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Closing the Courtroom for Undercover Police Witnesses: New York Must Adopt A Consistent Standard

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CLOSING THE COURTROOM FOR UNDERCOVER POLICE WITNESSES: NEW YORK MUST ADOPT A CONSISTENT STANDARD

Robin Zeidel[*]

INTRODUCTION

On one routine evening, an undercover narcotics officer moved on foot through a neighborhood known for drug activity, attempting to buy narcotics.[1] In unmarked cars parked nearby, the back-up team of officers listened to his commentary into a hidden radio transmitter.[2] The undercover officer asked a young man on a bicycle for a "twenty."[3] The man led him to a cocaine dealer

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[1] Michael Connelly, *Street-Level View of the War on Drugs*, L.A. TIMES, Mar. 16, 1992, at B3 (describing a series of buy-and-bust operations during a "four-hour Wednesday evening sweep" by undercover officers in the San Fernando Valley, Los Angeles). In a police buy-and-bust operation, an undercover police officer poses as a narcotics buyer. After buying the drugs, the officer communicates with a nearby back-up team, which then arrests the seller. Ruben Castaneda, *D.C. Police Chief Bars "Buy-Bust" Drug Tactics: Action Taken in Wake of Fatal Shootout,* WASH. POST, Feb. 14, 1992, at D1; Elliot Zaret, *Police Units Deal Blows to Drugs via "Buy/Bust,"* COM. APPEAL, June 11, 1995, at 1A. The undercover officer may then "drive-by" to identify the seller. *E.g.*, People v. Martinez, 82 N.Y.2d 436, 439, 624 N.E.2d 1027, 1028, 604 N.Y.S.2d 932, 933 (1993).

[2] Connelly, *supra* note 1, at B3.

[3] Connelly, *supra* note 1, at B3.

waiting outside a sandwich shop.[4] The officer exchanged marked money for a "small, pale rock."[5] He walked away, saying into his transmitter, "It's a go. It's a go." The unmarked cars rushed in to arrest both the dealer and his "director"[6] on the bicycle.[7] By the end of their four-hour shift, this narcotics team handcuffed five suspects from different operations and placed them in the back of their van.[8] For the officers, this was a "slow day."[9]

When prosecutors try arrests such as these in court, their main witnesses are often undercover officers.[10] Undercover officers are commonly concerned that by testifying against a defendant arrested

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[4] Connelly, *supra* note 1, at B3. As a result of increased arrests of street-level drug dealers, the undercover officers noted, "it is becoming rarer for buyers to directly approach a dealer." Connelly, *supra* note 1, at B3. Instead, dealers hire "directors" or "steerers" with bicycles, buzzers or walkie-talkies to "sheperd[]" customers to dealers and "act as lookouts for customers as well as police." Connelly, *supra* note 1, at B3; Matthew Purdy, *Drug Turf Is Safer As Dealers Avoid Streets,* N.Y. TIMES, Jan. 2, 1995, at A1. Undercover officers must persuade the director to lead them to the dealer. Connelly, *supra* note 1, at B3.

[5] Connelly, *supra* note 1, at B3.

[6] Connelly, *supra* note 1, at B3.

[7] Connelly, *supra* note 1, at B3.

[8] Connelly, *supra* note 1, at B3.

[9] Connelly, *supra* note 1, at B3. The police had hoped to fill their 15-passenger van by the end of the night. Connelly, *supra* note 1, at B3. However, the police considered themselves lucky because they learned through informants that one of the men they arrested was a major dealer. Connelly, *supra* note 1, at B3.

The buy-and-bust operation described above is typical. *See, e.g.,* Zaret, *supra* note 1, at 1A (describing a buy-and-bust operation consisting of a drug purchase by an undercover officer who poses as a junkie and an arrest of the street sellers moments later by 10 police officers, ultimately resulting in the arrest of 25 people in 12 operations in one night); Report & Recommendation at 2, Brown v. Andrews, No. 94-CV-3253 (S.D.N.Y. Oct. 19, 1995) ("As part of a police 'buy and bust' operation, [undercover] Officer Fisher bought the narcotics from [petitioner] Brown, then radioed other officers, who arrested Brown minutes later.").

[10] United States *ex rel.* Lloyd v. Vincent, 520 F.2d 1272, 1273 (2d Cir.), *cert. denied,* 423 U.S. 937 (1975); People v. Hinton, 31 N.Y.2d 71, 73, 286 N.E.2d 265, 266, 334 N.Y.S.2d 885, 887 (1972), *cert. denied,* 410 U.S. 911 (1973); People v. Boyd, 59 A.D.2d 558, 559, 397 N.Y.S.2d 150, 151 (2d Dep't 1977).

in an undercover narcotics operation, the officers will expose their identities to the public, thus jeopardizing their own safety and the integrity of their ongoing undercover operations.[11] An undercover officer may have other pending investigations, perhaps near the site of the arrest in the case at trial.[12] The officer's undercover unit may also target friends or family of a defendant, who are likely to view the trial.[13] The part of the courthouse where the trial takes place may be dedicated to predominantly narcotics cases, so that other spectators may recognize the officer.[14] The officer may have

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[11] Martinez v. Sullivan, No. 88-CV-7335, 1989 WL 63103, at *4 (S.D.N.Y. June 7, 1989), *aff'd*, 914 F.2d 240 (2d Cir. 1990); People v. Brown, 214 A.D.2d 579, 579, 625 N.Y.S.2d 570, 571 (2d Dep't), *appeal denied*, 86 N.Y.2d 732, 655 N.E.2d 710, 634 N.Y.S.2d 613 (1995); People v. Badillo, 207 A.D.2d 742, 743, 616 N.Y.S.2d 619, 620 (1st Dep't), *appeal denied*, 84 N.Y.2d 1009, 647 N.E.2d 126, 622 N.Y.S.2d 920 (1994); People v. DeChirico, 185 A.D.2d 282, 282, 586 N.Y.S.2d 25, 26 (2d Dep't), *appeal denied*, 80 N.Y.2d 974, 605 N.E.2d 879, 591 N.Y.S.2d 143 (1992), *cert. denied*, 507 U.S. 942 (1993); People v. Brown, 172 A.D.2d 844, 845, 569 N.Y.S.2d 208, 209 (2d Dep't 1991); People v. White, 170 A.D.2d 629, 629, 566 N.Y.S.2d 401, 402 (2d Dep't), *appeal denied*, 77 N.Y.2d 1002, 575 N.E.2d 414, 571 N.Y.S.2d 928 (1991); People v. Weaver, 162 A.D.2d 486, 487, 556 N.Y.S.2d 173, 175 (2d Dep't), *appeal denied*, 76 N.Y.2d 868, 561 N.E.2d 907, 560 N.Y.S.2d 1007 (1990); People v. McLennon, 156 A.D.2d 478, 548 N.Y.S.2d 764, 765 (2d Dep't 1989), *appeal denied*, 75 N.Y.2d 921, 554 N.E.2d 77, 555 N.Y.S.2d 40 (1990); People v. Wharton, 143 A.D.2d 958, 958, 533 N.Y.S.2d 557, 557 (2d Dep't 1988), *aff'd*, 74 N.Y.2d 921, 549 N.E.2d 462, 550 N.Y.S.2d 260 (1989); People v. Tinsley, 145 A.D.2d 448, 448-49, 535 N.Y.S.2d 415, 417 (2d Dep't 1988).

[12] *E.g.*, *Vincent*, 520 F.2d at 1273 (noting that undercover officer was active in same county as arrest); *Hinton*, 31 N.Y.2d at 73, 286 N.E.2d at 266, 334 N.Y.S.2d at 887 (noting that undercover officer was active in same community as arrest).

[13] People v. Dorcas, 630 N.Y.S.2d 796 (2d Dep't), *appeal denied*, 87 N.Y.2d 845 (1995) (noting that the undercover officer feared an open courtroom because he "attempted to make drug purchases in that area [the site of defendant's arrest]," so that "the defendant's family or friends could very well point him out as he attempted to make another buy"); People v. Aguayo, 200 A.D.2d 541, 542, 606 N.Y.S.2d 694, 695 (1st Dep't), *appeal denied*, 83 N.Y.2d 963, 639 N.E.2d 756, 616 N.Y.S.2d 16 (1994) (noting that the undercover officer stated that "he feared an open courtroom because 'one of [the defendant's] friends' from whom he was currently purchasing drugs might be there").

[14] People v. Gross, 179 A.D.2d 138, 140, 583 N.Y.S.2d 832, 832-33 (1st Dep't), *appeal denied*, 80 N.Y.2d 832, 600 N.E.2d 643, 587 N.Y.2d 916 (1992)

received threats connected with work on undercover operations.[15] All of these factors may cause an undercover officer to fear that public testimony will result in exposure of his or her identity.

In New York State, these concerns of identity exposure and jeopardy to ongoing undercover operations have led prosecutors to request closure of courtrooms to the public during the testimony of witnesses who are undercover police officers.[16] These requests are often granted by trial judges, and the closing of courtrooms during such testimony has become a "routine practice" in New York State narcotics cases, primarily in New York City.[17] The closing of courtrooms during the testimony of undercover police officers directly conflicts with defendants' countervailing constitutional right to a public trial.[18]

(quoting the trial court, which found compelling that its part heard "almost exclusively" narcotics cases, so that "it is likely that someone could come in here who might have dealt with the undercover or who might deal with her in the future").

[15] *E.g.*, Woods v. Kuhlman, 977 F.2d 74, 77 (2d Cir. 1992) (noting that the defendant's family member threatened the undercover officer).

[16] *See, e.g., supra* note 11 (indicating cases where courtrooms were closed due to concerns of identity exposure and jeopardy to ongoing operations).

[17] The closing of courtrooms during testimony by undercover police officers has become a routine practice in New York drug cases, "even in penny-ante buy-and-bust cases," according to Jeffrey A. Udell of the Office of the Appellate Defender, who represented the defendant in [People v.] Gutierez [86 N.Y.2d 817, 657 N.E.2d 491, 633 N.Y.S.2d 470 (1995)].

Gary Spencer, *Court of Appeals Limits Closing of Courtrooms*, 214 N.Y. L.J. 1 (1995).

[18] The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial." U.S. CONST. amend. VI. "This very fundamental right was one of the first Sixth Amendment rights held by the Supreme Court to be an essential element of due process and therefore applicable in state proceedings under the Fourteenth Amendment." WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 1009 (2d ed. 1992) (citing *In re* Oliver, 333 U.S. 257 (1948)). In Anglo-American tradition, secret trials of the Spanish Inquisition, the English Court of Star Chamber and the French monarchy "obviously symbolized a menace to liberty." *In re* Oliver, 333 U.S. at 268-69. "The guarantee [of a public trial] has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution," by operating as "an effective restraint on possible

The closure of courtrooms during the testimony of undercover police officers is strictly a New York phenomenon. In other jurisdictions, where undercover officers face the same dangers as those in New York, the pattern of closing the courtroom has not developed.[19] As very few courts have considered the issue,[20] one may infer that it is rarely raised. One possible explanation is that other jurisdictions have eliminated the need to close courtrooms during undercover police testimony. In Washington, D.C., for example, police officers work undercover for short periods of time because of regular appearances in open courtrooms.[21]

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abuse of judicial power." *Id.* at 270.

[19] In the following cases, for example, the court noted that at trial an undercover officer testified that he or she had purchased narcotics from the defendant without noting courtroom closure: *Ex parte* State (Re: Kennedy v. State), No. 1941731, 1996 WL 29458, at *1 (Ala. Jan. 26, 1996); Jones v. State, No. A95A2669, 1996 WL 51125, at *1 (Ga. Ct. App. Feb. 9, 1996); Commonwealth v. Whitlock, 658 N.E.2d 182, 184 (Mass. App. Ct. 1995), *review denied,* 661 N.E.2d 100 (Mass. 1996); Carvajal v. State, No. 04-94-00680-CR, 1995 WL 595802, at *1 (Tex. Ct. App. Oct. 4, 1995).

[20] In recent years, few courts outside New York considered the issue of closing the courtroom during the testimony of undercover officers. *See* State v. Bone-Club, 906 P.2d 325, 326 (Wash. 1995) (considering whether closure of pretrial suppression hearing during testimony of undercover police officer violated the defendant's right to a public trial under the Washington State Constitution); People v. Seyler, 494 N.E.2d 267, 270 (Ill. App. Ct. 1986) ("[W]e conclude, as have the New York courts, that shielding the identity of a police witness, preserving his future usefulness, and safeguarding his life provides an adequate justification for excluding the public for that limited period while an undercover agent is testifying.").

[21] "[Washington, D.C. Police Department] Lt. Mario Sevilla, the 5D Vice [C]ommander, cautioned all undercovers when they came into the unit that the assignment was only temporary, that in a year or so, because of frequent court appearances, too many drug boys would recognize them, and they would have to be replaced." Paul Duggan, *Anatomy of a Sting: Greed and Fast Money Made a Dozen Dirty Cops Easy Pickings for the FBI, Who Snared Them in "Operation Broken Faith,"* SUN-SENTINEL, Oct. 22, 1995, at 8. The Los Angeles Police Department has assigned Black officers to undercover work for two-week periods, explaining that "fresh faces" are needed so that "drug dealers and other suspects are less likely to identify undercover officers." David Freed, *LAPD: Despite Gains, Race, Sex Bias Persist*, L.A. TIMES, Sept. 28, 1986, at 1. However, detective assignments in the LAPD's narcotics division are full time and generally long term due to overtime pay and other benefits. *Id; see also*

In New York, however, the practice of closing the courtroom to protect undercover officers' identities has been in place since *People v. Hinton*.[22] In *Hinton*, the New York Court of Appeals ruled that the testimony of an undercover narcotics officer was an exception to the general right to a public trial.[23] In *People v. Jones*,[24] the court of appeals further ruled that courts may not close the courtroom during the testimony of undercover police officers for "less than compelling reasons,"[25] thus requiring a factual showing of a threat to the witness's safety or to the integrity of other cases.[26] Subsequently, the U.S. Supreme Court, in *Waller v. Georgia*,[27] developed a stringent four-part test to determine when closure is proper during a suppression hearing:[28] (1) "the

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Dennis Hevesi, *Detective Dies in Shooting in Drug Case,* N.Y. TIMES, Mar. 11, 1993, at B1 (reporting that an undercover officer who was killed in a buy-and-bust operation had worked in the same undercover unit for approximately four years).

[22] 31 N.Y.2d 71, 286 N.E.2d 265, 334 N.Y.S.2d 885 (1972), *cert. denied,* 410 U.S. 911 (1973).

