

NEW YORK COUNTY INDEX No. 04576/07

To Be Argued By:
RICHARD WARE LEVITT
William H. Murphy, Esq.
(of the bar of the State of Maryland)
Appearing by permission of the Court

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

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

REMY SMITH,

Defendants-Appellant.

BRIEF FOR APPELLANT REMY SMITH

THE MURPHY FIRM
One South Street, Suite 2300
Baltimore, Md. 21202
(410) 539-6599
billy@billymurphylaw.com

LEVITT & KAIZER
148 East 78th Street
New York, N.Y. 10075
(212) 737-0400
rlevitt@richardlevitt.com

Attorneys for Remy Smith

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**SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT**

-----X
THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,
-against-

REMY SMITH,

Defendant- Appellant.

-----X

Statement Pursuant To Rule 5531

1. The indictment number in the court below was 04576/07.
2. The full names of the original parties were The People of the State of New York against Remy Smith. This action was commenced in the Supreme Court, New York County.
3. This action was commenced by the filing of an indictment on 9/11/07.
4. This is an appeal from a judgment convicting appellant, after a jury trial, of assault in the second degree, attempted coercion in the first degree, and criminal possession of a weapon in the second degree.
5. This is an appeal from a judgment of conviction rendered on May 13, 2008.
6. The appendix method is being used.

Preliminary Statement

This is an appeal from a judgment of the Supreme Court, New York County, rendered on May 13, 2008, convicting appellant, after a jury trial, of two counts of assault in the second degree [P.L. §§ 120.05 (1), (6)], attempted coercion in the first degree [P.L. §§ 110.00,135.65], criminal possession of a weapon in the second degree [P.L. § 265.03(3)], and sentencing her to concurrent prison terms of eight years on the assault and weapon counts, one and one-third to four years on the attempted coercion count, and five years post-release supervision (Uviller, J.).

Timely notice of appeal was filed. Appellant is currently incarcerated pursuant to the judgment. No application for a stay of execution of judgment has been made.

Appellant had no co-defendants below.

QUESTIONS PRESENTED

1. Whether the trial court wrongly instructed the jury, over defense objection, that if it found Makeda Joseph “was truthful and accurate” then her testimony “under the law satisfies the proof beyond a reasonable doubt.”
2. Whether the trial court’s order forbidding defense counsel to argue during summation that Makeda Joseph was shot during a struggle for the gun denied Ms. Smith a fair trial.

3. Whether Ms. Smith was unfairly prejudiced by the inclusion in the indictment of the counts regarding the violent gang assault at the Player's Club, as to which there was no evidence of her complicity, but which likely colored the jury's consideration of the remaining counts.

4. Whether the gun possession charge must be dismissed because Penal Law §265.03 unqualifiedly bans the possession of handguns outside the home or place of business and is therefore unconstitutional.

Statement of Facts

Introduction and Argument Summary

Appellant Remy Smith was charged in a nine-count indictment with offenses that allegedly occurred on two separate dates. The first set of offenses, charged in Counts One through Five, concerned the July 14, 2007 shooting of Makeda Joseph. The People alleged that Ms. Smith, Joseph and others had been partying at a club on 14th Street, the Pizza Bar, and that they eventually left during the early evening hours and entered various cars. Ms. Smith then realized that \$3,000 had been taken from her pocketbook and decided to confront Joseph, who had held the pocketbook for a short period of time in the club. Witnesses claimed that Ms. Smith entered Joseph's car with a cocked gun. A "tussle" ensued as Ms. Smith tried to look into

Joseph's pocketbook and Ms. Smith demurred, attempting to pull the pocketbook back. In the struggle, the rear view mirror was shattered, and then the gun went off, with a bullet entering Joseph's body and injuring her severely. For this alleged conduct, Ms. Smith was charged with intentional assault (Count One), reckless assault (Count Two), coercion (Count Three), criminal possession of a weapon (Count Four), and felony assault (Count Five).

The second set of charges stemmed from an encounter at a strip club called the Player's Club, on August 18, 2007. At that time, a group of men assaulted Kendrick Green – the boyfriend of Joseph's friend Krystal Bolton - and Green's friend, Sydney Holmes. The People alleged this assault was intended to tamper with or intimidate prospective prosecution witnesses, Bolton in particular. This conduct formed the basis for the charges against Ms. Smith alleging gang assault (Count Six), tampering with a witness (Count Seven), intimidating a witness (Count Eight), and assault (Count Nine).

The principal issues with regard to Counts One through Five were whether Ms. Smith possessed a weapon and whether she intended to shoot Joseph or whether the gun accidentally discharged as Ms. Smith and Joseph

struggled. The principal issue regarding Counts Six through Nine was whether Ms. Smith was an accessory to the assault on Green and Holmes.

The jury convicted Ms. Smith of Counts One, Three, Four, and Five (the jury was told not to reach Count Two if it convicted on Count One), and acquitted her of Counts Six, Seven, Eight, and Nine.

Ms. Smith was sentenced on May 13, 2008 to a period of eight years imprisonment.¹ She is presently serving her sentence at Bedford Hills Correctional Facility.

In this brief we raise four issues. In Point One, we address the trial court's erroneous instruction to the jury that if it found the complainant "was truthful and accurate," then her testimony "under the law satisfies" the requirement of proof beyond a reasonable doubt. This instruction wrongly directed a verdict of guilt should the jury find Joseph credible, and thereby violated Ms. Smith's Sixth Amendment right to a jury trial and due process of law.

In Point Two, we show that Ms. Smith was denied her constitutional right to a fair trial and to present a defense when the trial court forbade defense counsel from arguing that Joseph was shot accidentally during a

¹ Ms. Smith received concurrent prison terms of eight years on the assault and second-degree weapon possession counts, and one and one-third to four years on the first-degree attempted coercion count, and five years post-release supervision.

struggle over the gun. The court ruled that this argument would be improper because Joseph denied ever touching the gun, but the balance of the evidence unquestionably permitted such an inference. Certainly, a complainant's denial of certain facts does not trump a defendant's right to make an argument otherwise supported by the evidence.

In Point Three, we discuss the unfair prejudice that inured to Ms. Smith as a result of the joinder of Counts One through Five with Counts Six through Nine. The latter counts – concerning the brutal assault that occurred at the Player's Club – should never have been included in the indictment because the evidence was insufficient to support them. Though the jury acquitted Ms. Smith of these counts, the underlying facts were sufficiently brutal and disturbing that a grave risk exists that these facts colored the jury's consideration of Counts One through Five, to Ms. Smith's unfair detriment.

In Point Four, we argue that the statute under which Ms. Smith was prosecuted for weapons possession, P.L. § 265.03, is unconstitutional in light of the Supreme Court's decision in District of Columbia v. Heller, ___ U.S. ___, 128 S.Ct.2783 (2008), in which the Court found that the Second Amendment confers an individual right to keep and bear arms.

1. The Prosecution's Evidence

A. The Shooting of Makeda Joseph

Makeda Joseph, the 24-year old shooting victim, knew appellant, Ms. Smith, for about seven months when the shooting occurred. They met through a common friend, Krystal Bolton, who also introduced Ms. Smith to other individuals called as trial witnesses by the People, including Krystal Ricks and Ojudun Oluwole (also known as “Wally”) (A. 465-69).²

The events leading up to the shooting began July 13, 2007, when Joseph and others celebrated Bolton’s 25th birthday. Joseph and Bolton first went to a rooftop bar, “235,” where they planned to meet others, but they left after Ms. Smith was unable to enter because certain persons she was with were not suitably attired. And so they drove to the “Pizza Bar” on 14th Street, arriving at about 11:00 p.m. (A. 469-70, 475). Ms. Smith arrived about 45 minutes later, as did others, including “Shandra,” “Tiffany”, “Jemel”, and “Candice” (A.472, People’s Exhibits (PX) 18 and 19).

At some point during their stay at the Pizza Bar, Joseph became aware that Ms. Smith’s phone – which was in Ms. Smith’s pocketbook on a seat – was vibrating. Joseph said she and Ms. Smith “were cool” enough for Joseph to reach into the bag and take out the phone. The caller was

² Numbers in parentheses preceded by “A” to the Appendix filed with this brief.

identified as “D Love.” Joseph knew this was not the name of Ms. Smith’s boyfriend, and felt she could take the liberty to return the phone to the bag without telling Ms. Smith. A moment later, the phone vibrated again. Ms. Smith asked for the bag and Joseph complied. Ms. Smith stepped away and spoke on the phone (A. 474).

The entourage left the Pizza Bar at approximately 3:30 or 4:00 a.m. Joseph walked across the street with Ms. Smith, Bolton, Tiffany and Krystal Ricks and entered a deli. Krystal Ricks, a friend of Bolton and Joseph, had also known Ms. Smith for a few months (A. 234-37). They were loud, laughing and having a good time. Joseph took a package of gummy bears and asked Ms. Smith to buy them for her; Ms. Smith complied. They stayed in front of the Deli a few minutes and then returned to various cars. Joseph’s car was on Washington Street (a north to south street) between 14th and 13th Streets. Wally wanted to enter Joseph’s car but Joseph told him to get a ride with Bolton as they lived near one another (A. 475-77). Krystal Ricks entered Bolton’s car (A. 238-39).

