longer “of the opinion that an air pistol or BB gun was fired in this incident.” T.

21.<sup>5</sup>

**3. The weight of the evidence was against convictions for second degree menacing where the complainants was simply incredible and their testimonies were unsupported by the suspicious security footage or any physical evidence.**

In sum, the evidence here fell far short of proving beyond a reasonable doubt that Mr. Rodriguez intentionally displayed what the complainants perceived to be a gun or other firearm. There was a complete lack of any physical evidence to corroborate the allegation that Mr. Rodriguez fired a gun. The security footage missing 16 minutes in the middle does not corroborate that Mr. Rodriguez fired a weapon, and the complainants’ behavior on the video contradicts their claim that they perceived a gun. Given that the complainants repeatedly claimed they actually

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<sup>5</sup> Mr. Rodriguez was also unfairly denied the ability to fully conduct his defense when the trial court ruled that it would allow the prosecution to inquire into decades old and wholly irrelevant convictions. Defense counsel informed the court that intended to call Minerva Negrón Franciona, a friend of Mr. Rodriguez. T. 174-175. His wife Rosalia Martinez stated that she and Ms. Franciona had been outside of the building at the time Mr. Rodriguez was arrested for no apparent reason. T. 190-92. Ms. Franciona therefore would likely have corroborated Mr. Rodriguez and Ms. Martinez’s version of the incident. But the trial court ruled that it would allow the prosecution to inquire about a nearly 20 year old drug conviction and a weapons charge from the 1970s in order to impeach Ms. Franciona, over defense’s strong objection. T. 181-82. Defense counsel chose not to call her as a result. T. 183.

The trial court also refused to allow defense counsel to complete his impeachment of Mr. Vargas on his testimony about where he lived, claiming that Mr. Vargas’s inconsistent statements to the trial court and the grand jury about his address were “collateral.” T. 137-43. Mr. Vargas had testified to the grand jury that he lived in Brooklyn at the time of the incident. T. 137. But at trial, he testified that at the time of the incident he was living in the Bronx. *Id.* When defense counsel pointed out this inconsistency, Mr. Vargas denied it, saying he lived in Brooklyn, at which point the transcript of his statement was read to him. T. 138. He denied testifying as the transcript recorded. *Id.* After a lengthy sidebar, the trial court did not allow defense counsel to inquire further. T. 142-43.

saw a black plastic bag, and that there was no evidence of any weapon whatsoever,<sup>6</sup> the complainants' allegations simply do not make sense.

Accordingly, the conviction for second degree menacing was against the weight of the evidence and must be reversed.

**B. The verdict was against the weight of the evidence for the criminal possession of a weapon charge because it was never proven what, if anything, Mr. Rodriguez actually possessed and the requisite intent was not proven.**

A person is guilty of criminal possession of a weapon in the fourth degree when they possess an “imitation pistol, or any other dangerous or deadly instrument or weapon, with intent to use the same unlawfully against another.” N.Y. Penal Law § 265.01(2).

As discussed above, the prosecution's had no credible evidence that Mr. Rodriguez had a gun, real or imitation. The security footage showed nothing more than an indistinct, dark-colored object held by the person the complainants identified as Mr. Rodriguez. Video at 16:56:17. The complainants themselves actually saw only a black plastic bag. T. 62, 63, 101, 123, 125, 126, 127. Mr. Vargas did not know what was in Mr. Rodriguez's hand, T. 155, and Mr. Prieto-Ramos's claim that he could see a gun inside the bag cannot be credited. No one in

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<sup>6</sup> Moreover, Officer DeStaso's opinions that a gun had been fired at the scene are of no evidentiary value. First, he admitted that there was no ballistics evidence. Second, he initially stated that he thought Mr. Prieto-Ramos had been shot with a pellet gun, but then changed this opinion based solely on the video, which, as argued above, did not support this assumption.

the security footage shows reacts in a manner consistent with Mr. Rodriguez belligerently threatening to kill Mr. Prieto-Ramos. Video at 16:56:17-16:56:36. Their claims that he fired a gun are not consistent with their behavior immediately following the alleged firing. The car alarm allegedly activated by the shot could have been activated by anyone of the three people leaning against the car, and there was no strike mark where the prosecution said the bullet struck the ground. Video at 16:56:36-16:56:59; T. 12, 37. Officer DeStaso's search turned up nothing that would indicate a gun. *Id.* at 37. The injuries the complainants reported were scratches and bruising for which neither bothered to seek any medical attention. *Id.* at 33, 52.

Moreover, although Mr. Vargas claimed that Mr. Rodriguez "pointed" a weapon and fired it, T. 123, *no such gesture clearly appears on the video* which purportedly recorded the acts at issue here. Video at 16:56:36-16:56:59. In the video, the man identified as Mr. Rodriguez in the video moved his hand in a manner that was consistent with an accidental discharge, and, if anything, something discharged into the sidewalk. *Id.* So, even if, for the sake of argument, Mr. Rodriguez did possess a weapon as defined by the statute, there was no evidence that he did so with the intent "to use the same unlawfully against another." N.Y. Penal Law § 265.01(2).



## **CONCLUSION**

For the foregoing reasons, this Court must reverse Mr. Rodriguez's conviction.

Dated: New York, New York  
January 16, 2018

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**ADDENDA**

Supreme Court of the State of New York  
Appellate Division: First Department

The People of the State of New York,

Respondent,

— against —

Ind. No. 2839-2011

Jose Rodriguez,

Defendant-Appellant.

**Statement Pursuant to Rule 5531**

1. The indictment number in the court below was 2839-2011.
2. The full names of the original parties were “The People of the State of New York” against “Jose Rodriguez.”
3. This action was commenced in Supreme Court, Bronx County.
4. This action was commenced by the filing of an indictment.
5. This is an appeal from a judgment rendered on July 25, 2013, by the Supreme Court, Bronx County. Jose Rodriguez was convicted, after trial, of menacing in the second degree, N.Y. Penal Law § 120.14, and criminal possession of a weapon in the fourth degree, N.Y. Penal Law § 265.01. Mr. Rodriguez received a sentence of time-served and a fine of \$1,000. Justice Frank Milano presided over the trial and sentencing. Timely notice of appeal was filed. No stay of execution has been sought.
6. Mr. Rodriguez has been granted leave to appeal as a poor person on the original record and typewritten briefs.

Supreme Court of the State of New York  
Appellate Division: First Department

The People of the State of New York,

Respondent,

— against —

Ind. No. 2839-2011

Jose Rodriguez,

Defendant-Appellant.

**Printing Specification Statement**

1. The following statement is made in accordance with First Department Rule 600.10.
2. Jose Rodriguez's brief was prepared with Microsoft Word 2010 with Times New Roman typeface 14 point in the body and 12 point in the footnotes.
3. The text of the brief has a word count of 10,352 as calculated by the processing system and is 44 pages.