[23] *Id.* at 74, 286 N.E.2d at 267, 334 N.Y.S.2d at 889. The New York Court of Appeals noted that targets of the undercover officer's investigations were present in the courtroom, and stated: "While we reaffirm the inherent discretionary power of the trial court to close the courtroom, we need only point out that the discretion be sparingly exercised and then, only when unusual circumstances necessitate it." *Id.* at 75-76, 286 N.E.2d at 267, 334 N.Y.S.2d at 889.

[24] 47 N.Y.2d 409, 391 N.E.2d 1335, 418 N.Y.S.2d 359, *cert. denied,* 444 U.S. 946 (1979).

[25] *Id.* at 414-15, 391 N.E.2d at 1339, 418 N.Y.S.2d at 363.

[26] *Id.* at 415, 319 N.E.2d at 1339, 418 N.Y.S.2d at 363. The court ruled that the "defendant's trial was improvidently closed to the public" where the court relied "on its own unparticularized impressions of the vicissitudes of undercover narcotics work in general. That undercover work at times entails serious threats to the safety of agents was by no means sufficient to connect that threat to this witness." *Id.*

[27] 467 U.S. 39 (1984).

[28] A "suppression hearing" is a "challenge to the seizure of evidence [that] frequently attacks the conduct of police and prosecutor." *Id.* at 47. In the majority of jurisdictions, a suppression hearing follows from a pretrial motion to suppress, usually required for "exclusion based on all grounds relating to the illegal acquisition of the evidence." LAFAVE & ISRAEL, *supra* note 18, at 500. A minority of jurisdictions require the defendant to object at trial when the prosecution attempts to introduce the evidence. LAFAVE & ISRAEL, *supra* note

party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced;"[29] (2) "the closure must be no broader than necessary to protect that interest;"[30] (3) "the trial court must consider reasonable alternatives to closing the proceeding"[31] and (4) the trial court "must make findings adequate to support the closure."[32] Following *Waller,* the New York Court of Appeals expressly applied its test to closures during trial testimony, and required a fact-sensitive analysis of the specific nature of the threat posed to the witness.[33]

However, despite the New York Court of Appeals' ruling, many lower New York courts continued to employ the looser "compelling reasons" standard of *People v. Jones*, rather than the test established in *Waller*.[34] New York state courts upheld closure merely

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18, at 499.

[29] *Waller*, 476 U.S. at 48.

[30] *Id.*

[31] *Id.*

[32] *Id.* at 48. See *infra* parts III and IV for an in-depth description and analysis of the *Waller* test.

[33] In *People v. Kan*, the New York Court of Appeals ruled that the *Waller* test is the means "by which to assess the propriety of closure." 78 N.Y.2d 54, 57-58, 574 N.E.2d 1042, 1044, 571 N.Y.S.2d 436, 438 (1991). The court of appeals then applied the test to review the trial court's decision to close the courtroom during the trial testimony of a cooperating accomplice. *Id.* at 56-57, 574 N.E.2d at 1043, 571 N.Y.S.2d at 437. The court ruled that the closure violated the defendant's right to a public trial. *Id.* at 59, 574 N.E.2d at 1044-45, 571 N.Y.S.2d at 438-39.

[34] For example, the following cases referred to the vaguer "compelling reasons" standard adopted in *People v. Jones*, 47 N.Y.2d 409, 414-15, 391 N.E.2d 1335, 1339, 418 N.Y.S.2d 359, 363, *cert. denied,* 444 U.S. 946 (1979): People v. Brown, 172 A.D.2d 844, 845, 569 N.Y.S.2d 208, 209 (2d Dep't 1991); People v. White, 170 A.D.2d 629, 629, 566 N.Y.S.2d 401, 402 (2d Dep't), *appeal denied,* 77 N.Y.2d 1002, 575 N.E.2d 414, 571 N.Y.S.2d 928 (1991); People v. McLennon, 156 A.D.2d 478, 478, 548 N.Y.S.2d 764, 765 (2d Dep't 1989), *appeal denied,* 75 N.Y.2d 921, 554 N.E.2d 77, 555 N.Y.S.2d 40 (1990); People v. Bowden, 156 A.D.2d 372, 373, 548 N.Y.S.2d 328, 328 (2d Dep't 1989), *appeal denied,* 76 N.Y.2d 731, 557 N.E.2d 1189, 558 N.Y.S.2d 893 (1990); People v. Tinsley, 145 A.D.2d 448, 449, 535 N.Y.S.2d 415, 417 (2d Dep't 1988). Despite the fact that in *Waller*, the Supreme Court implicitly overruled the *Jones* court's "compelling reasons" standard with the four-prong test, these New York courts continue to apply the weaker *Jones* standard.

if the officer actively worked undercover,[35] particularly if the officer was active in the same general geographical area as the arrest or the trial,[36] which is an easier burden than *Waller*. This lax

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[35] *Brown*, 172 A.D.2d at 845, 846, 569 N.Y.S.2d at 209-10 (upholding closure where the undercover officer was "actively engaged as an undercover officer" and "reasonably expected that she would be working in the same community where she was about to testify," having applied for a transfer); People v. Contino, 153 A.D.2d 948, 948, 545 N.Y.S.2d 754 (2d Dep't) (noting that closure proper where undercover officer was "still engaged in pending investigations, and closure was necessary to protect his safety as well as the integrity of the ongoing operations"), *appeal denied,* 75 N.Y.2d 769, 551 N.E.2d 112, 551 N.Y.S.2d 911 (1989); People v. Legette, 153 A.D.2d 760, 761, 545 N.Y.S.2d 296, 297 (2d Dep't) ("[O]ne of the testifying officers . . . was still active in an undercover capacity, thereby sufficiently establishing that closure was necessary . . . ."), *appeal denied,* 74 N.Y.2d 949, 549 N.E.2d 486, 550 N.Y.S.2d 284 (1989); *see also* James F. Fagan, Jr., *Close that Door! Closure of Courtroom During Testimony of an Undercover Police Officer,* 26 SUFFOLK U. L. REV. 619, 635 (1992) ("Few state courts, however, have applied the *Waller* test to determine whether to close the courtroom during an undercover agent's testimony. Possibly the ambiguous language of cases reviewing the decisions of trial courts to close courtrooms diluted the effect of the *Waller* test."); Abraham G. Gerges, *A Judicial Dilemma*, 211 N.Y. L.J. 2 (1994) ("Until the decision in *People v. Martinez*, courtroom [*sic*] were routinely closed based on such testimony [as that of the undercover officer in *Martinez*]."); John M. Leventhal, *Public Trial: Keeping the Undercover Undercover*, 208 N.Y. L.J. 1 (1992) ("Although the courts formally reject a *per se* exception for an undercover witness, a showing of almost any factor will justify closure."); *Suppression Motion Is Granted After Officer Declines to Testify;* People v. Edwin Gonzalez, *Supreme Court, Criminal Term, Part 43, Justice P. Williams*, 208 N.Y. L.J. 21 (1992) [hereinafter *Suppression Motion*] (concluding after a review of New York law up through *People v. Kan* that "the law of this State is currently the same as that of *Hinton* and *Jones* in resting this issue in the sound exercise of judicial discretion, and requiring that that discretion be carefully exercised to ensure that closed proceedings are conducted only when absolutely warranted by unusual circumstances").

[36] *E.g.,* People v. DeChirico, 185 A.D.2d 282, 282, 586 N.Y.S.2d 25, 25 (2d Dep't 1992) (noting that officer testified "that his personal safety in the same geographical area where the defendant was arrested would be jeopardized if his identity as a police officer were revealed"), *cert. denied,* 507 U.S. 942 (1993); People v. White, 170 A.D.2d 629, 629, 566 N.Y.S.2d 401, 402 (2d Dep't 1991) (noting that undercover witness was still working "in the community"); People v. Sierra, 169 A.D.2d 682, 683, 565 N.Y.S.2d 62, 63 (1st Dep't), *appeal denied,* 78 N.Y.2d 974, 580 N.E.2d 426, 574 N.Y.S.2d 954 (1991) (noting that

standard threatened to become an impermissible *per se* rule, where the court could automatically close the courtroom for any active undercover officer. The New York Court of Appeals addressed the specific issue of closing the courtroom for undercover witnesses in *People v. Martinez*,[37] and reemphasized the *Waller* test and its requirement of a strong factual basis for closure.[38]

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undercover officer was "still operating as an undercover police officer in the same community as defendant's arrest"); People v. Carter, 162 A.D.2d 218, 219, 556 N.Y.S.2d 588, 589 (1st Dep't), *appeal denied*, 76 N.Y.2d 984, 565 N.E.2d 521, 563 N.Y.S.2d 772 (1990) ("[T]he witness's testimony that he currently worked as an undercover narcotics agent in the area provided a sufficient factual basis to seal the courtroom."); People v. Weaver, 162 A.D.2d 486, 487, 556 N.Y.S.2d 173, 175 (2d Dep't) (ruling closure proper where undercover officer "testified that . . . investigations pending in the same geographical area where the defendant was arrested would be jeopardized if his identity as a police officer were revealed"), *appeal denied*, 76 N.Y.2d 868, 561 N.E.2d 907, 560 N.Y.S.2d 1007 (1990); *McLennon*, 156 A.D.2d at 478, 548 N.Y.S.2d at 765 (ruling that closing proper where, *inter alia*, the undercover witness "was assigned to ongoing investigations [in the Brooklyn North Narcotics Area] and would be required to testify in Brooklyn courts with respect to those cases"); People v. Santos, 154 A.D.2d 284, 285, 546 N.Y.S.2d 587, 588 (1st Dep't 1989) ("Active engagement in the community as an undercover narcotics agent is itself a compelling reason for excluding the public from the courtroom . . . ."), *appeal denied*, 75 N.Y.2d 817, 551 N.E.2d 1245, 552 N.Y.S.2d 567 (1990); People v. Bostick, 150 A.D.2d 707, 708, 541 N.Y.S.2d 581, 582 (2d Dep't 1989) (ruling closing proper where the "undercover officer was still operating in the community"); *Tinsley*, 145 A.D.2d at 448, 535 N.Y.S.2d at 416-17 (ruling closure proper where, *inter alia*, the undercover witness "was still actively engaged in undercover work and was participating in operations in drug investigations in Kings County," the site of defendant's arrest); People v. Wharton, 143 A.D.2d 958, 958, 533 N.Y.S.2d 557, 557 (2d Dep't 1988) (ruling closure proper where, *inter alia*, the undercover officer "was still working in an undercover capacity with some 200 pending cases, some of which were in the same geographical area as the 'buy and bust' case on trial"), *aff'd*, 74 N.Y.2d 921, 549 N.E.2d 462, 550 N.Y.S.2d 260 (1989).

[37] 82 N.Y.2d 436, 624 N.E.2d 1027, 604 N.Y.S.2d 932 (1993).

[38] *Id.* at 442-44, 624 N.E.2d at 1030, 604 N.Y.S.2d at 935-37. The court cited the *Waller* test, stating, "Since *Jones* . . . the United States Supreme Court has further particularized the standard for closure under the Sixth Amendment, which we recognized in *People v. Kan* . . . ." *Id.* at 442, 624 N.E.2d at 1030, 604 N.Y.S.2d at 935. It ruled that the prosecution's "perfunctory showing in *Martinez* was insufficient to meet the standards for closure repeatedly insisted

Since *Martinez*, New York courts have applied a variety of standards: some citing all four prongs of the *Waller* test,[39] others addressing only certain prongs,[40] others following *Martinez* but not acknowledging the *Waller* test,[41] others continuing to apply older, implicitly overruled standards[42] and others failing to

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upon by this Court and the Supreme Court." *Id.* at 443, 624 N.E.2d at 1031, 604 N.Y.S.2d at 936.

[39] *See, e.g.*, People v. Green, 627 N.Y.S.2d 21, 22 (1st Dep't 1995); People v. Badillo, 207 A.D.2d 742, 742-43, 616 N.Y.S.2d 619, 620 (1st Dep't), *appeal denied*, 84 N.Y.2d 1009, 647 N.E.2d 126, 622 N.Y.S.2d 920 (1994); People v. Tapia, 207 A.D.2d 286, 287, 615 N.Y.S.2d 380, 381 (1st Dep't), *appeal denied*, 84 N.Y.2d 910, 645 N.E.2d 1228, 621 N.Y.S.2d 528 (1994).

[40] For example, the following cases ruled that the closure order did not meet the second prong of the *Waller* test, which requires that the closure order must be "no broader than necessary to protect" the overriding interest. These courts, however, did not address all four prongs of the *Waller* test. People v. Carrington, 633 N.Y.S.2d 47, 47-48 (2d Dep't 1995) (ruling that the closure was broader than necessary); People v. Pankey, 631 N.Y.S.2d 766, 767 (2d Dep't 1995) (same).

[41] The following cases cited *Martinez* to support closure under the specific factual circumstances, but did not apply the *Waller* test: People v. Abdul-Aziz, 628 N.Y.S.2d 272, 274 (1st Dep't) (ruling that closure was proper where the undercover officer had "ongoing operations in the general vicinity of the crime, which also was the vicinity of defendant's residence, as well as the ease of transportation between the neighborhood and the courthouse"), *appeal denied*, 86 N.Y.2d 788, 656 N.E.2d 601, 632 N.Y.S.2d 502 (1995); People v. Ocasio, 628 N.Y.S.2d 651, 652 (1st Dep't) (ruling that the courtroom was properly closed where undercover officer was "still active in that capacity in the specific area where defendant was arrested"), *appeal denied*, 86 N.Y.2d 845, 658 N.E.2d 232, 634 N.Y.S.2d 454 (1995); People v. Rosario, 214 A.D.2d 345, 345, 625 N.Y.S.2d 19, 19 (1st Dep't) (ruling that closure was proper where, *inter alia*, the undercover officer was "on call to return to the specific area of the instant sale"), *appeal denied*, 86 N.Y.2d 801, 656 N.E.2d 614, 632 N.Y.S.2d 515 (1995); People v. Aguayo, 200 A.D.2d 541, 542, 606 N.Y.S.2d 694, 695 (1st Dep't) (noting that closure was proper where the undercover officer was active in the "neighborhood where defendant was arrested," and feared that "'one of [the defendant's] friends' from whom he was currently purchasing drugs might be [in the courtroom]"), *appeal denied*, 83 N.Y.2d 963, 639 N.E.2d 756, 616 N.Y.S.2d 16 (1994).