Joseph sat in her car talking on the phone with her boyfriend and waited for Bolton to pull out because they intended to drive together. Eventually, Joseph backed up her car along side of Bolton’s to ask Bolton why she had not yet left. Bolton explained she was speaking with Ms.

Smith, who said she had lost \$3,000. Another car came down the block, so Joseph moved hers in front of Bolton's. Meanwhile, Joseph heard Bolton yelling into the phone that Joseph was "right in front of me." Joseph, hearing this, asked Bolton why her name was being used and Bolton reported that, according to Ms. Smith, Joseph had been the last person with her bag (A. 476-77).

Shortly thereafter, Ms. Smith pulled up, her car screeching to a stop with her front bumper aligned with Joseph's rear bumper. Joseph saw Ms. Smith jump out of her car, a Cadillac Escalade (A. 478-79). Ms. Smith was holding a gun. Over objection, Joseph testified she had previously observed Ms. Smith with this gun, or a gun that at least looked the same, on approximately three occasions: once in January 2007 when they went to a party together and Ms. Smith put the gun under the seat of her car, a second time at Ms. Smith's home as they got ready to attend a party and Ms. Smith explained she had previously been assaulted and robbed and that she would not let it occur again, and a third time when they went to a party and she saw the gun in Ms. Smith's purse (A. 481-83).

Joseph saw Ms. Smith cock the gun as she approached Joseph's car and she heard Ms. Smith say, "Yo, I'm not even playing, that is my word. Dump the bag." Ms. Smith was in a rage. Joseph did not believe, however,

that Ms. Smith would shoot her, but rather that Ms. Smith was making a scene and had cocked the gun to be dramatic (A. 551-52). She opened the door, entered the car and grabbed Joseph's bag. Joseph grabbed the bag back and the two started to "scuffle." Joseph told Ms. Smith to let go of the bag and that she would never take Ms. Smith's money. According to Joseph, "it was like the last time, she said, get off the bag." Their hands swung upward and they hit the rearview mirror, which broke. She then saw a flash and heard a noise, and she breathed in smoke (A. 483-85). Joseph felt pins and needles in her leg. Seconds later she felt a burning in her stomach and saw a red spot on her white dress. Joseph said, "Remy you shot me" as Ms. Smith was looking through Joseph's bag. Joseph asked for help, and Ms. Smith said "get into my car." Joseph fell out of the car with her legs still inside, and Ms. Smith left (A. 483-89).³

At this point, Bolton, who had been observing these events from her own car, came to Joseph's aid. Bolton had met Joseph years before when they both worked together in a sneaker store. At the time of trial, Bolton worked as a teacher's assistant and child counselor, and was also an aspiring

³ Detective Jeffrey Salta of the Manhattan South Homicide Squad interviewed Joseph in St. Vincent's Hospital's surgical intensive care unit after surgery. Joseph said that she saw Ms. Smith exit her vehicle, rack her gun and enter Joseph's vehicle. Ms. Smith grabbed for Joseph's bag, then "A little struggle ensued and the gun went off and she realized she was shot" (A. 442).

rapper. She met Ms. Smith in November 2006 at a club when she gave Ms. Smith a tape she had made, and they exchanged phone numbers, eventually becoming close friends (A. 395-99).

Bolton's testimony of the night's events was similar to Joseph's. She admitted, however, being drunk and did not recall anyone being in her car at the time she heard a shot fired, though she later learned that Wally and Krystal Ricks in fact were her passengers (A. 406-07). She did recall receiving a call from Ms. Smith, who angrily said that someone had stolen money from her and that Joseph had held her bag. Ms. Smith also told Bolton that everyone was going to be searched, though Bolton said she paid no attention to her and was busy asking her boyfriend, Kendrick Green, to get into her car (A. 407-09). Bolton did not see Ms. Smith approach Joseph's car (A. 409-10).

When Bolton ran to Joseph's car, she saw that Joseph had been shot and was bleeding. Joseph told her, "she shot me, just let me go to sleep... please don't let me die."

Bolton's boyfriend, Kendrick Green, was drunk and helpless on the street when he heard a gunshot, but Green was too drunk to even get up (A. 649-51). Green had possession of Bolton's phone and shortly after the

shooting he received a call from Ms. Smith, who asked Green to tell Bolton to call her (A. 652-53).

Krystal Ricks testified she saw Ms. Smith pull up in her car, exit and enter the passenger side of Joseph's Maxima. She then saw Joseph and Ms. Smith "tussling" for a couple of seconds, and then heard a pop and saw a light (A. 242-43). Ricks ran toward Joseph as she saw Ms. Smith enter her own car and drive off (A. 244-45). She saw Joseph lying on the sidewalk, and called 911 (A. 244-46).

Oluwole Ojudun, the person referred to as "Wally," was very friendly with both Joseph and Bolton and casually knew the others at the party. He said he had one or two drinks that night but was not impaired (A. 271-76). At the end of the night, he entered Bolton's car, as did Ricks, and he sat in the middle of the back seat (A. 277, 282-83). At some point, he saw Joseph pull up in front of Bolton in a white Maxima and he then saw Ms. Smith pull up (A. 278-80). He saw Ms. Smith exit her car holding a gun and enter the passenger seat of Joseph's car. He was scared and so did nothing (A. 303-05). He saw Ms. Smith and Joseph "tussling" for about ten seconds, heard a shot fired and saw a spark. Ms. Smith exited Joseph's car, re-entered her own and drove away (A. 284-85). Another person was also in Ms. Smith's

car (A. 286-87). He saw Joseph bleeding from her stomach, leaning out of her car with her legs still inside (A. 288-91).

Wally said that when he was first questioned at the police station about the events he lied, saying he was asleep in the back of the car. He felt it was not his place to tell the police what he observed because he did not know whether Joseph wanted to handle the situation in the courts or retaliate in the street and because he felt his life was in danger (A. 291-93). Asked why he decided to finally tell what occurred, Wally said he spoke with his friends and spoke with Joseph in the hospital. He saw her condition, including her colostomy bag and she said, “do what you feel is right” (A. 293-96). Invoking “street principles,” Wally said that if Joseph had not cooperated with the police he would not have done so either (A. 295-96). But he changed his mind when the Assistant District Attorney called him to the prosecutor’s office. In fact, even then he lied, saying he was in the back of the car sleeping while the shooting occurred, but he eventually told the “truth” (A. 320-23).

Fire Department EMT worker Matthew Scalise responded to the scene (A. 77), and Joseph was taken by ambulance to St. Vincent’s hospital (A. 80). Several police officers also responded. Police Officer David Taylor and his partner located Ms. Smith’s Escalade on Tenth Avenue, facing

south, between Little West 12th Street and Gansevoort Street (A. 89), some 1152 feet from Joseph's Maxima (A. 190). Part of the front end was smashed and the airbags had deployed in the now-empty vehicle, which apparently had crashed into a parked vehicle before coming to a halt (A. 89-92, 189-90).

Police Office Patrick McLaughlin testified as a crime scene reconstruction expert (A. 101). The upshot of his investigation was that he believed – but was not certain -- that the single bullet that was fired grazed Joseph's leg, entered her stomach and exited through her right buttock (A. 118-20, 177-81, 200-11, 216-17). The shell casing was found in the utility cubby of Joseph's Nissan Maxima, a location that P.O. McLaughlin said made it unlikely that the person in the driver's seat had shot the weapon (A. 180-82). P.O. McLaughlin also said that the weapon – a .45 caliber handgun – would not fire if merely dropped from a handbag (A. 184-85). The hollow point bullet that exited Joseph's body was found in the rear of the Maxima (A. 185-87). However, P.O. McLaughlin arrived at the scene of the shooting at least three or four hours after the event (A. 211).

P.O. McLaughlin also testified that he had shown Joseph a gun of the same caliber as that with which she was shot, and she described the gun that shot her as a “little bit heavier” (A. 197-98).

Sergeant Peter Chamberlain responded to a call for assistance at 3:52 a.m., arriving less than a minute later. He observed a black female lying in the street. EMS removed her (A. 444-49). He did not observe a gun in Joseph's vehicle (A. 449) (and in fact the weapon with which Joseph was shot was not recovered). Sergeant Chamberlain had been informed at the precinct, possibly by Detective Yzaguirre, that Joseph was shot twice after being forced to strip down to her underwear (A. 450).

Joseph testified regarding her injuries and her three-week stay in the hospital (A. 496-98, 506). She hired an attorney, Lauren Raysor, to deal with the publicity and reporters trying to enter her hospital room. Raysor also filed a lawsuit against Ms. Smith on Joseph's behalf (A. 498-504). The lawsuit was dropped before the trial and Joseph said she did not know whether it would be re-filed (A. 575) (but in fact, the suit was revived after Ms. Smith was sentenced⁴). Dr. Justin Steel, attending surgeon at St. Vincent's Hospital, explained the surgery he performed on Joseph when she was brought to the emergency room (A. 580-93).