[42] The following cases applied language from *People v. Jones* despite the fact that it was implicitly overruled: People v. Brown, 214 A.D.2d 579, 579-80, 625 N.Y.S.2d 570, 572 (2d Dep't) (ruling that "the factual showing went beyond

identify any specific standard at all.[43] Generally, the New York State appellate courts are quite sympathetic to the concerns of undercover officers, and uphold closure by the trial court in the majority of cases.[44]

The approaches employed by the New York State lower courts are inconsistent with one another, with the rulings by the New York Court of Appeals, and with that of the U.S. Supreme Court. The lower New York State courts acknowledge *Martinez* only by

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'unparticularized impressions of the vicissitudes of undercover narcotics work in general,'" quoting *People v. Jones*), *appeal denied,* 86 N.Y.2d 732, 655 N.E.2d 710, 631 N.Y.2d 613 (1995); People v. Parker, 194 A.D.2d 335, 336, 598 N.Y.S.2d 490, 492 (1st Dep't 1993) (ruling that closing was improper where the court did not make "'an inquiry careful enough to assure the court that the defendant's right to a public trial is not being sacrificed for less than compelling reasons,'" quoting *People v. Jones*); People v. Tinsley, 145 A.D.2d 448, 449, 535 N.Y.S.2d 415, 417 (2d Dep't 1988) (ruling that closure was proper because "compelling reasons to close the courtroom were clearly established," citing *People v. Jones*).

[43] The following cases did not cite to any New York Court of Appeals or U.S. Supreme Court cases for a controlling standard. People v. Cid, 629 N.Y.S.2d 203 (1st Dep't) (ruling closure was proper where the undercover officer was "still active in the very area where defendant was arrested"), *appeal denied,* 86 N.Y.2d 872, 659 N.E.2d 776, 635 N.Y.S.2d 953 (1995); People v. Andrades, 215 A.D.2d 304, 627 N.Y.S.2d 23 (1st Dep't) (ruling closure was proper where the undercover officer "had numerous cases pending from purchases which he had made in the area after the instant crime" and had received threats), *appeal denied,* 86 N.Y.2d 840, 658 N.E.2d 227, 634 N.Y.S.2d 449 (1995).

[44] *E.g.*, People v. Abdul-Aziz, 628 N.Y.S.2d 272 (1st Dep't), *appeal denied,* 86 N.Y.2d 788, 656 N.E.2d 601, 632 N.Y.S.2d 502 (1995); People v. Dorcas, 630 N.Y.S.2d 796 (2d Dep't), *appeal denied,* 87 N.Y.2d 845 (1995); People v. Rosario, 214 A.D.2d 345, 625 N.Y.S.2d 19 (1st Dep't), *appeal denied,* 86 N.Y.2d 614, 656 N.E.2d 614, 632 N.Y.S.2d 515 (1995); People v. Aguayo, 200 A.D.2d 541, 606 N.Y.S.2d 694 (1st Dep't), *appeal denied,* 83 N.Y.2d 963, 639 N.E.2d 756, 616 N.Y.S.2d 16 (1994); People v. Skinner, 204 A.D.2d 664, 612 N.Y.S.2d 419 (2d Dep't), *appeal denied,* 84 N.Y.2d 910, 645 N.E.2d 1227, 621 N.Y.S.2d 527 (1994); People v. Jackson, 171 A.D.2d 756, 567 N.Y.S.2d 310 (2d Dep't), *appeal denied,* 78 N.Y.2d 967, 580 N.E.2d 419, 574 N.Y.S.2d 947 (1991); People v. White, 170 A.D.2d 629, 566 N.Y.S.2d 401 (2d Dep't), *appeal denied,* 77 N.Y.2d 1002, 575 N.E.2d 414, 571 N.Y.S.2d 928 (1991); People v. Carter, 162 A.D.2d 218, 556 N.Y.S.2d 588 (1st Dep't), *appeal denied,* 76 N.Y.2d 984, 565 N.E.2d 521, 563 N.Y.S.2d 772 (1990).

requiring a stronger factual basis for closure than was commonly deemed appropriate before the court of appeals' decision, thus implicitly acknowledging the defendant's countervailing right to a public trial.[45] In this way, the New York Court of Appeals largely succeeded in averting the development of a *per se* rule in the lower courts that would allow automatic closure for any active undercover officer. But the lower courts still have not complied with the requirements of the Supreme Court's decision in *Waller*,[46] even though in *Martinez* the New York Court of Appeals expressly adopted the test for closures during undercover witness testimony.

In contrast, when the Second Circuit Court of Appeals reviews state court decisions upholding closure during the testimony of undercover officers on habeas corpus petitions,[47] it uniformly applies the *Waller* test.[48] Courts in the Second Circuit must

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[45] The following cases followed *Martinez* but failed to apply *Waller*'s four-prong test. *Abdul-Aziz*, 628 N.Y.S.2d at 273; *Dorcas*, 630 N.Y.S.2d at 796; *Rosario*, 214 A.D.2d at 345, 625 N.Y.S.2d at 19; *Aguayo*, 200 A.D.2d at 541, 606 N.Y.S.2d at 695.

[46] *See, e.g., Dorcas*, 630 N.Y.S.2d at 796; *Abdul-Aziz*, 628 N.Y.S.2d at 273; *Rosario*, 625 N.Y.S.2d at 19; *Aguayo*, 200 A.D.2d at 541, 606 N.Y.S.2d at 695; *Skinner*, 204 A.D.2d at 664, 612 N.Y.S.2d at 420.

[47] Under the habeas corpus statute, persons convicted of crimes under state law may bring a claim in federal court arguing that their incarceration is in violation of federal law or federal constitutional law. The habeas corpus statute provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254(a) (1994). In the closure context, the qualifying law is the Sixth Amendment. The statute does not "limit the relief that may be granted to discharge of the applicant from physical custody." Carafas v. LaVallee, 391 U.S. 234, 238-39 (1968).

[48] *See, e.g.*, Vidal v. Williams, 31 F.3d 67, 68-69 (2d Cir. 1994), *cert. denied*, 115 S.Ct. 778 (1995); Burton v. Senkowski, No. CV-94-3836, 1995 WL 669908, at *3-4 (E.D.N.Y. Nov. 5, 1995); Pearson v. James, No. 94-CV-1499, 1995 WL 617331, at *1-2 (S.D.N.Y. Oct. 20, 1995); Ayala v. Speckard, No. 94-CV-7850, 1995 WL 373419, at *2-4 (S.D.N.Y. June 21, 1995); Okonkwo v. Lacy, 895 F. Supp. 571, 574, 577-79 (S.D.N.Y. 1995); Daniel v. Kelly, No. CV-78-830E, 1990 WL 130523, at *6-7 (W.D.N.Y. Aug. 31, 1990); Ip v. Henderson,

synthesize their own caselaw with New York State law that does not always comply with the *Waller* test and the rulings of the New York Court of Appeals.[49] Other complications faced by federal courts when reviewing New York state court decisions include evaluating whether claims have been exhausted or procedurally barred.[50] To protect fully both the defendant's right to a public trial and the undercover officer's concerns, New York's courts should consistently apply the *Waller* test.

Part I of this Note provides a brief background of the buy-and-bust operation,[51] and the consequent increased reliance on the testimony of undercover officers.[52] Part II describes the New York State and Second Circuit Court of Appeals decisions that developed the practice of closing the courtroom during the testimony of undercover witnesses. In part III, this Note examines the Supreme Court decision *Waller v. Georgia*,[53] which outlines a stringent four-part test governing such closures. Part IV focuses on the application of the *Waller* test in the lower state and federal courts. In conclusion, this Note criticizes New York State courts for their failure to adopt the *Waller* test in full as a means of protecting both defendants' right to a public trial and the undercover officers'

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710 F. Supp. 915, 917-19 (S.D.N.Y.), *aff'd without opinion*, 888 F.2d 1376 (2d Cir. 1989); Martinez v. Sullivan, No. 88-CV-7335, 1989 WL 63103, at *3-4 (S.D.N.Y. June 7, 1989), *aff'd*, 914 F.2d 240 (2d Cir. 1990); Jones v. Henderson, 683 F. Supp. 917, 923-24 (E.D.N.Y. 1988).

[49] *Okonkwo*, 895 F. Supp. at 579 n.20.

[50] *Id.* at 574-79.

[51] *See supra* note 1 (defining the buy-and-bust operation).

[52] When buy-and-bust operations cases come to trial, the undercover officer is often the prosecution's primary witness and may be the only witness to identify the defendant as the narcotics seller. *E.g.*, United States *ex rel.* Lloyd v. Vincent, 520 F.2d 1272, 1273 (2d Cir. 1975) ("At trial, the State's primary witnesses were two undercover officers from the Narcotics Squad of the Nassau County Police Department."), *cert. denied*, 423 U.S. 937 (1975); People v. Hinton, 31 N.Y.2d 71, 73, 286 N.E.2d 265, 266, 334 N.Y.S.2d 885, 887 (1972) ("[P]rosecution's main witness was an undercover agent who posed as an addict when making the narcotic purchases from the defendant."), *cert. denied*, 410 U.S. 911 (1973); People v. Castro, 63 A.D.2d 891, 405 N.Y.S.2d 729, 730 (1st Dep't 1978) ("The defendant's conviction at trial rested almost exclusively on the damaging testimony of the undercover officer.").

[53] 467 U.S. 39, 48 (1984).

concerns for safety, and recommends a strategy to ensure their full compliance with *Waller*.

I. THE BUY-AND-BUST OPERATION AND UNDERCOVER OFFICERS

The issue of courtroom closure for undercover officers commonly arises in cases stemming from buy-and-bust operations.[54] In this police tactic, uniformed officers arrest street drug dealers after they sell narcotics to undercover officers posing as buyers.[55] In New York City, the police department has recently directed attention to street drug dealing as part of its attack on many low-level crimes.[56] As a consequence, the police arrest more drug dealers,[57] and the testimony of undercover officers regarding their roles in buy-and-bust operations can be crucial during the trials of these dealers.[58] However, undercover officers may fear that their testimony in open court will expose their identity, thus threatening their safety and their ongoing investigations.[59] Prosecutors, therefore, commonly request that the trial court close the courtroom to the public during the testimony of these undercover officers, primarily in buy-and-bust cases.[60]

As in other communities fighting the war on drugs,[61] New

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[54] *See supra* note 11 (providing cases in which the trial judge closed the courtroom due to an undercover officer's concerns of identity exposure and jeopardy to ongoing operations).

[55] *See supra* note 1 (defining the buy-and-bust operation).

[56] *See* William J. Bratton, *The New York City Police Department's Civil Enforcement of Quality-of-Life Crimes,* 3 J.L. & POL'Y 447, 447-48 (1995).

[57] Samson Mulugeta, *Drug War's Smaller Battles Drug War's Little Battles*, DAILY NEWS, Apr. 9, 1995, (Suburban), at 1.

[58] *See supra* note 10 (citing cases in which an undercover officer is the primary witness for the prosecution).

[59] *See supra* note 11 (providing cases in which the trial judge closed the courtroom due to an undercover officer's concerns of identity exposure and jeopardy to ongoing operations).

[60] *See supra* note 17 and accompanying text (describing courtroom closure during the testimony of undercover officers in New York State narcotics cases as routine, primarily in New York City).

[61] Police departments in communities outside New York City also employ buy-and-bust operations to combat drug offenses. *See, e.g.,* Bill Bryan, *A*

York City has recently increased its reliance on buy-and-bust operations,[62] where uniformed officers arrest street sellers of narcotics after undercover officers buy drugs from them.[63] Under Mayor Rudolph Giuliani's Administration,[64] the New York City Police Department adopted an aggressive style and new tactics[65] to target

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Thankless Job Is Strangely Attractive: No Shortage of Candidates for Police Chief of St. Louis, ST. LOUIS POST-DISPATCH, Nov. 19, 1995, at 1B (noting that in 1989, in response to complaints of blatant drug dealing, the St. Louis Police Department assembled an undercover narcotics unit to buy drugs from street dealers and has made more than 5000 arrests); Connelly, *supra* note 1, at B3 (reporting thousands of arrests made by street narcotics team in the San Fernando Valley, Los Angeles); Phillip J. O'Connor, *Twenty-Three Arrested in Drug Dealing Probe*, CHI. SUN-TIMES, Nov. 9, 1995, at 67 (reporting that undercover officers in Chicago arrested 23 alleged drug dealers during an eight-month investigation in which the officers made 88 street-level buys of narcotics on eight targeted street corners with "an estimated street value of $40,000"); Alan Travis, *Met Claims Success in Tackling Drugs Without Public Disorder*, GUARDIAN, July 12, 1995, at 5 (reporting that in Brixton, U.K.—a place that was "once a byword for drug dealing and urban riot"—police reduced drug trafficking in part via purchases by undercover officers); Zaret, *supra* note 1, at 1A (explaining that in Memphis, Tennessee, buy-and-bust operations were disbanded in 1993 and then resurrected in 1994).

[62] Clifford Krauss, *Giuliani Sets New Policy to Spur Drug Arrests by Officers on Beats*, N.Y. TIMES, Apr. 7, 1994, at A1 (reporting that one of the New York Police Department's new initiatives included "teams to conduct aggressive buy and bust operations against illegal drug and gun dealers"); Elaine Rivera, *Campaign '93: Blast of Applause for Rudy's TNT Plan*, NEWSDAY, Sept. 22, 1993, at 28 (noting that then mayoral candidate Rudolph Giuliani "promis[ed] to return to the [Ed] Koch [A]dministration policy of making massive arrests of street-level dealers" using undercover buy-and-bust operations, a tactic that was abandoned during the David Dinkins Administration). The buy-and-bust operation is one integral part of the police's strategy to drive narcotics dealers out of New York City. NEW YORK CITY POLICE DEP'T, POLICE STRATEGY NO. 3: DRIVING DRUG DEALERS OUT OF NEW YORK 6 (1994) [hereinafter POLICE STRATEGY NO. 3].

[63] *See supra* note 1 (defining the buy-and-bust operation).

[64] Mayor Giuliani was elected in 1993, defeating David Dinkins by 53,581 votes. *Giuliani Won by 53,000, Final Official Tally Shows*, Associated Press Pol. Service, Dec. 10, 1993, *available in* 1993 WL 5598954.

[65] The increased reliance on buy-and-bust operations is in marked contrast to the strategies of Mayor Dinkins' Administration, during which police directed their efforts at higher levels of the narcotics trade. The Dinkins Administration

all crimes, including relatively minor "quality-of-life" violations[66]

"abandoned" the Tactical Narcotics Teams ("TNTs")—buy-and-bust units—"in favor of a strategy focusing on arresting upper-level drug dealers and cutting off the drugs flooding into the city's poorer neighborhoods." Rivera, *supra* note 62, at 28. Consequently, under Mayor Dinkins, both the number of drug arrests and the number of officers in the city's TNTs decreased. David Kocieniewski, *City's War on Crime Off to a Slow Start*, NEWSDAY, Sept. 18, 1991, at 26 (stating that in the past year, drug arrests fell from 48,805 to 36,632, and that the TNT units dropped from 700 to 500 undercover officers). Between 1989 and 1993, Narcotics Division staffing levels declined 11% and narcotics arrests declined by 30%. POLICE STRATEGY NO. 3, *supra* note 62, at 13. The report also notes the TNT operation's many failings which contributed to its lack of effectiveness, such as the lack of community involvement, the large size of the targeted areas, separation from and lack of coordination with police precincts, inadequate use of uniformed police officers, regular working hours known to street drug dealers and the lack of a strategy "for holding areas reclaimed by TNT." POLICE STRATEGY NO. 3, *supra* note 62, at 11-14. Under Mayor Dinkins, however, crime dropped 15%. *Giuliani Edges out Dinkins in N.Y. Wins Mayoralty by Narrow Margin*, BUFFALO NEWS, Nov. 3, 1993, at A1.

Under former Commissioner William J. Bratton, who was appointed by Mayor Giuliani in 1994 and served until March 1996, the TNTs were replaced with Strategic Narcotics and Gun ("SNAG") teams, "which change the mission and some methods of the old TNTs of the Narcotics Division, to initiate intensive buy-and-bust operations against both drug and gun dealers." POLICE STRATEGY NO. 3, *supra* note 62, at 6; *see also* Craig Horowitz, *The Suddenly Safer City*, N.Y., Aug. 14, 1995, at 22, 23 (describing then Commissioner Bratton's strategy of attacking crime "solely through effective law enforcement: using maps, computers, and . . . good management," and by addressing "minor signs of disorder"); Krauss, *supra* note 62, at A1 (reporting that for the first time since the early 1970s, the police department is giving uniformed police officers in New York City a large role in finding and arresting drug dealers, so as to "keep drug locations free of sellers after the specialized units leave the area"). Although it is unclear how police policies will change under the leadership of Commissioner Howard Safir, appointed in March 1996, it is interesting to note that he "be[gan] his career in 1965 as an undercover agent in New York with the Deferal Bureau of Narcotics" and then worked in the Drug Enforcement Administration. Steven Lee Myers, *Fire Commissioner to Take Over as Police Head*, N.Y. TIMES, Mar. 29, 1996, at A1, B8.

[66] Quality-of-life crimes include "street prostitution, low-level drug dealing, underage drinking, blaring car radios" and "other crimes that contribute to a sense of disorder and danger on the street." Bratton, *supra* note 56, at 447-48. For a detailed description of police rationale and strategies used to address these crimes, see generally Bratton, *supra* note 56; NEW YORK CITY POLICE DEP'T,

such as low-level drug dealing. Accordingly, from 1993 to 1994, misdemeanor narcotics arrests in New York City rose by forty-nine percent.[67]

Police attribute New York City's recent steep decline in crime in part to this increased pressure on low-level criminals.[68] By arresting low-level drug dealers in particular, police reduce the amount of violent crimes because most violent crimes are drug related.[69] In 1994, for example, as narcotics arrests increased,

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POLICE STRATEGY NO. 5: RECLAIMING THE PUBLIC SPACES OF NEW YORK (1994).

[67] Mulugeta, *supra* note 57, at 1; *see also* Clifford Krauss, *Computers Entering World of Drug Dealers,* N.Y. TIMES, Oct. 2, 1995, at B7 (reporting that narcotics arrests in New York City increased 27.5% in 1994).

Similarly, on Long Island, after police adopted a policy of "zero tolerance" toward quality-of-life offenses that they ignored in the past, including low-level drug dealing, misdemeanor narcotics arrests increased by 44% in Nassau County and by 38% in Suffolk County from 1993 to 1994. Mulugeta, *supra* note 57, at 1. Further, narcotics arrests in the Finger Lakes District of the state have nearly tripled since 1992. Maureen Sieh, *Police Team Up to Fight Dealers: Task Force Aims to Get Drugs off the Street,* SYRACUSE HERALD AM., Oct. 15, 1995, at F1. These increases "reversed a five-year trend of falling arrest rates throughout the state." Mulugeta, *supra* note 57, at 1.

[68] *Murder Rate Fell in 1994 for 3d Consecutive Year, Agency Says*, N.Y. TIMES, Oct. 24, 1995, at A19 [hereinafter *Murder Rate Fell in 1994*]. Former Commissioner Bratton credited the police department for the drop. Charles Laurence, *Crime's Down—But We're Locking Our Doors Anyway*, DAILY TELEGRAPH (London), May 10, 1995, at 19. Others disagree, theorizing that the drop in crime is possibly due to other factors such as gangs voluntarily reducing the level of violence, smaller numbers of violent people on the street, a reassertion of values or demographic shifts. *Id; see also* John Teirney, *The Holy Terror*, N.Y. TIMES, Dec. 3, 1995, § 6 (Magazine), at 82 (noting that although the hiring of more police officers during the Dinkins Administration may contribute to the falling crime rate, "New York's decline has been much more dramatic than other cities'—so sudden and so pronounced that it defies traditional thinking about crime. . . . Crime rates started plummeting as soon as the [police] department adopted its new tactics").

[69] "[N]early 40 percent of [New York C]ity's violent crime is linked to drug trafficking in 15 of the 76 precincts," leading police officials to conclude that "accurate and timely intelligence on drug suspects is the best way to produce leads toward solving murders, shootings, burglaries and robberies." Krauss, *supra* note 67, at B7; *see also* POLICE STRATEGY NO. 3, *supra* note 62, at 5 ("Criminal justice officials . . . have noted for many years that the main engine of urban

crime fell 12.3% in New York City, while nationally the drop in crime was only 3%.[70] Statistics show that felonies in New York City continue to fall at an unprecedented rate.[71] During William

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crime in the United States is narcotics. People rob and steal to keep using drugs, and people kill and maim to keep selling drugs."). The police department estimates that from 1989-94, "at least 25% of all homicides in New York City were directly related to drugs." POLICE STRATEGY NO. 3, *supra* note 62, at 9. At Manhattan Central Booking during 1993, 78% of all male suspects tested positive for drugs, 79% of male robbery suspects tested positive for drugs, 81% of male weapons-charge suspects tested positive for drugs and 80% of male burglary suspects tested positive for drugs. POLICE STRATEGY NO. 3, *supra* note 62, at 9. The great majority tested positive for cocaine. POLICE STRATEGY NO. 3, *supra* note 62, at 9. Further, "[f]ederal research has shown that offenders on drugs engage in criminal activity at a rate four to six times higher than when they are drug-free." POLICE STRATEGY NO. 3, *supra* note 62, at 9.

[70] Horowitz, *supra* note 65, at 24. New York City is leading a nationwide drop in crime rates. Laurence, *supra* note 68, at 19.

[71] Horowitz, *supra* note 65, at 22. Compared to the first half of 1994, during the first half of 1995 reports of murder in New York City fell by 31%; robbery fell by 21.9%; felonious assault fell by 6% and car theft fell by 25.2%. Horowitz, *supra* note 65, at 22. Compared to 1993, murder fell 37.3%; robbery, 31.3%; felonious assault, 10.6% "and, cumulatively, all reported serious crime [is] down 27.1 percent." Horowitz, *supra* note 65, at 22. "[O]ver the two-year peiod that began in early 1994," murder declined 40% and robbery declined 30%. Clifford Krauss, *Drop in Crime Slows to 9% in the Quarter,* N.Y. TIMES, Apr. 7, 1996, at 23. Crime has dropped so sharply that New York is now one of America's safest cities, and its police department's strategies are being copied across the nation. Teirney, *supra* note 68, at 62. "In the past two years overall crime has dropped nearly 30%, and the rates of robbery and murder have fallen even more sharply, to the lowest level in 25 years." Teirney, *supra* note 68, at 82; *see also* John T. McQuiston, *Nassau Is Maligned on Crime Rate, Study Says*, N.Y. TIMES, Nov. 21, 1995, at B7 (noting that Professor Harvey Kushner, chairman of the Department of Criminal Justice at the C. W. Post campus of Long Island University in Nassau County, reported in a study that "crime in Nassau is presently at its lowest level in 20 years, and much lower, on a per capita basis, than either New York City or Suffolk County"); Eric Pooley, *One Good Apple,* TIME, Jan. 15, 1996, at 54 (profiling Commissioner Bratton and reporting that crime in New York City is "plunging farther and faster than it has done anywhere else in the country, faster than any cultural or demographic trend could explain").

J. Bratton's tenure as police commissioner, "crime fell to its lowest levels since the 1960's."[72]

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[72] David Firestone, *Bratton Quits Police Post; New York Gains over Crime Fed a Rivalry with Giuliani,* N.Y. TIMES, Mar. 27, 1996, at A1. As commissioner, William J. Bratton "presided over the sharpest drop in crime in the city's history." Krauss, *supra* note 71, at 21. As outgoing Commissioner Bratton described in his resignation letter to Mayor Giuliani, "[t]oday, New York is recording 47[%] fewer homicides than it did when you took office in 1994. In addition, we have 35[%] fewer burglaries and 40[%] fewer thefts of automobiles. Overall, New York's serious crime is 32[%] lower than it was when you became . . . Mayor." *'Greatest Cops on Earth,'* N.Y. TIMES, Mar. 27, 1996, at B4. The most recent police statistics show that "[t]he double-digit decline in crime that New York City has enjoyed in the last two years is slowing . . . ." Krauss, *supra* note 71, at 21. "[R]eports of serious crime declined 9 percent in the first 3 months of [1996]." Krauss, *supra* note 71, at 21. Unlike in 1994 and 1995, when "every one of the city's 76 precincts enjoyed substantial decreases in total reported felony crimes . . . 14 precincts in the first quarter of 1996 experienced small increases in crime over the year-earlier period . . . ." Krauss, *supra* note 71, at 21. During the first three months of 1996, the murder rate continued to drop another 15% from last year. Krauss, *supra* note 71, at 21. "Senior aides to Mr. Bratton say the newest statistics indicate that felony crime should go down 20 percent more in the next two years—a slowing of the trends of the last two years but a solid gain nevertheless." Krauss, *supra* note 71, at 23. These aides indicated that a new wide-ranging "antinarcotics sweep . . . should assure those gains." Krauss, *supra* note 71, at 23.

Another result of aggressive policing is that it has made selling drugs much more difficult, forcing many low-level dealers to alter their methods of doing business, by driving them indoors or out of state. "Dread," a drug dealer in Bedford-Stuyvesant, New York, described the difficulties he faced:

> Used to be that you could stand on the corner with [crack] in your pockets or your mouth and make your sales. . . . Not long ago, you could make $2,500 a day this way with very little risk. Well, you can still make some money, but the risk is big.
>
> You can't just stand on the corner no more with your pockets full of stuff . . . . You got to stash the shit somewhere on the street. Then you got to have somebody watching it. Then you need another guy to get the money. All of this takes time, and it cuts down on the profits. Anybody who's smart is putting his money away, trying to get enough to go do something else.

Horowitz, *supra* note 65, at 22. Persistent police work has transformed former high volume drug areas, and drug dealing is now less conspicuous. *See* Purdy, *supra* note 4, at A1 (reporting that in July 1986, in order to demonstrate how open the selling of drugs had become, then U.S. Attorney Rudolph W. Giuliani,

who wore a leather vest and sunglasses, and "Senator Alfonse M. D'Amato, who wore a windbreaker and Army cap, bought crack as part of a buy-and-bust operation on 160th Street" in Manhattan); Zaret, *supra* note 1, at 1A (describing that as a result of increased police pressure, dealers no longer approach cars). Where dealers once blatantly approached passers-by on the street, police efforts have forced their operations into apartment buildings. Purdy, *supra* note 4, at A1. "Steerers," who direct customers inside apartments, and "lookouts" with walkie-talkies who watch for the police, replaced dealers on the street. Purdy, *supra* note 4, at A1.

As a result of concentrated police efforts, targeted neighborhoods, generally, are safer; however, it is more difficult for the police to arrest dealers indoors than on the street. Horowitz, *supra* note 65, at 22. The Los Angeles Police Department, for example, reduced the city's Chronic Narcotics Sales Locations—"targets of weekly and sometimes daily buy-bust operations"—from 56 to 32 in four years. Connelly, *supra* note 1, at B3. Although police know that drug dealing persists, they arrest less dealers because they have been driven off the streets. Connelly, *supra* note 1, at B3. Dealers are now organized in sophisticated ways to bypass the police. *See, e.g.,* Purdy, *supra* note 4, at A1 (reporting that dealers have "nearly invisible custom-made compartments for hiding contraband" in apartments and cars, "video cameras trained on the street to spot police activity" and separate apartments for transactions and for storing drugs and money); Sieh, *supra* note 67, at F1 (reporting that some drug dealers "operate out of local hotel rooms or pay residents to use their homes" instead of conducting business in their own homes). It is therefore harder to arrest them. Connelly, *supra* note 1, at B3.

Despite the effect on the commission of serious crime, some criticize the attention the police department gives to low-level drug dealing. Some critics have noted the strain the buy-and-bust operation has created on the criminal justice system and the increased cost to the taxpayers for operating jails and courts for low-level criminals. Rivera, *supra* note 62, at 28 (quoting Bob Gangi, executive director of the Correctional Association of New York, as warning that targeting street-level dealers leads to higher taxpayer costs for jails and courts for those who "'are not the mid-level drug dealers or the drug kingpins'"). Due to the police department's attention to low-level drug dealing and other quality-of-life offenses, the prison populations in New York have reached record levels. Laurence, *supra* note 68, at 19. The "explosion" of arrests for quality-of-life crimes "is starting to overwhelm the city's criminal justice system." Anthony M. DeStefano & George E. Jordan, *All Jammed Up: Quality-of-Life Busts Clog Courts*, NEWSDAY, Oct. 24, 1994, at 7. In October 1994, about 80% of the 20,000 average daily inmate population in city prisons waited for trial. *Id.* In July 1994, the average wait for arraignment was 28.03 hours in the city's criminal courts, and in September 1994, the average time was 30.64 hours. *Id.*

Similarly, in Baltimore, Maryland, during the first quarter of 1995, drug defendants—62% of all Baltimore felony defendants during this period—waited an average of nearly seven months before their first trial date unless they agreed to an early plea bargain. Kate Shatzkin, *Prosecutor Acts to Ease Court Backlog,* BALT. SUN, Nov. 7, 1995, at 1B. "In an attempt to keep more serious cases from being delayed" in felony court, the Baltimore state's attorney's office changed its rules so that prosecutors can charge drug offenders with a misdemeanor if caught with up to double the amount of drugs that previously qualified as felony offenses. *Id.* The change stemmed from the large amounts of drug arrests and an overflowing Baltimore City Detention Center. *Id.* Baltimore State's Attorney Patricia C. Jessamy hoped to be able to "concentrate more resources on large kingpin and conspiracy cases that could make a real dent in drug distribution networks." *Id.* One of the exceptions to the new rule is sales to an undercover police officer. *Id.* The state's attorney's office also predicted that the police's "large drug sweeps and other arrests would flood the Baltimore system with 7,482 felony defendants by the end of [1995]—about 1,600 more than in 1994." *Id.*

Former Commissioner Bratton maintained that the enforcement of quality-of-life offenses decreased prison populations because these criminals are incarcerated for short periods only, and because the enforcement is "chang[ing] behavior" of criminals. *Today Show Interview: Criminologist Jack McDevitt and New York City Police Commissioner William Bratton on the Sharp Drop in Crime Across the Country* (NBC television broadcast, Jan. 11, 1996).