Bolton spoke with police the following day at the precinct. She also received a phone call from Ms. Smith's boyfriend, Papoose, who kept repeating that Ms. Smith had not committed the shooting and that someone

⁴ Barnes-Joseph v. Smith, Ind. No. 305176/2008 (Supreme Court Bronx County).

else might have run to the side of the car and shot Joseph (A. 410-16). Ms. Smith also called her; neither Papoose nor Ms. Smith told Joseph the shooting was accidental (A. 419-21).⁵

B. The Assault on Kendrick Green⁶ and Sydney Holmes

Because Ms. Smith was acquitted of all counts stemming from the assault on Kendrick Green and Sydney Holmes, we recount the relevant facts of this incident only briefly.

Kendrick Green was Krystal Bolton's boyfriend. Sydney Holmes was friends with both Bolton and Green (A. 599, 642). On August 18, 2007, Holmes and Green and five other friends went together to the Player's Club, a strip club on Randall Avenue in the Bronx, arriving at approximately 11:30 p.m. (A. 599, 655). They proceeded to the rear of the bar and entered the "VIP" section (A. 656-57). Holmes saw Ms. Smith at the club but didn't speak to her (A. 621). As Green went to get some champagne, Ms. Smith

⁵ Various telephone company records custodians testified regarding various phone records that the People introduced into evidence (Cleveland Jewett: A. 351; Sue Johnson: A. 385; Dan Jensen: A. 626). Antoinette Parker, employed by Ms. Smith's business management company, Padell Nadell Fine Weinberger, testified that they opened up phone accounts for their clients, including for Ms. Smith's ATT phone 646-420-0642. Ms. Smith's phone was opened in the name of Ms. Smith's corporation, Raye Syxx (A. 381-82). Josh Bruny, a junior manager of Violator Management, the booking agent for William Mackie, a/k/a Papoose (Ms. Smith's boyfriend), testified that Papoose made and received calls from the cell phone he carried while he was in Europe on tour with Papoose on July 14, 2007 (A. 457-63).

⁶ Green, who was on probation for possession of a gun (A. 643), testified, but invoked his Fifth Amendment privilege when questioned on cross-examination regarding his pending state kidnapping charge (A. 645-46). The court instructed the jury that it could draw a negative inference from this invocation of rights (A. 646, 677-79).

approached and asked why Bolton changed her number and also asked, “are people taking the stand?” (A. 655). Ms. Smith’s demeanor at this time was “regular” (A. 658). Green responded that he did not have anything to do with it (A. 658). As they were ordering bottles of champagne, a group of perhaps 30 men, including Ms. Smith’s boyfriend Papoose, approached them and stared them down for some ten minutes (A. 616, 659-60, 694-95). Ms. Smith walked over, stopped by Papoose and then walked off. Green did not see Ms. Smith signal Papoose or talk with him at this time (A. 662-63).

Green and Holmes, sensing trouble, went to the front of the bar to advise one of the bouncers who Green knew – “Scooter” - that they thought there would be trouble (A. 601-02, 659-60, 662). At about this time, Green was assaulted and Holmes stepped into the developing melee. Eventually, the two made it to the outside of the club (a. 604-06, 624, 663-64, 668-69). They went to the local police precinct and then were taken by Bolton, whom Green had called, to St. Barnabas Hospital (A. 665). Holmes had surgery for a broken jaw. He had a permanent plate inserted and his jaw was wired shut for several weeks (A. 606-08); see also testimony of dentist Niral Parkh: (A. 697-703). Green left St. Barnabas Hospital and was treated the next day at Montefiore Hospital for what he said was a fractured bone in his face (A. 663, 665).

2. The Court's Preclusion of Defense Argument

After the People rested, the parties discussed possible defense witnesses, including a forensics expert who would testify regarding the circumstances under which a handgun could accidentally discharge, and at some point during the ensuing dialog, the court asked defense counsel to address the People's argument that "there is no evidence of the struggle over a gun" (A. 730). Defense counsel argued, "it is not an unreasonable inference during such an altercation in the car with a gun loaded that at some point she attempted to put – to pull the gun away," (A. 732), but the court rejoined, "That is speculation" and "It is the old, when did you stop beating your wife" (*id.*). The court concluded that the expert could testify regarding the ease with which a cocked gun could discharge, but that counsel could not argue on summation that there was a struggle over the gun:

MR. FISHER: If I were to get up in summation and argue to the jury during that confrontation between two very angry people, and there was a loaded gun, and that it was cocked, it may very well have been – it would have even been perhaps likely at some point Makeda reached for the gun to pull it away, to pull it out of the hand of her assailant:

THE COURT: There is no evidence of that.
You cannot argue that...

MR. FISHER: What I'm suggesting is, looking at the situation in its broader context where Makeda is sitting in the car, she says Remy Smith got out of the car with the gun, cocked it, got in the car, they began to struggle.

THE COURT: Over a purse.

MR. FISHER: That is what she says, over a purse.

Now, remember at one time she says she lost control – her hands went up to the extent of breaking... the rearview mirror and that it came down.

Now, our witness is prepared to testify that if her hand came down and knocked into the gun, not struggle, just knocked into it that it could go off.

THE COURT: That is what we are talking about. If you are talking about how this could have been accidental, not there was a struggle over the gun, the victim touched the gun... (A. 733-35).

As discussed further below (post at 19-20), defense counsel complied with the court's order and did not argue on summation that Joseph was shot accidentally during a struggle over the gun.

3. Motion to Dismiss Player's Club Charges

After the People rested, defense counsel moved to dismiss Counts Six through Nine, the Player's Club charges, for insufficiency, pointing out that the only reference at all to Ms. Smith in connection with that incident was Green's testimony that Ms. Smith had asked him about Bolton having changed her phone number and whether people were taking the stand, and then stopped near Papoose for a "brief second" before leaving the club (A. 785-90). The court reserved judgment until after the jury's verdict stating, "the evidence is very thin" but "enough to get to the jury" (A. 791).

4. The Defense Case

A retired N.Y.P.D. forensics consultant, James Gannalo, testified as a defense witness regarding how a handgun can be fired accidentally by a reflex action when someone with a finger on the trigger is under stress (A. 751). He explained that this possibility accounts for the training police officers receive to keep their finger away from the trigger area when they hold a weapon (A. 752). He likened this reflex action to grabbing a banister when one slips going down stairs (A. 752).

Ms. Smith's manager, Jennifer Turner, authenticated several photographs of Ms. Smith's home, including ones depicting a window that permits Ms. Smith to identify visitors to her front door (testimony presented in response to Bolton's testimony that she had seen Ms. Smith answer her front door with gun in hand, which Ms. Smith supposedly explained she carried to the front door because she had previously been assaulted and robbed – see A. 481-83, 523-24).

5. The Defense Summation

Defense counsel's primary argument on summation was that, even assuming, arguendo, that Joseph's testimony was true, the People had failed to prove intentional assault as alleged in Count One:

Now, I'm going to be doing something -- I've been practicing law for 38 years, I have never done this ever. I am going to

with regard to one charge ask you to assume that everything the prosecution witness, Makeda Joseph, said is so. I'm going to ask you to assume that. And then argue to you, I think demonstrate to you, that in fact even based on Makeda Joseph's version of events, even then, not guilty of intentional assault (A. 806).

Counsel attempted to show that the likely scenario was that the gun went off accidentally during the "tussle" in Joseph's car over the handbag (A. 807-13).

6. The Court's Reasonable Doubt Charge and Jury's Verdict

During its instructions regarding reasonable doubt, the court told the jury it wanted to add a "note with regard to" the assault charge, then charged the jury as follows:

I do instruct you if you find Ms. Joseph was truthful and accurate in her testimony to you, *her testimony* without any other eyewitness to what happened inside the car, under the law *satisfies the proof beyond a reasonable doubt*. The law does not require more than one witness to a crime in order to prove guilt by that standard because as I'm sure you are aware, most crimes are not committed on camera or before an audience. Since Ms. Joseph is the only witness to the event inside the car it is important that you examine her testimony with special care testing it for both truthfulness and accuracy, using the various guidelines I suggested in order to decide if the People have proved guilty beyond a reasonable doubt with regard to the events inside the car.

(A. 909) (emphasis added).

At the conclusion of the charge, defense counsel raised the following objection to the charge:

Finally... your Honor, when you were discussing Makeda as the only witness who testified with regard to what happened in the car, you were very good enough to describe the credibility issues that pertain.

Please also tell the jury that if they find that her version of events, even if they believe it, but if they find that it is not sufficient to sustain the intentional assault counts then they should acquit. It is not just accuracy or credibility there, it is sufficiency.

(A. 939-41). The court denied the application, stating, “I don’t believe that’s an appropriate charge to give with regard to intent because intent has to do with the surrounding circumstances” (A. 941).

The jury convicted Ms. Smith of the charges concerning Joseph: two counts of assault in the first degree (intentional and felony assault), attempted and criminal possession of a weapon in the second degree, and attempted coercion in the first degree. It acquitted her of the charges concerning the Player’s Club incident: assault in the third degree and gang assault, intimidating a witness and tampering with a witness, all in the second degree (A. 995-97).