Others have noted that the buy-and-bust operation has very little long-term effect on drug trafficking while placing officers in "volatile situations that are difficult to control." Castaneda, *supra* note 1, at D1 (quoting James Fyfe, a criminologist at American University and former New York City policeman who supported the decision to suspend buy-and-bust operations in Washington, D.C.: "The problem with [buy-and-busts] is they have very little effect on drug traffic and they put officers at great risk").

> [O]perations such as "Buy/Bust" have been criticized for not being effective in the long term because they go after the small dealer on the street. Many of the dealers arrested will be out on the street within days, selling crack again. Besides, its opponents say, when a street-corner dealer is arrested, another one will just step in to take his place.

Zaret, *supra* note 1, at 1A; *see also* Rivera, *supra* note 62, at 28 (quoting Susan Sadd, an ethnographer with the Vera Institute of Justice, who worked on a 1992 study that reviewed the effectiveness of TNT units in a Brooklyn neighborhood, arguing that arresting people is a short-term solution that is not sufficient to stop the drug trade). The police department has attempted to address these and other criticisms of the TNT operations by implementing new strategies, including deploying uniformed officers to prevent return of drug activities after undercover operations, conducting buy-and-bust operations against gun as well as drug

The buy-and-bust operation places police officers at considerable risk, particularly those working undercover.[73] The operations depend, of course, on undercover officers, who pose as drug addicts, giving them the ability to see what uniformed officers cannot.[74] Drug dealers often arm themselves to deter both robberies and rivals.[75] In addition, the dealers are likely to be overly suspicious or high on drugs themselves.[76] Criminals have overwhelmingly demonstrated their willingness to use weapons against police,[77] but undercover police officers in buy-and-bust operations cannot wear bulletproof vests because they may be searched by the drug sellers they target.[78] Further, undercover officers may be forced to follow drug dealers out of the view of their partners, and thus face potential danger alone.[79]

Increased reliance on buy-and-bust operations necessitates the testimony of undercover officers when buy-and-bust operation cases are tried. The undercover officer is often the primary witness at

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dealers and conducting operations seven days a week. POLICE STRATEGY NO. 3, *supra* note 62, at 10-26.

[73] William Hermann, *DEA Agent Died in Risky "Buy-Bust": "Terribly Dangerous" Drug Sting Went Awry,* ARIZ. REPUBLIC, July 2, 1994, at B1.

[74] Zaret, *supra* note 1, at 1A.

[75] Zaret, *supra* note 1, at 1A. Dealers may not arm themselves in order to avoid an additional felony charge if caught, or try to discard their weapons before an arrest. Zaret, *supra* note 1, at 1A.

[76] Hermann, *supra* note 73, at B1.

[77] Castaneda, *supra* note 1, at D1. The presence of undercover officers in dangerous areas also places them at risk of random street violence. *See* Burton v. Senkowski, No. CV-94-3836, 1995 WL 669908, at *1 (E.D.N.Y. Nov. 5, 1995) (noting that during a buy-and-bust operation, robbers took an undercover officer's money and possessions at gun point, then when they discovered his identity as an undercover officer, they attacked him and shot at him as he fled).

[78] Hevesi, *supra* note 21, at B1.

[79] Hermann, *supra* note 73, at B1. Such dangers led the New York City Police Department to suspend the use of buy-and-busts in the early 1970s, "after several officers were shot." Castaneda, *supra* note 1, at D1. In 1992, the police chief of Washington, D.C. also abolished the use of buy-and-bust operations pending review following a shoot-out. After the undercover officers bought drugs from three suspects, and the uniformed officers approached to arrest them, "at least one of the three suspects" fired a gun at the officers. The bullets wounded one officer in his buttocks and another in the leg. One of the suspects was fatally shot. Castaneda, *supra* note 1, at D1.

trial.[80] Indeed, in certain cases, the officer is the only one who can identify the defendant as the seller.[81] Undercover officers may have concerns about the potential threat to their safety and to ongoing investigations should they testify in an open courtroom.[82] In New York, unlike any other jurisdiction, this concern has prompted prosecutors to regularly request the trial judge to close the courtroom to the public during undercover officers' testimony.[83] Trial courts, generally sensitive to this fear of exposure, often allow such closure.[84]

II. THE LAW BEFORE *WALLER V. GEORGIA*

The right to a public trial is guaranteed by the Sixth Amendment[85] and by New York law.[86] A public trial has several

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[80] *See supra* note 10 (describing relevant citations).

[81] *E.g.*, People v. Boyd, 59 A.D.2d 558, 559, 397 N.Y.S.2d 150, 151 (2d Dep't 1977) ("The principal and only eye witness against appellant was Police Officer Veronica Hobbs, who worked as an undercover officer."); People v. Garcia, 51 A.D.2d 329, 332, 381 N.Y.S.2d 271, 274 (1st Dep't 1976) ("The identity of defendant as the seller was established by the testimony of [undercover] Officer Ferrer."), *affirmed*, 41 N.Y.2d 861, 362 N.E.2d 260, 393 N.Y.S.2d 709 (1979).

[82] *See supra* note 11 (listing supporting cases).

[83] *See supra* note 17 and accompanying text (describing that closing the courtroom during the testimony of undercover officers is routine in New York State narcotics cases, primarily in New York City).

[84] As New York State Supreme Court Justice Abraham G. Gerges noted: "The combination of an open courtroom, or even a partially closed courtroom combined with the capability for instant communication [between criminals] could prove deadly to some undercover officers . . . ." Gerges, *supra* note 35, at 2.

[85] *See supra* note 18; *In re* Oliver, 333 U.S. 257, 266-67 (1948).

[86] N.Y. CIV. RIGHTS LAW § 12 (McKinney 1992) ("In all criminal prosecutions, the accused has a right to a speedy and public trial."); Gannet Co. v. De Pasquale, 43 N.Y.2d 370, 376, 372 N.E.2d 544, 547, 401 N.Y.S.2d 756, 759 (1977) ("Criminal trials are presumptively open to the public . . . ."), *aff'd*, 443 U.S. 368 (1979). The federal constitutional right to a public trial stemmed from colonial reaction to the closed proceedings and harsh bills of attainder imposed by the British and "[t]he traditional Anglo-American distrust for secret trials." Leventhal, *supra* note 35, at 1; *In re Oliver*, 333 U.S. at 268; *see also*

advantages: it "ensur[es] that judge and prosecutor carry out their duties responsibly . . . encourages witnesses to come forward and discourages perjury."[87] The Supreme Court has ruled that criminal cases are presumptively open to the public.[88] However, the Court has long recognized that the right to a public trial is not absolute,[89] and the presumption of an open trial may be overcome under limited circumstances.[90]

People v. Jones, 47 N.Y.2d 409, 413, 391 N.E.2d 1335, 1338, 418 N.Y.S.2d 359, 362 ("[T]he concept of a secret trial is anathema to the social and political philosophy which motivates our society."), *cert. denied,* 444 U.S. 946 (1979). A "bill of attainder" is a legislative act that applies "either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial." United States v. Brown, 381 U.S. 437, 448 (1965).

[87] Waller v. Georgia, 467 U.S. 39, 46 (1984). Public trials help ensure that the court, the prosecutor and the police witnesses remain "keenly alive to a sense of their responsibility and to the importance of their functions. . . ." *Id.* (quoting *In re Oliver*, 333 U.S. at 266-72 & n.25; THOMAS M. COOLY, CONSTITUTIONAL LIMITATIONS 647 (8th ed. 1927)); *see also* Press-Enterprise Co. v. Superior Court of Cal., 464 U.S. 501, 508 (1984) ("The sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known.") (emphasis in original); Jones v. Henderson, 683 F. Supp. 917, 921 (E.D.N.Y. 1988) ("[P]ublic trials safeguard the accuracy and integrity of criminal proceedings.").

[88] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573 (1980) ("[A] presumption of openness inheres in the very nature of a criminal trial under our system of justice.").

[89] *Id.* at 581 n.18 (quoting Cox v. New Hampshire, 312 U.S. 569 (1941)).

[90] "[T]he right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." *Waller*, 467 U.S. at 45. *See also* United States *ex rel.* Lloyd v. Vincent, 520 F.2d 1272, 1274 (2d Cir.) ("[T]he exclusion of the public in whole or in part has been found constitutionally acceptable where closed proceedings were deemed necessary to preserve order, to protect the defendant or witnesses, or to maintain the confidentiality of certain information."), *cert. denied,* 423 U.S. 937 (1975). The court in *Vincent* cited the following cases for support: United States v. Bell, 464 F.2d 667, 669-71 (2d Cir.) (holding closure of suppression hearing justified during testimony regarding hijacker profile), *cert. denied,* 409 U.S. 991 (1972); United States *ex rel.* Bruno v. Herold, 408 F.2d 125, 128 (2d Cir. 1969) (upholding closure where witness had been intimidated), *cert. denied,* 397 U.S. 957 (1970); United States *ex rel.* Orlando v. Fay, 350 F.2d 967, 971 (2d Cir. 1965) (upholding closure to

Recognizing that the right to a public trial is not absolute,[91] the New York Court of Appeals ruled in *People v. Hinton* that the testimony of an undercover narcotics officer was an exception to the general rule of public trials.[92] An undercover agent, the

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protect witnesses from threats and intimidation), *cert. denied sub non,* Orlando v. Follette, 384 U.S. 1008 (1966).

In addition, the New York Civil Rights Law establishes that "[i]n all criminal prosecutions, the accused has a right to a speedy and public trial." N.Y. CIV. RIGHTS LAW, art. II, § 12 (McKinney 1992). However, the New York Legislature has subjected the right to a public trial to certain limitations. The New York Judiciary Law provides, in pertinent part, that:

> The sittings of every court within this state shall be public, and every citizen may freely attend the same, except that in all proceedings and trials in cases for divorce, seduction, abortion, rape, assault with intent to commit rape, sodomy, bastardy or filiation, the court may, in its discretion, exclude therefrom all persons who are not directly interested therein, excepting jurors, witnesses, and officers of the court.

N.Y. JUD. LAW, art. II § 4 (McKinney 1983).

[91] People v. Hinton, 31 N.Y.2d 71, 74, 286 N.E.2d 265, 266-67, 334 N.Y.S.2d 885, 888 (1972), *cert. denied,* 410 U.S. 911 (1973). The court in *Hinton* stated that:

> "The public trial concept has, however, never been viewed as imposing a rigid, inflexible straitjacket on the courts. It has uniformly been held to be subject to the inherent power of the court to preserve order and decorum in the courtroom, to protect the rights of parties and witnesses, and generally to further the administration of justice." That a trial court has the inherent power to exclude the public from the courtroom in a criminal case is well settled. The exclusion might be prompted for any one of a number of reasons. The public has been excluded when the exhibition of certain evidence was offensive, or a witness would be unnecessarily embarrassed, or a scandalous trial would affect young people or a witness would thereby be enabled to testify to the material facts of a case.

Id. at 74, 286 N.E.2d at 266-67, 334 N.Y.S.2d at 888 (quoting People v. Jelke, 308 N.Y. 56, 63, 123 N.E.2d 769, 772, (1954); and citing, *inter alia,* Lancaster v. United States, 293 F.2d 519 (D.C. Cir. 1961); Geise v. United States, 262 F.2d 151 (9th Cir. 1958), *cert. denied,* 361 U.S. 842 (1959); United States v. Kobli, 172 F.2d 919 (3d Cir. 1949)).

[92] *Id.* at 74, 286 N.E.2d at 267, 334 N.Y.S.2d at 889. For a history of jurisprudence involving testimony of undercover officers at criminal trials before *Hinton,* see Fagan, *supra* note 35, at 626-27 (describing the New York Court of Appeals' ruling in *People v. Jelke,* which "established that New York statutory

prosecution's primary witness in *Hinton,* "posed as an addict when making the narcotic purchases from the defendant."[93] The court convicted the defendant of "two counts of selling a dangerous drug in the second degree and two counts of criminal possession of a dangerous drug."[94] Before the undercover agent testified, the district attorney moved to have the courtroom closed to the public for the following reasons: "(1) the undercover agent was still operating actively in the community [of the arrest]; (2) that other narcotic investigations were pending; (3) that other targets in these narcotic investigations were present in the courtroom, thus jeopardizing the agent's life if his identity were exposed."[95] Based on these arguments, the court excluded the public during the agent's testimony.[96]

The New York Court of Appeals affirmed the closure and ruled that under the circumstances, the defendant's right to a public trial was not violated by exclusion of the public.[97] In creating this exception to the general rule of open courtrooms, the court stressed that closure was only warranted under limited circumstances:

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and common law grants trial courts authority to close courtrooms for the protection of witnesses").

[93] *Hinton,* 31 N.Y.2d at 73, 286 N.E.2d at 266, 334 N.Y.S.2d at 887.

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.* at 73, 75, 286 N.E.2d at 266, 267, 334 N.Y.S.2d at 887, 889. The court followed two cases. The court relied on *People v. Hagan,* stating that in *Hagan*:

> We held that: "In the balancing of policy and of interest if, for a good reason related directly to the management of the trial, the Judge closes the courtroom as to the testimony of a witness and otherwise keeps it open to the press and public, a defendant is not necessarily deprived of a 'public' trial."

Id. at 75, 286 N.E.2d at 267, 334 N.Y.S.2d at 889 (citing People v. Hagan, 24 N.Y.2d 395, 397-98, 248 N.E.2d 588, 590, 300 N.Y.S.2d 835, 837, *cert. denied,* 396 U.S. 886 (1969)). Further, the court ruled that "[t]he rationale offered in *Pacuicca* for the exclusion was to shield the identity of the [undercover police] witness from the public and to preserve not only her future usefulness, but also her life." *Id.* (citing People v. Pacuicca, 134 N.Y.S.2d 381 (N.Y. Co. Ct. 1954) (upholding conviction of defendant, who purchased narcotics from an undercover officer), *aff'd,* 144 N.Y.S.2d 711 (1st Dep't 1955)).

"While we reaffirm today the inherent discretionary power of the trial court to close the courtroom, we need only point out that the discretion be sparingly exercised and then, only when unusual circumstances necessitate it."[98]

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[98] *Id.* at 75-76, 286 N.E.2d at 267, 334 N.Y.S.2d at 889. It is unclear which facts the court found to establish "unusual circumstances." The court stressed the presence of the undercover officer's other investigatory targets in the courtroom. *Id.* at 75, 286 N.E.2d at 267, 334 N.Y.S.2d at 889. However, the court called this merely an "added factor" to the fact that the police witness had an identity "unknown to the public" and "was engaged in other narcotics investigations." *Id.* Thus, it is unclear whether the court found dispositive the presence of other targets in the courtroom. If so, after *Hinton,* courts could close the courtroom only if such targets were present. If, in contrast, these spectators were not essential to the court's ruling, *Hinton* merely requires that a police witness be actively working undercover to properly close the courtroom to spectators during the officer's testimony.

The ambiguity in *Hinton* led to contradictory results in the lower courts. In *People v. Richards*, the Appellate Division, First Department, found reversible error when the trial court excluded the public during the testimony of an undercover officer merely "because he was still engaged in similar activities in the same 'general area'" and reversed defendant's conviction of "criminal sale of a dangerous drug in the third degree." 48 A.D.2d 792, 792-93, 369 N.Y.S.2d 162, 163-64 (1st Dep't 1975) (ruling that "[a]ctive engagement in the community as an undercover narcotics agent is itself a compelling reason for excluding the public from the courtroom"), *overruled by* People v. Santos, 154 A.D.2d 284, 546 N.Y.S.2d 587 (1st Dep't 1989), *appeal denied,* 75 N.Y.2d 817, 551 N.E.2d 1245, 552 N.Y.S.2d 567 (1990). The *Richards* court based the decision on *Hinton*'s requirement of "unusual circumstances." *Id.* at 792-93, 369 N.Y.S.2d at 163-64 ("We find no 'unusual circumstances' presented in the instant case sufficient to sanction the violation of defendant's general right to a public trial."); *see also* People v. Boyd, 59 A.D.2d 558, 559-60, 397 N.Y.S.2d 150, 152 (2d Dep't 1977) ("It is reversible error to close the courtroom summarily if there are no unusual circumstances, the undercover agent was shown to be only in the same general area and there was no hearing and no finding, but only a brief conclusory recital for relief.").

Another trial court denied a motion for closure on similar grounds, noting that the unusual circumstances that warranted closure in *Hinton* included the "actual, and not the anticipated or possible presence of persons in the courtroom whose recognition of the officer as such would place either him or his investigations in jeopardy." *Suppression Motion, supra* note 35, at 21.

In marked contrast to *Richards,* the First Department in *People v. Garcia* affirmed the trial court's decision to close the courtroom where the undercover officer, "prior to and at the time of his testimony, was engaged in undercover

The Second Circuit Court of Appeals, like the New York Court of Appeals, allowed an exception to the defendant's right to a public trial during the testimony of undercover officers. In *United States* ex rel. *Lloyd v. Vincent*,[99] the Second Circuit specifically found that in *Hinton*, the presence in the courtroom of other targets of the narcotics investigation "was not essential to the [New York Court of Appeals'] decision."[100] Therefore, a trial court could close the courtroom simply because the witness is an undercover

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narcotics investigations." 51 A.D.2d 329, 330, 381 N.Y.S.2d 271, 273 (1st Dep't 1976), *aff'd*, 41 N.Y.2d 861, 362 N.E.2d 260, 393 N.Y.S.2d 709 (1979).

In *Garcia*, the First Department based its ruling on the public interest in ending drug trafficking, and emphasized that a narcotics officer is "embarked upon a dangerous venture." *Garcia*, 51 A.D.2d at 331, 381 N.Y.S.2d at 273 ("Disclosure of such person's identity will not only destroy his usefulness, but could jeopardize his life."). Unlike *Hinton*, where potential targets of the undercover officer's investigations viewed the trial, there were no other special or unusual circumstances about the testifying officer or the conditions of the case. The only relevant fact noted by the court was that the officer actively worked undercover before the trial and during his testimony. *Id.* In a dissent from the Court of Appeals' affirmance of the ruling in *Garcia*, Judge Jacob D. Fuchsberg noted that the holding adopted a *per se* rule for closing the courtroom during the testimony of an undercover agent. People v. Garcia, 41 N.Y.2d 861, 862, 362 N.E.2d 260, 261, 393 N.Y.S.2d 709, 710 (1977) (Fuchsberg, J., dissenting).

The New York Appellate Division courts also did not agree as to whether *Hinton* required a hearing to determine whether unusual circumstances existed. Some courts, including *Richards*, specifically held under *Hinton* that courtroom closure during an undercover agent's testimony without a preclosure hearing was reversible error. People v. Richards, 48 A.D.2d 792, 793, 369 N.Y.S.2d 162, 164 (1975). *See* Fagan, *supra* note 35, at 629 (citing People v. Doty, 73 A.D.2d 802, 423 N.Y.S.2d 797 (4th Dep't 1979); People v. Boyd, 59 A.D.2d 558, 559-60, 397 N.Y.S.2d 150, 152 (2d Dep't 1977); People v. Morales, 53 A.D.2d 517, 518, 383 N.Y.S.2d 620, 621 (1st Dep't 1976)). In other cases, however, courts upheld closure where there was no factual hearing on whether unusual circumstances existed. *Garcia*, 51 A.D.2d at 330, 381 N.Y.S.2d at 273; People v. Rickenbacker, 50 A.D.2d 566, 566, 374 N.Y.S.2d 672, 673 (2d Dep't 1975).

[99] 520 F.2d 1272 (2d Cir.), *cert. denied*, 423 U.S. 937 (1975).

[100] *Id.* at 1275 n.1. *Vincent* was an appeal of a district court decision granting petitioner's writ of habeas corpus. A jury convicted Lloyd of two counts of "selling a dangerous drug in the third degree . . . ." *Id.* at 1273.

agent.[101] The Second Circuit did not find this relaxed standard to violate the defendant's Sixth Amendment right to a public trial; rather, the Second Circuit agreed with the *Hinton* court that the right to a public trial is not absolute, and recognized the trial judge's discretion to close the courtroom during the testimony of an undercover police officer.[102] It noted that this discretion should be "sparingly exercised and limited to those situations where such action is deemed necessary to further the administration of justice."[103] The Second Circuit concluded that "shielding the identity of a police witness, preserving his future usefulness, and safeguarding his life provides an adequate justification for excluding the public" during the officer's testimony.[104]

Thus, the rulings in *Vincent* and *Hinton* were not specifically rooted in any particular circumstance or risk posed by the case that caused a danger to the witnesses. Instead, the courts acknowledged the dangers of undercover work in general. Under this analysis, a trial court could close the courtroom for the testimony of any active

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[101] *Id.* at 1274-75 ("[W]e conclude, as have the New York courts, that shielding the identity of a police witness, preserving his future usefulness, and safeguarding his life provides an adequate justification for excluding the public for that limited period while an undercover agent is testifying.").

[102] *See supra* note 90 (quoting from the court's opinion and citing other cases in which courts allowed the presumption of an open trial to be overcome).

[103] *Vincent,* 520 F.2d at 1274.

[104] *Id; see also* U.S. *ex rel.* Maisonet v. La Valee, 405 F. Supp. 925, 928 (S.D.N.Y. 1975) (ruling that the trial court's decision to close the courtroom during testimony of an undercover officer in a drug case, "whose safety might have been endangered if his identity had been publicly exposed was a reasonable resolution of the conflicting interests").

In *Vincent,* the court acknowledged that rather than relying exclusively on the prosecution's statements about the witnesses' need for closure, "the better course would have been for the trial judge to hold an evidentiary hearing" showing that the witnesses' "confidentiality would be jeopardized or that their lives would in fact be endangered." *Vincent,* 520 F.2d at 1275. However, it ruled that it was within the trial court's power to find that exclusion was warranted "on the basis of [its] judicial knowledge of the role of undercover agents," such as "the facts that undercover agents lived a perilous life . . . and that their mere appearance in court as witnesses . . . created a risk of exposure of their identities to actual or potential targets of their active investigations." *Id.*

undercover officer, regardless of whether there is an actual threat to that particular witness in the circumstances at hand.

Since *Hinton* and *Vincent*, the New York state courts and the Second Circuit have wrestled with the showing prosecutors must make to close the courtroom during an undercover officer's testimony and the manner in which prosecutors must make such a showing. In *People v. Jones*,[105] the New York Court of Appeals imposed stricter factual requirements for closure than those in *Hinton*.

In *Jones*, the court noted that the trial judge determined that there was "a real and present danger" to the undercover officer's safety based upon the prosecutor's representation.[106] In so doing, the court noted that the trial judge did not hold a hearing or receive "an iota of supporting information,"[107] but merely noted that "the very nature of the work of the undercover agent in the City of New York involved with narcotics is such as to place him in jeopardy every day he is on the streets."[108] However, during testimony, the witness revealed that he was no longer working undercover or on open investigations, or even near his former area.[109] The New York Court of Appeals found that closure under these circumstances violated the defendant's Sixth Amendment right to a public trial.[110]

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[105] 47 N.Y.2d 409, 391 N.E.2d 1335, 418 N.Y.S.2d 359, *cert. denied*, 444 U.S. 946 (1979).

[106] *Id.* at 413, 391 N.E.2d at 1338, 418 N.Y.S.2d at 362.

[107] *Id.* at 412, 391 N.E.2d at 1338, 418 N.Y.S.2d at 362.

[108] *Id.*

[109] *Id.* at 413, 391 N.E.2d at 1338, 418 N.Y.S.2d at 362.

[110] *Id.* at 414-15, 391 N.E.2d at 1339, 418 N.Y.S.2d at 363; *see also* People v. Castro, 63 A.D.2d 891, 891-92, 405 N.Y.S.2d 729, 730 (1st Dep't 1978). In *Castro*, the court reversed the defendant's conviction where the trial court closed the courtroom without a hearing, based solely on the prosecutor's representation that the officer was still engaged in the purchase of narcotics. Only when the officer testified did he reveal that he had been transferred from the Bronx Narcotics Division to the Joint Federal Task Force and was no longer working undercover in the Bronx. *Id.* In People v. Boyd, the court reversed the defendant's conviction where the trial court sealed the courtroom upon the representation of the prosecutor that the undercover officer was still active. 59 A.D.2d 558, 559, 397 N.Y.S.2d 150, 152 (2d Dep't 1977). At trial, however, the officer testified that she no longer worked for the New York City Police

In sharp contrast to the earlier cases, the *Jones* court ruled that "[t]here should have been a factual showing that an exception to the norm of a public trial was justified,"[111] and criticized the trial court for relying on "its own unparticularized impressions of the vicissitudes of undercover work in general."[112] The court ruled that "no closing can be tolerated that is not preceded by an inquiry careful enough to assure the court that the defendant's right to a public trial is not being sacrificed for less than compelling reasons."[113] The court suggested in certain cases the trial court may need to hold a hearing to determine whether such "compelling reasons" exist,[114] now known as a "*Hinton* hearing."[115]

After *Jones*, trial courts permitted a showing that the witness was an active undercover officer to overcome the presumption of an open courtroom. In *People v. Cantone,*[116] for example, the court upheld closure where the undercover officer testified during a hearing that he continued to work undercover and was assigned to the same area as the arrest, even where the area of operation was as large as a county.[117] Similar information, given solely by a prosecutor, without a hearing or testimony from the officer, did not

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Department, and was presently working undercover in New Jersey. *Id.*, 397 N.Y.S.2d at 151.

[111] *Jones*, 47 N.Y.2d at 415, 391 N.E.2d at 1339, 418 N.Y.S.2d at 363.

[112] *Id.* ("That undercover work at times entails serious threats to the safety of agents was by no means sufficient to connect that threat to this witness.").

[113] *Id.* at 414-15, 391 N.E.2d at 1339, 418 N.Y.S.2d at 363.

[114] *Id.* at 414, 391 N.E.2d at 1339, 418 N.Y.S.2d at 363.

[115] *E.g.,* Okonkwo v. Lacy, 895 F. Supp. 571, 573 (S.D.N.Y. 1995).

[116] 73 A.D.2d 936, 423 N.Y.S.2d 507 (2d Dep't 1980), *habeas corpus granted,* Cantone v. Superintendent, Green Haven Correctional Facility, 589 F. Supp. 440 (S.D.N.Y. 1984), *rev'd,* 759 F.2d 207 (2d Cir. 1985), *cert. denied,* Cantone v. Scully, 474 U.S. 835 (1985).

[117] *Id.* at 937, 423 N.Y.S.2d at 508. The officer testified at the hearing in *Cantone* that:

> [H]e was currently engaged in two undercover drug investigations in Nassau County and that there were five "contracts" on his life, two of which were placed by persons on Long Island, and one of which called for his death before he testified in the instant case. The officer further stated that he was the only black agent assigned to the Long Island District Office of the Drug Enforcement Agency.

Id.

usually pass muster after *Jones*.[118] New York appellate courts did not seem to consider that the simple requirement of active undercover work supported closure in the vast majority of buy-and-bust cases, even where a particular case posed no specific threat to a witness's safety.

III. *WALLER V. GEORGIA* AND THE TRIAL TESTIMONY OF UNDERCOVER OFFICERS

In *Waller v. Georgia*,[119] the Supreme Court applied a four-prong test to determine whether closure of a suppression hearing violated the defendant's right to a public trial.[120] The New York Court of Appeals and the Second Circuit district courts adopted this test to evaluate closure during the trial testimony of undercover officers.[121] Second Circuit district courts consistently apply the

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[118] *See* People v. Cuevas, 50 N.Y.2d 1022, 1024, 409 N.E.2d 1360, 1361, 431 N.Y.S.2d 686, 687 (1980) (ruling that the trial court, which granted motion to close the courtroom after questioning the prosecutor, "erred by failing to make an adequate inquiry of the witness, as well as the factual finding prescribed by *People v. Jones*"); People v. Romain, 137 A.D.2d 848, 848, 525 N.Y.S.2d 313, 313 (2d Dep't 1988) (finding reversible error where courtroom closed for testimony of undercover officer without prior hearing); People v. Cousart, 74 A.D.2d 877, 878, 426 N.Y.S.2d 295, 297 (2d Dep't 1980) (finding error where trial court acted solely upon prosecutor's statement that closure was necessary for "'the safety and protection of this police officer, working in an undercover capacity. He is still active in various parts of the City'"). *But cf.* People v. Pollack, 50 N.Y.2d 547, 551, 407 N.E.2d 472, 474, 429 N.Y.S.2d 628, 630 (1980) (finding no error where "defense counsel made no request for a hearing nor did she dispute the People's contention that the witness would be in danger if the general public was not excluded"); People v. Portilla, 190 A.D.2d 827, 828, 593 N.Y.S.2d 831, 833 (2d Dep't) (ruling that trial court did not err in failing to order, *sua sponte*, a full hearing where defense did not object on this ground), *appeal denied*, 82 N.Y.2d 852, 627 N.E.2d 526, 606 N.Y.S.2d 604 (1993).