Argument

POINT ONE

THE TRIAL COURT WRONGLY INSTRUCTED THE JURY, OVER DEFENSE OBJECTION, THAT IF IT FOUND MAKEDA JOSEPH “WAS TRUTHFUL AND ACCURATE” THEN HER TESTIMONY “UNDER THE LAW SATISFIES THE PROOF BEYOND A REASONABLE DOUBT”

During its instructions regarding reasonable doubt, the court told the jury it wanted to add a “note with regard to” the assault charge. It reminded the jury that “only Makeda Joseph” was inside the car at the time of the alleged crime, but that her testimony, if believed, “satisfies the [requirement of] proof beyond a reasonable doubt” (A. 909). Defense counsel objected to this charge, arguing it was wrong to instruct the jury that Joseph’s testimony, if believed, would be sufficient to prove guilt as a matter of law (A. 939-41). The court’s rejection of this objection was error and left the jury with an instruction that wrongly directed a verdict of guilty should the jury find Joseph to be credible and, thus, deprived Ms. Smith of her fundamental constitutional rights to due process and a jury trial.

A. The Court’s Instruction Amounted to a Directed Verdict

“The Due Process Clause of the Fourteenth Amendment ‘protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.’”

Francis v. Franklin, 471 U.S. 307, 313, 105 S.Ct. 1965 (1985) (court quoting In Re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068 (1970)). The Sixth Amendment guarantees a right to trial by jury in criminal cases which “includes, of course, as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of ‘guilty.’” Sullivan v. Louisiana, 508 U.S. 275, 277, 113 S.Ct. 2078 (1993). “It is the jury’s basic function to determine a defendant’s guilt or innocence.” People v. Stahl, 138 A.D.2d 920,921, 526 N.Y.S.2d 868 (4th Dept. 1988), lv. denied, 72 N.Y.2d 867, 532 N.Y.S.2d 517 (1988). The trial court usurps that function by directing a guilty verdict; “[t]his is unequivocally error because a directed verdict is never permitted in a criminal prosecution.” Id. at 921 (court citing Connecticut v. Johnson, 460 U.S. 73, 84, 103 S.Ct. 969 (1993); People v. Walker, 198 N.Y. 329, 334-35 (1910); see also Francis v. Franklin, supra, 471 U.S. at 313 (state prohibited from “using evidentiary presumptions in a jury charge that have effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime”).

A jury instruction amounts to a directed verdict when it “encroach[es] upon the jury’s exclusive fact finding prerogative by removing from its consideration some element of the crime or of a defense to it.” People v. Goetz, 73 N.Y.2d 751, 752, 536 N.Y.S.2d 45 (1988); see People v. Stahl,

supra, 138 A.D.2d 920 (reversal required even though error unpreserved where court instructed jury it could find defendant either guilty of manslaughter or guilty of murder in the second degree, and did not submit a verdict of “not guilty” for jury’s consideration); People v. Doshi, 250 A.D.2d 431, 673 N.Y.S.2d 629 (1st Dept. 1998) (trial court improperly removed from consideration any good-faith defenses, and effectively directed verdict against defendant on sale and possession offenses, when it instructed jury that “unlawfully means that no one - physician or otherwise - is entitled to possess or to sell that substance”; instead, court should have instructed jury that any violation of Public Health Law was merely one factor to be considered in evaluating whether good-faith defense existed [emphasis supplied]), lv. granted 92 NY2d 896, affirmed on other gnds., 93 NY 2d 499 (1999); National Enterprises Corp. v. Reback, 219 A.D.2d 484, 631 N.Y.S.2d 161 (1st Dept. 1995)(to instruct jury in attorney fraud case that court has information that “as a matter of law” reveals that defendant engaged in professional misconduct, amounted to a directed verdict requiring reversal); cf. People v. Lewis, 166 A.D.2d 238, 560 N.Y.S.2d 630 (1st Dept. 1990)(“[j]ury instructions, in prosecution of fight manager accused of removing padding from his fighter's boxing gloves, did not effectively constitute directed verdict; though court instructed jury that, if it was shown

that fighter's padding had been removed, fighter had lost his legal right to strike opponent, court never removed from jury issues of whether, in fact, defendant conspired in removal of padding and had intent to inflict serious physical injury on opponent”).

Defense counsel’s principal argument on summation was that acquittal was required on the charge of intentional assault as alleged in Count One even accepting, arguendo, the truth of Joseph’s testimony:

Now, I’m going to be doing something -- I’ve been practicing law for 38 years, I have never done this ever. I am going to with regard to one charge ask you to assume that everything the prosecution witness, Makeda Joseph, said is so. I’m going to ask you to assume that. And then argue to you, I think demonstrate to you, that in fact even based on Makeda Joseph’s version of events, even then, not guilty of intentional assault (A. 806).

Continuing his argument, counsel dissected Joseph’s testimony in an effort to show that the likely scenario was that the gun went off accidentally during the “tussle” in Joseph’s car.

The court’s objectionable instruction eviscerated this strategy by directing the jury to convict Ms. Smith if it credited Joseph:

I do instruct you if you find Ms. Joseph was truthful and accurate in her testimony to you, *her testimony* without any other eyewitness to what happened inside the car, under the law *satisfies the proof beyond a reasonable doubt*. The law does not require more than one witness to a crime in order to prove guilt by that standard because as I’m sure you are aware, most crimes are not committed on camera or before an audience.

Since Ms. Joseph is the only witness to the event inside the car it is important that you examine her testimony with special care testing it for both truthfulness and accuracy, using the various guidelines I suggested in order to decide if the People have proved guilty beyond a reasonable doubt with regard to the events inside the car.

(A. 909) (emphasis added).

When provided an opportunity at the conclusion of the charge to raise objections, defense counsel argued:

Finally... your Honor, when you were discussing Makeda as the only witness who testified with regard to what happened in the car, you were very good enough to describe the credibility issues that pertain.

Please also tell the jury that if they find that her version of events, even if they believe it, but if they find that it is not sufficient to sustain the intentional assault counts then they should acquit. It is not just accuracy or credibility there, it is sufficiency.

(A. 939-41). The court denied the application, stating, “I don’t believe that’s an appropriate charge to give with regard to intent because intent has to do with the surrounding circumstances” (A. 941).

The court, thus, left standing an instruction that was in clear derogation of Ms. Smith’s right to a jury trial under the state and federal constitutions. Any argument that the court’s charge as a whole conveyed the prosecution’s burden of proving the defendant’s guilt beyond a reasonable doubt standard is unavailing since the court conveyed to the jury that its erroneous charge was a special exception with respect to Joseph’s

testimony. In fact, before giving the erroneous charge, the court told the jury it wanted to add a “note with regard to” the assault charge – thus highlighting the erroneous charge as one the jury must follow with respect to Joseph’s testimony.

There is, of course, a proper instruction that a court may give to convey to a jury that the testimony of one witness may be sufficient to convict. The following, a correct version of that instruction, markedly contrasts and throws into clear relief the fatal error made by the trial court in the present case:

I must stress that the People’s burden of proof does not shift to the defendant merely because the defendant has testified or has called a witness to testify in his (or her) behalf. Furthermore, this means that the People must establish each and every element of the crime with which the defendant is charged to your satisfaction beyond a reasonable doubt. Please bear in mind that one witness’ testimony is sufficient to convict if you believe it beyond a reasonable doubt and if it establishes, either standing alone or together with any other testimony, all the elements of the crime beyond a reasonable doubt. Howard G. Leventhal, Charges to the Jury and Requests to Charge in a Criminal Case in New York § 3:2. [emphasis added].

Critically, this charge properly instructs that the jury may convict based on a single witness’ testimony that it finds credible provided that testimony establishes all the elements of the crime beyond a reasonable doubt. By contrast, the trial court here instructed the jury that if it found Joseph truthful and accurate, her testimony established Ms. Smith’s guilt

beyond a reasonable doubt as a matter of law. Not only was this simply not true since, as argued by the defense, her testimony could be truthful and accurate and still not establish an essential element of the crime, to wit, intent, but also it usurped the jury's fundamental responsibility to determine whether the People had proven, through Joseph's testimony alone or with other evidence, each and every element of the crime beyond a reasonable doubt.

B. This Issue is Preserved and is not Subject to Harmless Error Analysis

Defense counsel objected to the court's charge, thus preserving this issue for appellate review. C.P.L. §470.05. No objection, however, was necessary to preserve this issue for appeal. An error that "relieve[s] the People of their obligation to prove a defendant's guilt beyond a reasonable doubt presents a ... basic defect" which deprives the accused of a "fundamental constitutional right." People v. Thomas, 50 N.Y.2d 467, 471-72, 429 N.Y.S.2d 584 (1980); Stahl, supra, 138 A.D.2d 920 (reversal required despite no objection to charge as court deemed error "of such magnitude as to deny defendant his constitutional right to a fair trial"). Further, when an instruction improperly lessens the burden of proof, the mode of proceedings in criminal trials is upended. See People v. Martinez, 81 N.Y.2d 810, 595 N.Y.S.2d 376 (1993) (holding that where jury is unable

to find defendant guilty of each element of the crime beyond a reasonable doubt, conviction presents non-waivable error fundamental to the mode of proceedings prescribed by law). Such an error is preserved without objection because it is "at basic variance with the mandate of law prescribed by [the] Constitution." *Id.* at 471-472, 586-587 (citing People v. Patterson, 39 N.Y.2d 288, 295- 296, 383 N.Y.S.2d 573, 577- 78 (1976), affirmed, 432 U.S. 197, 97 S.Ct. 2319 (1977)). Here, the court's charge relieved the People of their burden to prove, to the jury's satisfaction, every element of the crimes charged beyond a reasonable doubt. Accordingly, the issue is automatically preserved for this Court's review. Thomas, *supra*, 50 N.Y.2d 467; Martinez, *supra*, 81 N.Y.2d 810; Stahl, *supra*, 138 A.D.2d 920.

Finally, "[e]rrors in a reasonable doubt charge are not subject to harmless error analysis." People v. Garcia, 255 A.D.2d 266, 268, 682 NYS2d 7 (1st Dept. 1998))(court citing Sullivan v. Louisiana, *supra*, 508 U.S. at 281). Accordingly, if this Court finds that the court erred, reversal of Ms. Smith's conviction of the assault (Count One) is mandated.

POINT TWO

THE TRIAL COURT’S ORDER FORBIDDING DEFENSE COUNSEL FROM ARGUING DURING SUMMATION THAT MAKEDA JOSEPH WAS SHOT DURING A STRUGGLE FOR THE GUN DENIED MS. SMITH A FAIR TRIAL

The central issue for the jury to decide regarding the charges of intentional and felony assault and gun possession was whether Ms. Smith possessed the gun and intentionally shot Makeda Joseph or whether the gun discharged accidentally as Joseph and Ms. Smith struggled over it. Joseph testified she never possessed the gun and was shot while the two were “tussling” over her handbag, and the People argued that Ms. Smith, peeved because Joseph resisted, shot her. Yet there was another reasonable view of this evidence: that Ms. Smith and Joseph were struggling over the *gun* rather than the handbag, and it could have concluded that Joseph – and not Ms. Smith – initially possessed the gun; if the jury believed *this* scenario, then it was more likely to conclude the shooting was accidental and that Ms. Smith was guilty neither of shooting Joseph nor of possessing the weapon. Although Joseph denied this was so, the evidence, including Oluwole Ojudun’s testimony that he saw Ms. Smith and Joseph “tussling” for about ten seconds, and then heard a short fired and saw a spark permitted the jury to draw this conclusion. Additionally, Officer McLaughlin testified that Ms. Joseph described the weapon used to shoot her as “little bit heavier” than a

gun McLaughlin showed her (A. 197-98) – a statement Joseph could have made only if she had held the gun. The trial court’s order forbidding defense counsel from presenting this theory during summation deprived Ms. Smith of a fair trial.

“The Sixth Amendment guarantees to the accused in all criminal prosecutions” the right “to the Assistance of Counsel.” Herring v. New York, 422 U.S. 853, 856-57, 861, 95 S.Ct. 2550 (1975). This “fundamental” right “has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary factfinding process that has been constitutionalized in the Sixth and Fourteenth Amendments.” Id. at 857. “[C]losing argument for the defense is a basic element of the adversary factfinding process in a criminal trial” and the “last chance to persuade the trier of fact that there may be a reasonable doubt of the defendant's guilt.” Id. at 858. ““The Constitutional right of a defendant to be heard through counsel necessarily includes his right to have his counsel make a proper argument on the evidence and the applicable law in his favor, however simple, clear, unimpeached, and conclusive the evidence may seem, unless he has waived his right to such argument, or unless the argument is not within the issues in the case, and the trial court has no discretion to deny the accused such

right.” Id. at 860 (court quoting Yopps v. State, 228 Md. 204 (1962)); see United States v. Miguel, 338 F.3d 995 (9th Cir. 2003); People v. Luis, 189 A.D.2d 657, 592 N.Y.S.2d 357 (1st Dept. 1993); People v. Reina, 94 A.D.2d 727, 462 N.Y.S.2d 264 (2d Dept. 1983); see also, People v. Norris Williams, 10 A.D.3d 213, 780 N.Y.S.2d 335 (1st Dept. 2004) (reversal where erroneous portion of court's charge directly negated legitimate summation argument that jury draw unfavorable inference from prosecution's failure to call particular witness).

In Luis, the trial court sustained the People’s objections to defense counsel’s argument during summation that the jury should doubt whether the defendant ever made a statement to the police because the officers did not videotape it or have the defendant write it down. This Court reversed Luis’s conviction in the interest of justice, finding that this unjustifiable limitation prevented defense counsel from “drawing favorable inferences from the evidence in the record,” and thus “impaired” the defendant’s “right to make an effective closing argument.” Id. at 660.

Similarly, in Reina, supra, 94 A.D.2d 727, the trial court several times interrupted and limited defense counsel’s arguments in a one-witness identification case in which the defense was misidentification, that the jury could infer from the witness’ shocked state during the robbery that he

focused not on the face of the assailant but on the gun in the assailant's hand and thus, did not get a good look at him. Reversing Reina's conviction, the court found that the interruptions and limitations on defense counsel's arguments, and disparagement of his arguments as "surmise and speculation," "when he was legitimately commenting on matters of evidence," "substantially impaired" his "right ... to make an effective closing argument." *Id.* at 728.

Miguel, *supra*, 338 F.3d 995, has telling similarities to the present case. Miguel was convicted of felony murder stemming from an intended robbery in which a victim was shot through a window from outside a cabin. Six young men, including Miguel, after a night of drinking and smoking marijuana and acts of random violence, approached the cabin to rob it. When the occupants, a man and his wife, heard the men on the porch, they yelled, and some of the men ran away. According to a co-defendant [Calarruda] who testified at trial, Miguel and others stopped running and gathered together in front of the cabin, and Miguel then fired at the husband, hitting him in the chest. *Id.* at 998. In a pretrial statement to the police, Miguel gave conflicting accounts of the shooting, stating at one point that the rifle went off when he was trying to take it away from Calarruda whose finger was on the trigger and at another point that he fired the gun accidentally

when he was trying to fire it into the air. 338 F.3d 995. Miguel's statement, however, was not introduced into evidence at trial. Id. at 999.

During opening statements, the defense told the jury to pay particular attention to the physical evidence in the case and during cross examination, the defense questioned the government's expert extensively about the distance the rifle's shell casing would travel, based upon which the jury could infer that the shooter was more than 100 feet from the cabin. Id. at 999. Calarruda's testimony placed him in the area where the shell casing was found, while he testified that Miguel was thirty to forty feet from the cabin. Id.

During closing arguments, when Miguel's attorney began to argue that Calarruda might have fired the gun, the court determined that he lacked a good faith basis for the argument and precluded it. 338 F.3d at 999. The court stated: "I don't think there was any evidence before this court, at all, that anyone other than Mr. Miguel fired the gun. There just isn't a shred of evidence." Id. The court then instructed the jury to disregard counsel's argument and told them there was "no evidence before the court that Mr. Calarruda was the gunman." Id.

Reversing Miguel's conviction, the Ninth Circuit found that while "[a] district court certainly retains the power to preclude closing arguments on

defense theories that are not supported by the evidence,” “[t]hat is not what happened here. The physical evidence, expert testimony, testimony from the Government’s eyewitnesses, and permissible inference from that evidence all supported the defense theory.” 338 F.3d at 1001. The court found that, based even on the “[v]ery limited physical evidence [that] existed at the scene” - the shell casing- and the firearm expert’s testimony about it, the jury could infer that Calarruda, and not the defendant, was the gunman. *Id.* at 1001-02.

Similarly here, the trial court erred when it precluded defense counsel from arguing that the shooting occurred during a struggle over the gun. Even before Ojudun and Joseph testified, the People understood that who possessed the gun when it discharged was a bona fide issue in the case. The prosecutor asked Police Officer McLaughlin, a crime scene reconstruction expert, whether it was possible that the person in the Maxima’s driver’s seat – i.e. Joseph – could have fired the weapon; he initially responded in the negative. He explained that shell casings generally eject back and to the right of the firearm and that the ejected casing had been found in the passenger side utility holder of the Maxima (A. 180-81). The prosecutor then asked P.O McLaughlin to explain “why that wouldn’t likely happen if the person in the driver’s seat where you were would have the weapon?” (A.

181-82). P.O McLaughlin responded it would have been difficult for Joseph to have pulled the trigger given the apparent trajectory of the bullet and the likely distance of the gun from Joseph at the moment of discharge (A. 181-84). When asked, however, on cross-examination whether it was true that “you really do not know what happened in terms of the way Ms. Joseph was shot,” P.O. McLaughlin admitted, ”my reconstruction... is an absolute best guess scenario... I could say the gun was here, it may have actually been here...” (A. 209-10).