[119] 467 U.S. 39 (1984).

[120] *Id.* at 48.

[121] *See infra* note 141 (listing cases from the New York Court of Appeals and the Second Circuit).

test in reviewing these closure orders by trial courts;[122] New York State lower courts do not,[123] resulting in problematic law.

In 1984, the Supreme Court addressed the issue of closing a suppression hearing to the public to avoid tainting evidence in *Waller v. Georgia*.[124] In *Waller*, the Court noted that the trial court granted the prosecution's motion to close a suppression hearing[125] to the public so that information derived from wiretaps would not be "published in open court" and therefore tainted for use in future trials.[126] The Supreme Court ruled that the defendant's Sixth Amendment right to a public trial applied to a suppression hearing, and that the trial court failed to give that right proper weight.[127] The Court applied a stringent four-part test to determine whether closure of the suppression hearing was appropriate:[128] (1) "the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced;"[129] (2) "the closure must be no broader than necessary to protect that interest;"[130] (3) "the trial court must consider reasonable alternatives to closing the proceeding"[131] and (4) the trial court "must make findings adequate to support the closure."[132] Unless the party

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[122] *See infra* note 143 (listing relevant cases).

[123] *See supra* note 35 (citing cases and other authority).

[124] 467 U.S. 39 (1984).

[125] *See supra* note 28 (describing a suppression hearing).

[126] *Waller*, 467 U.S. at 42. The trial court agreed with the prosecution's argument that because "the evidence derived in the wiretaps would 'involve'" other suspects, the courtroom should be closed to comply with Georgia's wiretap statute, whereby "'[a]ny publication' of information obtained under a wiretap warrant that was not 'necessary and essential' would cause the information to be inadmissible as evidence." *Id.* at 41-42 (referring to GA. CODE ANN. § 16-11-64(b)(8) (1982)).

[127] *Waller*, 467 U.S. at 43, 47.

[128] *Id.* at 48 (citing Press-Enterprise Co. v. Superior Court of Ca., 464 U.S. 501, 510 (1984)).

[129] *Id.* at 48.

[130] *Id.*

[131] *Id.*

[132] *Id.* The Court ruled that the state's "proffer was not specific as to whose privacy interests might be infringed, how they would be infringed, what portions of the tapes might infringe them, and what portion of the evidence existed of the tapes;" therefore, "the trial court's findings were broad and general, and did not

seeking closure satisfied all four prongs of the test, closure would violate the defendant's Sixth Amendment right to a public trial.[133] Furthermore, the Court held that the defendant need not prove specific prejudice in order to gain relief, since the defendant is likely to have great difficulty in demonstrating proof of prejudice caused by the closure.[134]

The Court reconciled a defendant's right to a public trial with other countervailing "rights or interests"[135] by requiring a careful fact-based inquiry into the specifics of the danger posed by an open courtroom in a particular case. First, the Court placed the burden on the prosecution to prove that it has an interest so overriding that it necessitates closure.[136] Second, by requiring that the trial court consider alternatives to closure and narrowly tailor the scope of closure, the Court ensured that the trial court would carefully inspect the factual basis of the request for closure.[137] Last, the required findings must be "specific enough that a reviewing court can determine whether the closure order was properly entered,"[138] again ensuring a fair amount of factual detail, as "broad and general" findings cannot justify closure.[139] The Court anticipated that circumstances meriting closure "will be rare," and that this "balance of interests must be struck with special care."[140]

While the issue in *Waller* was closure of a suppression hearing, subsequent decisions by the New York Court of Appeals and the Second Circuit applied the *Waller* test to closures during the trial testimony of an undercover witness.[141] The Supreme Court

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purport to justify closure of the entire hearing." *Id.*

[133] *Id.* at 45-47.

[134] *Id.* at 49-50 n.9.

[135] The Court cited the examples of "the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." *Id.* at 45.

[136] *Id.* at 48.

[137] *Id.* at 48-49.

[138] *Id.* at 45 (citing Press-Enterprise Co. v. Superior Court of Ca., 464 U.S. 501, 510 (1984)).

[139] *Id.* at 48.

[140] *Id.* at 45.

[141] Pearson v. James, No. 94-CV-1499, 1995 WL 617331, at *1-2 (S.D.N.Y. Oct. 20, 1995); Ayala v. Speckard, No. 94-CV-7850, 1995 WL 373419, at *2-4

implicitly overruled the relatively lax "compelling reasons" test of *Jones* with the *Waller* test, and guarded against basing closure on imprecise "judicial knowledge" of the dangers in undercover work, as in *United States* ex rel. *Lloyd v. Vincent*.[142]

New York's lower courts, however, have failed to consistently apply the *Waller* four-prong test. Although the district courts in the Second Circuit adopted *Waller*'s scrupulous test in reviewing closure orders for undercover officers' testimony,[143] not all New York State courts followed *Waller*'s strict standards for closure. Despite the New York Court of Appeals' express adoption of the *Waller* four-part test in *People v. Kan*,[144] many New York State lower courts failed to conform to *Waller*'s requirements. These courts upheld courtroom closure in the vast majority of cases where the undercover officer merely testified that he or she was still working on pending investigations,[145] particularly where those investigations were in the same general area as the arrest or the trial.[146] As one commentator noted, appellate courts were

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(S.D.N.Y. June 21, 1995); Daniel v. Kelly, No. CV-78-830E, 1990 WL 130523, at *6 (W.D.N.Y. Aug. 31, 1990); People v. Martinez, 82 N.Y.2d 436, 442-44, 624 N.E.2d 1027, 1030, 604 N.Y.S.2d 932, 936-37 (1993).

[142] 520 F.2d 1272, 1275 (2d Cir.), *cert. denied* 423 U.S. 937 (1975).

[143] Burton v. Senkowski, No. CV-94-3836, 1995 WL 669908, at *3-4 (E.D.N.Y. Nov. 5, 1995); *Pearson*, 1995 WL 617331, at *1-2; *Ayala*, 1995 WL 373419, at *2-4; Okonkwo v. Lacy, 895 F. Supp. 571, 574, 577-79 (S.D.N.Y. 1995); *Daniel*, 1990 WL 130523, at *6-7; Ip v. Henderson, 710 F. Supp. 915, 917 (S.D.N.Y.), *aff'd without opinion*, 888 F.2d 1376 (2d Cir. 1989); Martinez v. Sullivan, 88-CV-7335, 1989 WL 63103, at *3-4 (S.D.N.Y. June 7, 1989), *aff'd*, 914 F.2d 240 (2d Cir. 1990); Jones v. Henderson, 683 F. Supp. 917, 923-24 (E.D.N.Y. 1988).

[144] 78 N.Y.2d 54, 57-59, 574 N.E.2d 1042, 1043, 571 N.Y.S.2d 436, 438-39 (1991) ("The United States Supreme Court has articulated a four-prong test by which to assess the propriety of closure," reciting the test).

[145] *See supra* note 35 (citing cases and other authority).

[146] People v. Jackson, 171 A.D.2d 756, 756, 567 N.Y.S.2d 310, 311 (2d Dep't), *appeal denied*, 78 N.Y.2d 967, 580 N.E.2d 419, 574 N.Y.S.2d 947 (1991); People v. White, 170 A.D.2d 629, 629, 566 N.Y.S.2d 401, 402 (2d Dep't), *appeal denied*, 77 N.Y.2d 1002, 575 N.E.2d 414, 571 N.Y.S.2d 928 (1991); People v. Carter, 162 A.D.2d 218, 219, 556 N.Y.S.2d 588, 589 (1st Dep't), *appeal denied*, 76 N.Y.2d 984, 565 N.E.2d 521, 563 N.Y.S.2d 772 (1990); People v. Bowden, 156 A.D.2d 372, 372, 548 N.Y.S.2d 328, 328 (2d

"reluctant to find any error so long as closure was not based solely on the prosecutor's conclusory assertions that it was necessary to protect the identity of the undercover officer."[147] These courts adopted essentially a *per se* closure rule for active undercover officers, even though the Supreme Court proscribed such blanket closures.[148]

In *People v. Martinez*,[149] the New York Court of Appeals reaffirmed the *Waller* standard and clarified the factual showing required for closure.[150] The court concluded that to allow closure where there is merely a perfunctory showing of danger to the witness "would in effect sanction a rule of *per se* closure of undercover officers."[151] In *Martinez*, the court found the

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Dep't 1989), *appeal denied,* 76 N.Y.2d 731, 557 N.E.2d 1189, 558 N.Y.S.2d 893 (1990); People v. McLennon, 156 A.D.2d 478, 478, 548 N.Y.S.2d 764, 765 (2d Dep't 1989), *appeal denied,* 75 N.Y.2d 921, 554 N.E.2d 77, 555 N.Y.S.2d 40 (1990); People v. Santos, 154 A.D.2d 284, 284, 546 N.Y.S.2d 587, 588 (1st Dep't 1989), *appeal denied,* 75 N.Y.2d 817, 551 N.E.2d 1245, 552 N.Y.S.2d 567 (1990); People v. Tinsley, 145 A.D.2d 448, 448, 535 N.Y.S.2d 415, 416, 417 (2d Dep't 1988).

[147] Leventhal, *supra* note 35, at 1.

> Although the courts formally reject a *per se* exception for an undercover witness, a showing of almost any factor will justify closure. In the context of the violent war against narcotics related crime, it is not difficult for prosecutors to set forth such a factor and for a trial judge to sustain it. It will, on the other hand, be most difficult if not impossible for a defense attorney to overcome the "narcotics exception" to a public trial.

Leventhal, *supra* note 35, at 1.

[148] The Supreme Court ruled that a Massachusetts statute requiring mandatory closure in trials involving sexual abuse of a minor during the testimony of the victim was unconstitutional because it "requir[ed] no particularized determinations in individual cases." Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 611 n.27 (1982). The state's interest in protecting the victims and encouraging their testimony did "not justify a mandatory closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest." *Id.* at 607-08.

[149] 82 N.Y.2d 436, 624 N.E.2d 1027, 604 N.Y.S.2d 932 (1993).

[150] *Id.*

[151] *Id.* at 443, 624 N.E.2d at 1031, 604 N.Y.S.2d at 936.

prosecution's factual showing was too weak[152] where the officer's area of undercover operation was the entire Bronx,[153] and the officer made no reference "to associates of defendant or targets of investigation likely to be present in the courtroom, or to threats received" by the witness in connection with the case.[154]

The New York Court of Appeals then contrasted the unparticularized facts of *Martinez* with those in the companion case, *People v. Pearson,* where the undercover officer was part of ongoing investigations in the specific area of the arrest and "would be returning to work in that area immediately after testifying."[155] Under such circumstances, the court concluded that the trial court did not abuse its discretion in "concluding that, in these circumstances, testifying in an open courtroom might endanger the undercover officer's safety."[156] Reviewing the decision on the subsequent petition for a writ of habeas corpus, the district court agreed that the factual showing in *Pearson* satisfied the *Waller* test.[157]

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[152] The officer answered affirmatively to the prosecution's questions as to whether he was actively working undercover in the Bronx on a number of open cases, and whether he "fear[ed] for [his] safety if the courtroom is not closed in this case." *Id.* at 439, 624 N.E.2d at 1028-29, 604 N.Y.S.2d at 933-34. On cross-examination, the officer revealed that suspects had already been arrested in all his open cases, and that his "area of operations was 'the whole Bronx.'" *Id.* at 439-40, 624 N.E.2d at 1029, 604 N.Y.S.2d at 934.

[153] The court noted that the Bronx included "more than 41 square miles and 1.2 million residents." *Id.*

[154] *Id.* at 443, 624 N.E.2d at 1031, 604 N.Y.S.2d at 936. The court was critical of the fact that "no link was made, or even attempted, between the officer's fear for his safety throughout the Bronx area and open-court testimony in this buy-and-bust case." *Id.*

[155] *Id.* at 440, 624 N.E.2d at 1029, 604 N.Y.S.2d at 934.

[156] *Id.* at 443, 624 N.E.2d at 1031, 604 N.Y.S.2d at 936. The court also ruled that the trial court did not err in failing to consider reasonable alternatives to closure or whether closure was broader than necessary because the defendant did not object or argue on these grounds at trial. *Id.* at 444, 624 N.E.2d at 1031-32, 604 N.Y.S.2d at 936.

[157] Pearson v. James, 94-CV-1499, 1995 WL 617331, at *1-2 (S.D.N.Y. Oct. 20, 1995). The court ruled that the officer's fear for his safety was an overriding interest "because the trial court found that the officer was still working undercover, was planning to work in the area where the 'buy and bust' involving

Even with *Martinez*'s recent reemphasis of the detailed test of *Waller* and its specific factual requirements, results in the lower New York courts continue to be inconsistent. In some cases, New York courts have cited the *Waller* test, following the lead of the New York Court of Appeals.[158] In *People v. Tapia*,[159] for example, the First Department held under *Waller*, *Kan* and *Martinez* that closure was improper where the undercover officer was actively engaged in ongoing investigations throughout the entire Bronx.[160] Most New York trial courts within the First and Second Departments, however, still ignore the *Waller* test, although to a lesser degree than before *Martinez*.

Many lower courts have recently applied the less stringent "compelling reasons" standard of *People v. Jones*,[161] which allows trial court judges much more discretion than *Waller* and does not require that the prosecution advance a particularized factual basis for closing or that the trial judge make reviewable findings supporting closure on the record.[162] For example, in

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petitioner occurred, and feared for her safety . . . ." *Id.* at *2. The court further ruled that the second and third prongs of *Waller* were satisfied because the courtroom was closed only during the undercover officer's testimony, and because the petitioner did not suggest alternatives to closure at trial. The court found sufficient the trial court's finding that "the officer was continuing to operate undercover in the same area . . . ." *Id.*

[158] *E.g.*, People v. Green, 627 N.Y.S.2d 21, 22 (1st Dep't 1995) (finding that closure was broader than necessary where defendant's request to have his family present was not granted); People v. Badillo, 207 A.D.2d 742, 742-43, 616 N.Y.S.2d 619, 620 (1st Dep't) (ruling that an overriding interest was "sufficiently articulated" where the undercover officer "anticipated" involvement in operations in the area of defendant's arrest, that closure was "sufficiently restricted," and that defendant did not request alternative means of protecting the interest at trial), *appeal denied*, 84 N.Y.2d 1009, 647 N.E.2d 126, 622 N.Y.S.2d 920 (1994).