Thus the prosecution, through its questioning of its expert, had itself raised the issue of whether Joseph could have fired the weapon, and the expert conceded he could only provide his “best guess scenario.”⁷ This uncertainty, combined with the evidence that (1) the hands of Joseph and Ms. Smith apparently swung upward and some object – possibly the gun – broke the rear view mirror, and (2) Ojudun’s testimony that he saw Ms. Smith and Joseph “tussling” for about ten seconds, immediately before the shot, surely provided a good faith basis to argue that the two struggled over the gun. And, as or more importantly, P.O. McLaughlin testified that when he showed Joseph a gun of the same caliber as the gun with which she was

⁷ Police Officer McLaughlin in fact arrived at the scene hours after the shooting, and so there is no way of even knowing whether a central premise of his “best guess” – that the shell discharged into the front passenger side utility holder – was accurate, or whether the shell was found by another and moved.

shot, she said the latter gun was “a little bit heavier” (A. 197-98). This testimony surely put in issue whether Joseph had possessed the gun during the encounter.⁸ Additionally, the jury was not required to accept Joseph’s version of the events; no witness may be deemed truthful and infallible as a matter of law, and a jury is free not only to disbelieve a witness but to draw a negative inference based on that disbelief and additional evidence. Cf. MacReynolds v. Coney Island & B.R. Co., 170 A.D.2d 314, 155 N.Y.S. 655 (2d Dept. 1915) (The testimony of a witness need not be believed if the witness “is interested or his statements, even if uncontradicted, are ... so improbable as to require explanation.”); see also, United States v. Tran, 519 F.3d 98, 105-06 (2d Cir. 2008) (jury entitled to disbelieve defendant’s exculpatory testimony and such disbelief is a “relevant factor in the jury’s determination” of whether defendant committed the charged offense).

And there were many good reasons to disbelieve Joseph and other of the People’s witnesses. Joseph had sued Ms. Smith and therefore had a financial interest in Ms. Smith’s conviction. She dismissed the suit before trial, a move that appeared contrived to eliminate an area of cross-

⁸ Police Officer McLaughlin tried to back away from this testimony, saying “[h]eavier, meaning larger,” but he admitted she in fact had told him “it was a little bit heavier” (A. 197) and the jury certainly was not required to accept P.O. McLaughlin’s self-serving and strained interpretation of Joseph’s statement.

examination (even as she re-instated the suit thereafter). Additionally, her friend Willy (Oluwole Ojudun) – the only other witness who claimed to see Ms. Smith approach Joseph’s car with gun in hand -- flip flopped in his claimed recollection of the events, first telling the police that he slept through the incident and thereafter testifying to detailed recall of the relevant events. Moreover, there was a striking similarity in the language used by Wally and Joseph, both even using the same word – tussling – to describe the interaction between Joseph and Ms. Smith (Wally: A. 284-85, 325-26; Joseph: A. 485). Wally initially explained that he had lied because he didn’t know whether Joseph wanted to handle the shooting in the courts or “in the streets” and claimed to have decided to tell what he knew only after he saw Joseph, incapacitated, in the hospital, and she told him to do what he felt was right (A. 294-96).

In essence, the court precluded any argument that Joseph touched or possessed the gun simply because she denied having done so. As the court said, “The fact that she denies it means there is no evidence of it” (A. 732). Yet her testimony should not have had such preclusive effect. Had Joseph not testified at all, the evidence would certainly have supported the inference – among others – that Joseph in fact *had* possessed the gun: *someone* had the gun; there was a visible struggle where the only two items that could

have been the object of the struggle were the purse and the gun; at some point Joseph and Ms. Smith's hands moved upward and the rear view mirror was shattered; and then the gun discharged. If the jury knew these – and only these – facts, then it certainly could have concluded that Joseph, seeing Ms. Smith with a gun, tried to pull it away. Or the jury may have concluded that Ms. Smith never had the gun in the first place; that Joseph produced it when Ms. Smith confronted her and it discharged during an ensuing struggle.

As a result of the court's ruling, defense counsel was relegated to fashioning his summation around the assumption that Joseph was truthful, but that her testimony nonetheless raised a reasonable doubt (See A. 806: "I've been practicing law for 38 years, I have never done this ever. I am going to with regard to one charge ask you to assume that everything the prosecution witness, Makeda Joseph, said is so."). This forced concession had devastating consequences, as the court thereafter instructed the jury, "I do instruct you if you find Ms. Joseph was truthful and accurate in her testimony to you, her testimony without any other eye witness to what happened inside the car, under the law satisfies the proof beyond a

reasonable doubt” (A. 909; see Point One).⁹ The court’s limitation on summation and its instruction to the jury made a verdict of guilt inevitable because it boxed defense counsel into all but conceding Joseph’s credibility and created an un rebuttable presumption that if Joseph was credible then Ms. Smith was guilty.

For the foregoing reasons, the court erred in precluding defense counsel from arguing in summation that there was a struggle over the gun or that Joseph even touched the gun, and the court’s error deprived Ms. Smith of her fundamental Sixth Amendment right “to have [her] counsel make a proper argument on the evidence and the applicable law in his favor.” Herring, *supra*, 422 U.S. at 860. This Court should, accordingly, reverse Ms. Smith’s convictions of assault and weapon possession.

⁹ A blogger, who claimed to have been on Smith’s jury, contributed the following on May 5, 2008 in response to post-trial statements by Ms. Smith: “It was HER lawyer who told the jury ‘take the victim’s story at her word’! That’s why you’re guilty Remy!” <http://www.bossip.com/16725/greeting-from-rikers/#comments> (last viewed September 10, 2008).

POINT THREE

MS. SMITH WAS UNFAIRLY PREJUDICED BY THE INCLUSION IN THE INDICTMENT OF THE COUNTS REGARDING THE VIOLENT GANG ASSAULT AT THE PLAYER'S CLUB, AS TO WHICH THERE WAS NO EVIDENCE OF HER COMPLICITY, BUT WHICH LIKELY COLORED THE JURY'S CONSIDERATION OF THE REMAINING COUNTS

Counts Six through Nine concerned the violent gang assault perpetrated by Ms. Smith's boyfriend "Papoose" and some thirty others against Sydney Holmes and Kendrick Green, which occurred in the Player's Club on August 18, 2007. The People argued that Ms. Smith aided and abetted this attack, but in fact no evidence at all supported this theory; therefore, these counts should not have be presented to the jury. The jury eventually – and inevitably -- acquitted Ms. Smith of each of these counts but the likelihood that the wrongly admitted evidence nonetheless unfairly tainted the jury's consideration of the counts relating to the shooting of Makeda Joseph is undeniable. For these reasons, Ms. Smith was deprived of due process and a fair trial under the federal and state constitutions, and she should therefore be granted a new trial.

Under New York law, "the paramount consideration in assessing potential spillover" effect from evidence introduced in support of jointly tried dismissed counts "is whether there is a reasonable possibility that the

jury's decision to convict on the tainted counts influenced its guilty verdict on the remaining counts in a meaningful way.” People v. Doshi, 93 N.Y.2d 499, 505, 693 N.Y.S.2d 87 (1999) (court quoting People v. Baghai-Kermani, 84 N.Y.2d 525, 532, 620 N.Y.S.2d 313 (1994); People v. Williams, 292 A.D.2d 474, 475, 740 N.Y.S.2d 348 (2d Dept. 2002). “If so, then the spillover effect of the tainted counts requires reversal on the remaining charges.” Doshi, *supra*, 93 N.Y.2d at 505; see People v. Kelly, 76 N.Y.2d 1013, 1015, 565 N.Y.S.2d 754 (1990)(spillover prejudice from improper notations on verdict sheet regarding robbery count required reversal of weapon possession count since it was “factually related” to the robbery count); People v. Cohen, 50 N.Y.2d 908, 911, 431 N.Y.S.2d 446 (1980)(where second degree murder conviction reversed due to improper admission of testimony regarding study of homicides classified as suicides, reversal of conviction for criminal possession of a weapon in the second degree also required because factually related).

Some factors the courts consider in determining whether a “reasonable possibility” exists that the guilty verdict was the result of prejudicial spillover are 1) whether the evidence introduced to prove the tainted count(s) would otherwise have been admissible in support of the remaining count(s); 2) whether the evidence pertaining to each count was

easily separable; 3) the strength of the People’s case on the remaining count(s), Williams, supra, 292 A.D.2d at 475, and 4) whether the evidence pertaining to the tainted count(s) was so “inflammatory” as to “incite or arouse the jury to convict the defendant on the remaining counts,” Lindstadt v. Keane, 239 F.3d 191, 205 (2d Cir. 2001); United States v. Naiman, 211 F3d 40, 50 (2d Cir. 2000)(“we look to the totality of circumstances to assess prejudicial spillover of evidence from dismissed counts”).

Federal decisions have sometimes labeled the issue raised by the joinder of the insufficient “Player’s Club charges” with the charges stemming from the assault on Joseph, and the resulting prejudicial spillover, as “retroactive misjoinder.” For example, in United States v. Jones, 16 F.3d 487 (2d Cir. 1994), the Second Circuit invoked this principle when it held that its finding of insufficiency with respect to a “felon in possession” charge required reversal of the defendant’s conviction upon the remaining counts of armed bank robbery and related counts. Subsequent to Jones, the circuit court announced a “three-part test for determining whether there was likely prejudicial spillover from the evidence submitted in support of convictions that were set aside after trial.” United States v. Hamilton, 334 F.3d 170, 182 (2d Cir. 2003). That test invokes factors not unlike those

considered to determine if a “reasonable possibility” (Doshi, supra, 93 N.Y.2d 505) exists that there has been prejudicial spillover, namely:

(1) whether the evidence introduced in support of the vacated count was of such an inflammatory nature that it would have tended to incite or arouse the jury into convicting the defendant on the remaining counts, (2) whether the dismissed count and the remaining counts were similar, and (3) whether the government’s evidence on the remaining counts was weak or strong.

Id. The Second Circuit applied this test in United States v. Bruno, 383 F.3d 65 (2d Cir. 2004). In Bruno, several convictions, including for RICO, murder in aid of racketeering and obstruction of justice, were reversed for insufficiency of evidence. Defendants did not challenge the sufficiency of the evidence with respect to one of the defendant’s false statements to the FBI, but argued they were entitled to a new trial on that count based on the spillover prejudice to which they had been exposed as a result of the joinder of this count with those as to which the evidence was not sufficient. The court agreed because so much evidence irrelevant to the false statement count had been admitted to prove the RICO charge:

[O]ur reversal of the RICO and VCAR convictions also requires that we vacate Fortunato’s false statement conviction “given the enormous amount of prejudicial spillover evidence admitted to prove the RICO enterprise and its extensive activities.” United States v. Tellier, 82 F.3d 578, 581-82 (2d Cir. 1996)(internal quotation marks omitted). Fortunato’s false-statement conviction involved a single statement “to which all

but a tiny sliver of the evidence admitted on the RICO charges [was] irrelevant.” Id. at 582.

383 F.3d at 91.

Most of the factors discussed above militate in favor of finding there was a “reasonable possibility” that the guilty verdict rendered against Ms. Smith was the result of prejudicial spillover from the Player’s Club charges of which she was acquitted. Doshi, supra, 93 N.Y.2d at 505. First and foremost, the evidence in support of the Player’s Club charges was of such an inflammatory nature that it almost certainly affected the jury’s verdict convicting Ms. Smith guilty of assaulting Joseph. The evidence that a group of 30 or more men viciously assaulted Joseph’s boyfriend in an effort to intimidate Joseph into not testifying against Ms. Smith could hardly have been more inflammatory, since it not only suggested the obvious – that Ms. Smith wanted to scare Joseph into not testifying – but also because Ms. Smith’s profession and ever recurring news accounts of violence in the rap world summoned the stereotypical image of the rap star entourage behaving badly – indeed violently – on Ms. Smith’s behalf.

Secondly, the evidence in support of the Player’s Club charges was not, on any legal theory, independently admissible against Ms. Smith with respect to the counts charging the assault on Joseph. It certainly would not have been admissible to show consciousness of guilt since the evidence of

Ms. Smith's involvement in the Player's Club assault was not even circumstantially sufficient. See People v. Myrick, 31 A.D.2d 668, 818 N.Y.S.2d 287 (2d Dept. 2006)(there must be at least sufficient circumstantial evidence linking defendant to a third party's threat against a witness in order for such evidence to be admissible to prove defendant's consciousness of guilt). Indeed, that the jury acquitted Ms. Smith of the Player's Club charges is not surprising: the evidence implicating Ms. Smith in the assault on Green and Holmes was woefully weak. Ms. Smith was present at the Player's Club when the assaults occurred but did absolutely nothing to aid or abet that conduct. Holmes had no contact whatsoever with Ms. Smith at the Player's Club. Green testified that Ms. Smith at one point came up to him and asked in a "regular" way why Bolton had changed her phone number and enquired whether people were "taking the stand" (A. 655). He also saw Ms. Smith walk over to her boyfriend Papoose and then walk off, but did not see Ms. Smith signal him or even talk to him (A. 661-62).

The prosecutor argued during summation that Ms. Smith could be implicated in the Player's Club assaults because she and Papoose had been unsuccessful in many attempts to call Bolton – Green's girlfriend – and because Ms. Smith then enquired of Green about Bolton's change of number and the possibility of people "taking the stand" (A. 872-73). This, said the

prosecutor, combined with Papoose's early efforts to suggest – through phone calls to Bolton – someone else shot Joseph was sufficient to find Ms. Smith to be an aider or abettor in the Player's Club assaults and related charges. The prosecutor asked the jury to somehow infer that when Ms. Smith came over to Papoose at some point before the assault she in fact was giving him a signal (A. 876) – even though Green explicitly said he saw no such signal and didn't even see them speaking with one another.

None of this evidence evinced a consciousness of guilt on Ms. Smith's part or would have been otherwise relevant or material to the Joseph assault charges, thus, it would not have been admissible at Ms. Smith's trial had she been tried only on those charges.

Finally, the People's case against Ms. Smith on the Joseph assault charges was far from overwhelming; on the contrary, it was a very close question whether the gun was fired intentionally or accidentally. Joseph herself did not believe Ms. Smith initially intended to shoot her, believing she had cocked the gun just to be "dramatic" (A. 551-52), and she did not describe a clearly intentional shooting – only seeing a flash in the midst of a struggle over a pocketbook. Other witnesses, most of whom were intoxicated and one of whom, Wally, had originally told the authorities he was asleep in the back of the car when the incident occurred, saw a scuffle

and heard a shot or saw a flash, but none saw the shot fired. Ms. Smith, who had herself been drinking that night, left the scene and drove away, but this was hardly overwhelming evidence that she intentionally shot Joseph.¹⁰ Even the testimony of the People’s reconstruction expert did not eliminate the possibility that the shooting was accidental. If anything, the awkward angle and trajectory of the bullet, as well as the startling event that preceded the shooting – when Joseph and Ms. Smith’s hands flew upward and broke the car’s rear view mirror – supported the defense theory that the gun went off during a struggle.

In light of above factors – the inflammatory nature of the Player’s Club charges evidence, the inadmissibility of such evidence had Ms. Smith been tried only for Joseph’s assault, and the closeness of the case -- there is much more than a “reasonable possibility” that there was prejudicial spillover. Doshi, *supra*, 93 N.Y.2d at 505. Furthermore, as discussed above (ante at 47-48), the People’s evidence, even if fully credited, was insufficient to establish guilt of the “Player’s Club charges” and therefore should never have been joined with the balance of the indictment or, at the least, should

¹⁰ Indeed, it is axiomatic that flight is inherently weak evidence of guilt. People v. Moses, 63 N.Y.2d 299, 309, 482 N.Y.S.2d 228 (1984); People v. Yazum, 13 N.Y.2d 302, 304, 246 N.Y.S.2d 626 (1963). So much so that the 2nd Circuit has recently said that a flight charge should never be given. United States v. Mundy, ___ F.3d ___, 2008 WL 3863474, *3 (2d Cir. August 21, 2008). None was given in the instant case.

not have been presented to the jury.¹¹ Thus, in light of the same factors evincing prejudicial spillover, the inclusion in the indictment or presentation to the jury of the Player’s Club charges with the Joseph assault charges was retroactive misjoinder, depriving Ms. Smith of a fair trial. Jones, supra, 16 F.3d 487; Hamilton, supra, 334 F.3d 170.

POINT FOUR

THE GUN POSSESSION CHARGE MUST BE DISMISSED BECAUSE PENAL LAW § 265.03 UNQUALIFIEDLY BANS THE POSSESSION OF HANDGUNS OUTSIDE THE HOME OR PLACE OF BUSINESS AND IS THEREFORE UNCONSTITUTIONAL

Ms. Smith was charged with criminal possession of a weapon in the second degree under P.L. § 265.03 (3) which provides, in pertinent part, that “a person is guilty of criminal possession of a weapon in the second degree when” “[s]uch person possesses any loaded firearm” outside of their home or place of business. This statute, which by its breadth bans the possession of a handgun except in the home or place of business,¹² violates the

¹¹ The fact that the jury acquitted Ms. Smith, as opposed to the court having dismissed the Player’s Club counts, does not change the applicability of the prejudicial spillover or retroactive misjoinder doctrines. Whether the court dismissed insufficient charges after the evidence in support of those charges has been heard by the jury, or the charges are ultimately “dismissed” by a jury in acquitting the defendant of the charges, the same potential for prejudicial spillover exists.

¹² Notably, New York prohibits possession of a handgun even in the home or place of business without a license. Licensing is highly discretionary; such permits may be denied for “good cause” and are rarely granted. See P.L. §400.00, et seq.; Rules of the City of New York, Tit. 38, § 5-02 (2007). Even more restrictive regulations govern

individual right to keep and bear arms conferred by the Second Amendment, as recently expounded by the United States Supreme Court in District of Columbia v. Heller, ___ U.S. ___, 128 S.Ct. 2783 (2008). Accordingly, the statute is unconstitutional, Ms. Smith’s conviction under Count 4 should be reversed, and the charge should be dismissed.

In Heller, the Supreme Court struck down a District of Columbia statute banning the possession of “any firearm” by any person, finding that “the District’s ban on handgun possession in the home violates the Second Amendment.” Id., 128 S.Ct. at 2821. But beyond possession of a handgun in the home, which the New York statute here exempts from its prohibition, the court found that “the Second Amendment conferred an individual right to keep and bear arms,” id. at 2799, that, while not without limitations, encompassed the right to bear handguns for self-defense. Finding that the District’s handgun ban “amounts to a prohibition of an entire class of ‘arms’ that is overwhelmingly chosen by American society for that purpose,” id. at 2817-18, the court found that the “complete prohibition of” the use of handguns for the purpose of self-defense “is invalid.” Id. at 2818.

issuance of a “special” or “carry” license, which may be granted only for “proper cause,” such as where the applicant is exposed to “extraordinary personal danger, documented by proof of recurrent threats to life or safety requiring authorization to carry a handgun.” Rules of the City of New York, Tit. 38, § 5-03. “[T]he mere fact that an applicant has been the victim of a crime or resides in or is employed in a “high crime area,” does not establish “proper cause” for the issuance of a carry or special handgun.” Id.

While the New York statute here does not ban the possession of handguns in the home or place of business, it does ban their possession for self-defense outside of the home and, as such, violates the Second Amendment. Heller, supra, 128 S.Ct. at 1218. There was testimony in this case that Ms. Smith, a celebrity in an industry in which gun violence is not unknown, did in fact carry her handgun¹³ for self-defense; Joseph said that Ms. Smith told her on a past occasion that the reason she carried a handgun was because she had been accosted and robbed in the past (A. 481-83). Assuming, arguendo, that Ms. Smith was carrying a gun on the night in question, there was no suggestion that she carried it for any purpose other than self-protection. Moreover, regardless of the evidence in this case regarding her possession of the gun for self-defense, the statute contains no self-defense exception and, accordingly, the jury was never asked to resolve that issue under the instructions given to it.

“[T]he American people have considered the handgun to be the quintessential self-defense weapon.” Id. at 2818. Ms. Smith had the right under the Second Amendment to carry her handgun for self-defense, and the

¹³ Although no gun was recovered, there is no question that the gun in question was a handgun. Police Officer Patrick McLaughlin testified for the People that the bullet with which Joseph was shot came from a handgun (A. 183-84).

New York statute's total ban on the possession of a handgun for self-defense outside the home or place of business violates that right.

The Supreme Court did not decide the question of whether the Second Amendment is applicable to the states through the Fourteenth Amendment. The Heller court, however, questioned the continuing validity, on the issue of incorporation, of its decision in United States v. Cruikshank, 92 U.S. 542 (1875)(Second Amendment not intended to limit powers of state, but to operate on national government only), stating, “[w]ith respect to Cruikshank’s continuing validity on incorporation, a question not presented by this case, we note that Cruikshank also said the First Amendment did not apply against the States and did not engage the sort of Fourteenth Amendment inquiry required by our later cases.” Heller, supra, 128 S.Ct. at 2813, fn 23. While the court also stated that its later decisions in Presser v. Illinois, 116 U.S. 252, 265, 6 S.Ct. 580 (1886) and Miller v. Texas, 153 U.S. 535, 14 S.Ct. 874 (1894) “reaffirmed that the Second Amendment applies only to the Federal Government,” Heller, id. 2813, fn 23, those cases, which relied on Cruikshank, likewise, did not engage in the “required” “Fourteenth Amendment inquiry.” The Supreme Court “has not hesitated to re-examine past decisions according the Fourteenth Amendment a less central role in the preservation of basic liberties than that which was contemplated by the

Framers when they added the Amendment to our constitutional scheme.”

Malloy v. Hogan, 378 U.S. 1, 5 (1964).

We submit that the Fourteenth Amendment incorporated the Second Amendment right to bear arms and thus protects that right from impermissible state infringement and that the statute here is an impermissible violation of that right. An historical analysis of the passage of the Fourteenth Amendment bears this out. The Fourteenth Amendment was intended to confer upon freed slaves the “privileges and immunities of citizenship” that had been denied to them under widespread state and local laws known as “black codes.” Bell v. Maryland, 378 U.S. 226, 247-49, fn 3, 84 S.Ct. 1814 (1964). Among the deprivations of the black codes was that freed slaves were prohibited from bearing arms. Id. at fn3.

In his concurring opinion in Duncan v. Louisiana, 391 U.S. 145, 167-68, 88 S.Ct. 1444 (1968), Justice Black, whose view was that the Fourteenth Amendment as a whole made the Bill of Rights applicable to the states, notes that Senator Howard, who introduced the Fourteenth Amendment for passage in the Senate, recognized the privileges and immunities clause of the Fourteenth Amendment as incorporating the “personal rights” guaranteed by the first eight amendments of the constitution, including, of course, the

“right to keep and bear arms.” Senator Howard evidently was not alone at that time, for according to one legal scholar:

The same two-thirds of Congress that proposed the Fourteenth Amendment to the United States Constitution in 1866 also enacted the Freedman’s Bureau Act, which declared protection for the “full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and ... estate ..., including the constitutional right to bear arms....”

Stephen P. Halbrook, The Freedman’s Bureau Act and the Conundrum Over Whether the Fourteenth Amendment Incorporates the Second Amendment, 29 Northern Kentucky Law Review, No. 4, 683-703 (2002).

Further, based on the Heller court’s reliance on “founding-era sources” that showed that the “natural meaning” of “bear arms” was “the natural right of defense ‘of one’s person or house’” or “self-preservation,” *id.*, at 2793-94, the Second Amendment would seem to encompass a right of self-defense that is protected under the Fourteenth Amendment:

Heller concluded that the Second Amendment embodied what was widely thought to be a natural right of defense. And, as we have seen, recognition of the right of freedmen to protect themselves was of considerable concern to the Reconstruction Congress, even as it gave short shrift to the Second Amendment rights of the militias that were terrorizing them. Given its historical grounding, the right to defend oneself, one’s family, and one’s property may well be one of the unenumerated rights that nevertheless qualifies for constitutional protection under the Fourteenth Amendment. If so, a complete prohibition on the possession in one’s home or place of business on any form of weapon reasonably useful for defense could impose an impermissible burden on this right. A right of defense that does

not go so far as the more robust “right to possess and carry firearms in case of confrontation” recognized in *Heller*, in turn, would not pose a comparable threat to legitimate governmental interests. [footnotes mitted].

Lawrence Rosenthal, Second Amendment Plumbing After Heller: Of Standards of Scrutiny, Incorporation, Well-Regulated Militias, and Criminal Street Gangs, Chapman University School of Law Legal Studies Research Paper Series, Paper No. 08-302.

For the foregoing reasons, the Fourteenth Amendment incorporates the Second Amendment right to keep and bear arms - which encompasses the right to self-defense - making it applicable to the states.

Although this issue was not preserved below (Heller had not yet been decided at the time of Ms. Smith’s conviction), counsel’s failure to move for dismissal on the ground that the statute is unconstitutional under the Second Amendment is excusable in light of pre-Heller precedents in New York that have consistently found, we now know erroneously, that the Second Amendment did not confer an individual right to keep and bear arms. See People v. Handsome, 18 Misc.3d 543, 846 N.Y.S.2d 852 (N.Y. Crim. Ct. 2007)(defendant challenge to constitutionality of P.L. 265.001 rejected; statute not unconstitutional under second amendment since, even if it were made applicable to the states it does not confer an individual right to bear

arms); Grimm v. City of New York, 56 Misc.2d 525, 289 N.Y.S.2d 358 (N.Y. Sup. Ct. 1968)(rejecting argument that Gun Control Law violated Second Amendment). In this light, any such motion to dismiss would have been doomed to certain failure- indeed, would have bordered on frivolous. It was only after Heller was decided that this became a viable issue; accordingly, counsel's failure to raise the issue below was excusable. See People v. Phillips, 90 A.D.2d 900, 456 N.Y.S.2d 887 (3d Dept. 1982)(defendant's sodomy conviction reversed where consensual sodomy statute was declared unconstitutional by Court of Appeals decision subsequent to defendant's conviction).

Should the Court not find the failure to preserve this issue excusable, it should nevertheless consider the issue "as a matter of discretion in the interest of justice." CPL 470.15(6). Allowing to stand a conviction obtained under a statute that is unconstitutional goes against the very notion of justice. Here, moreover, the evidence certainly indicates that if Ms. Smith were in possession of the gun, she had it with her for self-protection - the very right protected by the Second Amendment right to bear arms. Finally, if "overwhelming proof indicates that the interest of justice would not be served by reversal," People v. Musolino, 54 A.D.2d 22, 26, 386 N.Y.S.2d 710 (3d Dept. 1976), then in this very close case, where the jury could well

have found that the shooting was an accident, the court should exercise its discretion to consider the issue in the interest of justice. See Karnbach v. Bould, 24 A.D.2d 600, 262 N.Y.S.2d 265 (2d Dept. 1965)(in close case, reversal required despite lack of objection where court's charge invoked statute that had been declared unconstitutional before date of accident); Carroll v. Harris, 23 A.D.2d 582, 256 N.Y.S.2d 715 (2d Dept. 1965)(same).

In sum, for the foregoing reasons, P.L. § 265.03 (3) is unconstitutional; therefore, Ms. Smith's conviction of criminal possession of a weapon in the second-degree should be reversed and the charge dismissed.

CONCLUSION

For the foregoing reasons set forth in Points One, Two, and Three, Ms. Smith's conviction should be reversed and a new trial granted, and for those set forth in Point Four, Ms. Smith's conviction of criminal possession of a weapon in the second degree should be reversed and the charge dismissed.

Dated: New York, New York
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Respectfully submitted,

William H. Murphy, Jr.
(Of the bar of the State of Maryland)
By permission of the Court
One South Street, Suite 2300
Baltimore, Md. 21202
(410) 539-6599

Richard Ware Levitt
Levitt & Kaizer
148 East 78th Street
New York, New York 10075
(212) 737-0400

On the Brief:

William H. Murphy, Jr.
Richard Ware Levitt
Yvonne Shivers

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Yvonne Shivers, Esq.