[159] 207 A.D.2d 286, 286, 615 N.Y.S.2d 380, 381 (1st Dep't), *appeal denied*, 84 N.Y.2d 910, 645 N.E.2d 1228, 621 N.Y.S.2d 528 (1994).

[160] *Id.*

[161] 47 N.Y.2d 409, 391 N.E.2d 1335, 418 N.Y.S.2d 359, *cert. denied*, 444 U.S. 946 (1979).

[162] *Id.* at 414–15, 391 N.E.2d at 1339, 418 N.Y.S.2d at 363.

People v. Brown,[163] the Second Department upheld closure of the courtroom where the undercover agent was "actively involved in [a] certain large-scale investigation" in an undetermined geographical area.[164] Other courts continue to allow closure based on assumptions about the level of danger to the witness. For example, in *People v. Gross*,[165] the court upheld closure of the courtroom where defense counsel "made no effort" to ascertain whether the officer was still working undercover.[166] Courts that have declined to apply any or all four prongs of the *Waller* test, however, have required a much stronger factual basis for closure than before *Martinez*.[167] Following *Martinez*, courts have generally allowed closure only where the undercover officer continued to operate in the specific area of the defendant's arrest, although the courts do not always note the scope of this area.[168]

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[163] 214 A.D.2d 579, 579-80, 625 N.Y.S.2d 570, 572 (2d Dep't), *appeal denied*, 86 N.Y.2d 732, 655 N.E.2d 710, 631 N.Y.S.2d 613 (1995).

[164] *Brown*, 214 A.D.2d at 579, 625 N.Y.S.2d at 571-72. At the *Hinton* hearings, the officer testified that "he was actively involved in certain large-scale investigations in connection with which his safety had been threatened, that there was a very real danger that if his identity became public, those threats might be realized, and that his ongoing investigations might be compromised." *Id.* (citation omitted).

[165] 179 A.D.2d 138, 583 N.Y.S.2d 832 (1st Dep't), *appeal denied*, 80 N.Y.2d 832, 600 N.E.2d 643, 587 N.Y.2d 916 (1992).

[166] *Id.* at 140–41, 583 N.Y.S.2d at 833.

[167] *See supra* note 41 (citing relevant cases).

[168] People v. Acevedo, 626 N.Y.S.2d 89, 90 (1st Dep't) (ruling closure proper where the undercover officer "identified a very specific street location, the site of defendant's arrest," where he had ongoing operations and where he was immediately returning), *appeal denied*, 85 N.Y.2d 969, 653 N.E.2d 969, 629 N.Y.S.2d 729 (1995); People v. Clifford, 626 N.Y.S.2d 444 (1st Dep't 1995) (ruling closure proper where the undercover officer testified that "he actively participated in other ongoing undercover operations in the same neighborhood of defendant's arrest"); People v. Forman, 626 N.Y.S.2d 558, 559 (2d Dep't 1995) (ruling closure proper where "[t]he undercover officer testified that he had open cases in the area of the defendant's arrest and would be returning to the area"); People v. James, 207 A.D.2d 564, 564, 616 N.Y.S.2d 75, 76 (2d Dep't 1995) (ruling closure was abuse of trial court's discretion where "[t]he record neither reflects that the undercover officers were still operating in the locale of the defendant's arrest nor that they expected to return there"); *cf.* People v. Brown, 172 A.D.2d 844, 845, 846, 569 N.Y.S.2d 208, 209, 210 (2d Dep't 1991)

It is without question that *Waller* binds the New York courts. As the Southern District of New York recently noted in response to one petitioner's argument that an entire line of New York cases was "suspect" for ignoring *Waller*'s requirements: "While this [c]ourt need not address this issue, it is beyond cavil that New York state courts, indeed the courts of all states, must comport with the minimal requirements demanded by the Constitution as explicitly enunciated in *Waller*."[169] The failure of New York State courts to comply with *Waller* results in unreliable and unclear law. Further, the inconsistencies in courtroom closure cases lead to complications in habeas corpus petitions, requiring federal courts to struggle to determine the applicable law, and whether there is exhaustion or procedural default.[170]

(upholding closure where, *inter alia,* undercover officer "anticipated" transfer to vicinity of defendant's arrest).

[169] Okonkwo v. Lacy, 895 F. Supp. 571, 579 n.20 (S.D.N.Y. 1995). In one case the First Department acknowledged the tendency of trial courts to ignore the *Waller* test:

> Initially, we note that while the trial court complied with *People v. Jones* . . . insofar as a hearing was conducted during which it was determined that the undercover feared for his life, the court did not specifically address the criteria set forth in *Waller v. Georgia* . . . which was decided subsequent to *Jones*, and which clarifies and lends structure to a criminal defendant's otherwise amorphous right to an open trial, mandating steps that a trial judge must first take before granting the government's request for exclusion and therefore providing greater protection for the individual defendant.

People v. Vidal, 172 A.D.2d 228, 229, 567 N.Y.S.2d 727, 728 (1st Dep't 1991) (citation omitted), *habeas corpus granted,* 31 F.3d 67 (2d Cir. 1994); *see also* State v. Bone-Club, 906 P.2d 325, 328 (Wash. 1995) (ruling that the "Washington Constitution provides at minimum the same protection of a defendant's fair trial rights as the Sixth Amendment," as interpreted by *Waller*).

[170] In *Okonkwo*, for example, the state argued that the petitioner's claim was procedurally barred because petitioner did not object with respect to each prong of the *Waller* test. 895 F. Supp. at 574 n.3. The district court noted that the appellate division "affirmed a bare trial court ruling—one apparently neglecting to consider the controlling precedent of *Waller*." *Id.* at 576 n.9. It ruled that the appellate division directly addressed the merits of the findings prong of *Waller* only, and "in the absence of a specific [a]ppellate [d]ivision ruling on each *Waller* prong, no bar exists with respect to the prongs on which it was silent" because the petitioner objected to the application of the *Waller* test "as a whole."

IV. AN ANALYSIS OF THE *WALLER* TEST'S FOUR PRONGS

The *Waller* test provides protection for a defendant's Sixth Amendment right by carefully balancing the witness's and the defendant's interests through a thorough examination of the factual basis for closure. The *Waller* test is well-suited to govern closure during undercover officers' testimony as long as New York courts apply and satisfy its prongs.[171] This section will analyze each of the four prongs of the *Waller* test, discuss the remedies for violation of the test and make a recommendation to ensure application of the test by the New York State courts.

Id. The district court "decline[d] to rule that the [a]ppellate [d]ivision erred in implicitly ruling that each prong . . . constitutes an individual claim requiring preservation by specific objection under the New York statute." *Id.* at 582; *cf.* People v. Forman, 626 N.Y.S.2d 558, 559 (2d Dep't 1995) (affirming closure on the merits but ruling that defendant's contention that closure was broader than necessary was unpreserved for appellate review).

[171] One commentator urges the Supreme Court to establish a separate rule that specifically addresses closure during the trial testimony of undercover officers. Fagan, *supra* note 35, at 636. Professor Fagan states that "undercover status should *per se* warrant closure unless the defendant establishes that public testimony is necessary" or shows that "the agent is no longer working undercover." Fagan, *supra* note 35, at 636, 639. This blanket rule, however, would result in courtroom closure in a great number of criminal cases. Given the resurgence of buy-and-bust operations in New York, many drug cases involve a purchase by an active undercover officer. Krauss, *supra* note 62, at A1. More importantly, the danger exists that the public may be excluded from courtrooms even when no factual basis for the officer's fears regarding testifying in a particular case exists. "If the undercover agent was the principal witness to the alleged offense, and it is expected that the agent's testimony will constitute the bulk of the state's proof, it may be argued that excluding the public during the witness's testimony will amount virtually to a secret trial." Thomas M. Fleming, Annotation, *Exclusion of Public from State Criminal Trial in Order to Preserve Confidentiality of Undercover Witness*, 54 A.L.R. 1156 (4th ed. 1994). The defendant's right to a public trial merits stronger protection than this blanket rule acknowledges.

A. The First Prong: An Overriding Interest Meriting Closure

The first prong of the *Waller* test requires that the prosecution demonstrate an "overriding interest that is likely to be prejudiced"[172] in order to close the courtroom to the public.[173] New York courts agree that in certain circumstances, testimony from an undercover officer "'whose public appearance would endanger their lives or seriously damage other investigations'" is an "overriding interest" meriting closure.[174] To satisfy this prong, the state must show the factual basis of the closure request, including evidence that supports the undercover officer's belief that his or her life and work are jeopardized by an open trial.[175] The trial judge may then weigh the level of danger posed to the witness by testifying in an open courtroom.[176] Specific evidence of the actual danger posed prevents the courts from closing their courtrooms unnecessarily, by reliance on such vague concerns as the undercover officer's general

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[172] Waller v. Georgia, 467 U.S. 39, 48 (1984).

[173] However, where there is only a partial closure, with only certain people excluded, "a 'substantial reason' rather than *Waller*'s 'overriding interest' will justify the closure." Woods v. Kuhlman, 977 F.2d 74, 76 (2d Cir. 1992) (following Nieto v. Sullivan, 879 F.2d 743 (10th Cir.), *cert. denied,* 493 U.S. 957 (1989); United States v. Sherlock, 962 F.2d 1349 (9th Cir. 1988), *cert. denied,* Charley v. U.S., 506 U.S. 958 (1992); Douglas v. Wainwright, 739 F.2d 531 (11th Cir. 1984), *cert. denied,* 469 U.S. 1208 (1985)). *But cf.* United States v. Doe, 63 F.3d 121, 129 (2d Cir. 1995) (finding closing to be "partial" during testimony of certain prosecution's witnesses, closing statements, and defendant and jury charge).

[174] Report & Recommendation at 10, Brown v. Andrews, No. 94-CV-3253 (S.D.N.Y. Oct. 19, 1995) (citing Ayala v. Speckard, No. 94-CV-7850, 1995 WL 373419, at *3 (S.D.N.Y. June 21, 1995) ("Safety of undercover officer can rise to level of an 'overriding interest.'"); Policano v. Riley, No. 90-CV-1312, 1990 WL 179740, at *1 (E.D.N.Y. Oct. 31, 1990) ("'Protection of the identity and safety of an undercover officer engaged in ongoing investigations is sufficient to justify closure of trial.'")).

[175] Burton v. Senkowski, No. CV-94-3836, 1995 WL 669908, at *3 (E.D.N.Y. Nov. 5, 1995); *Ayala,* 1995 WL 373419, at *3; Jones v. Henderson, 683 F. Supp 917, 923 (E.D.N.Y. 1988).

[176] *Ayala,* 1995 WL 373419, at *3.

fear of discovery, the prosecution's outdated information as to the officer's undercover activities or the judge's personal conception of the dangers of undercover work in general.[177]

As U.S. Magistrate Judge Andrew J. Peck of the Southern District of New York recently noted, "[d]espite the recognized general dangers faced by undercover officers, the courts [under

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[177] The choice between the competing interests of the defendant's Sixth Amendment rights and the undercover officer's need for safety can be a difficult one for trial judges. In making this decision, judges may not be able to ignore what they believe about the dangers of undercover work in general. As New York State Supreme Court Justice Gerges observed:

> The proverbial "damned if you do and damned if you don't" can best express a judge's dilemma in closing a courtroom during testimony of an undercover police officer. . . . It is that very balance of competing interests that is proving problematic. . . . The options before the court are closure of the courtroom, thus impinging on defendant's constitutional rights or an open courtroom, potentially jeopardizing the life of a police officer or confidential informant already engaged in an unquestionably hazardous job. Both alternatives are equally unacceptable.
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> . . . .
>
> The overwhelming tide of illicit drugs pervading our society has necessitated a change in the volume and type of police undercover investigations. Undercover 'buy and bust' operations or testimony from a confidential informant are often the only way for the police to glean evidence against suspected drug dealers. There is no question that undercover operations have become inherently more dangerous in recent years with the proliferation of illegal weapons available in the streets of our city. Furthermore, the availability of beepers and cellular phones provides for the possibility of instant communication between those engaged in criminal enterprise. An undercover officer recently testified that there was a standing $10,000 contract to kill undercover police officers in the Red Hook, Brooklyn area. The combination of an open courtroom, or even a partially closed courtroom combined with the capability for instant communication could prove deadly to some undercover officers or confidential witnesses.
>
> I am mindful that the Court of Appeals has stated that "a trial court's own impressions of the general vicissitudes of undercover narcotics work do not suffice for closure." However, in a courtroom confronted by an undercover officer or confidential witness concerned for his safety, that is cold comfort.

Gerges, *supra* note 35, at 2 (citation omitted).

Waller] have squarely rejected any *per se* rule that would allow closure of the courtroom any time an active undercover officer testifies."[178] The district court in *Okonkwo v. Lacy*[179] explained its rejection of a blanket rule for undercover officers:

> [T]he bare finding that an undercover officer . . . believes personal safety may be jeopardized from exposure of his or her identity does not, in and of itself, satisfy the Supreme Court's guidelines for the application of the Sixth Amendment. To hold otherwise would be to sanction an impermissible *per se* rule and to open the door for over-utilized, under-scrutinized courtroom closure.[180]

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[178] Report & Recommendation at 10-11, *Brown*, No. 94-CV-3253. Magistrate Andrew J. Peck cited the following cases: Okonkwo v. Lacy, 895 F. Supp. 571, 578 (S.D.N.Y. 1995) (justifying its holding as necessary to avoid "sanction[ing] an impermissible *per se* rule"); Vidal v. Williams, 31 F.3d 67, 69 (2d Cir. 1994) ("[R]ejecting state request to allow courtroom to be closed to defendant's relations if they live or work in the same county where the undercover operates."), *cert. denied,* 115 S.Ct. 778 (1995); Ip v. Henderson, 710 F. Supp. 915, 918 (S.D.N.Y. 1989) ("'[T]he court may not enact a *per se* rule in favor of closing the courtroom in certain instances.'"); *Jones*, 683 F. Supp. at 923 ("[R]eject[ing] *per se* rule for closure of trial for undercover testimony."); People v. Martinez, 82 N.Y.2d 436, 442, 443, 624 N.E.2d 1027, 1031, 1032, 604 N.Y.S.2d 932, 935, 936 (1993) (explaining that a ruling based on the undercover officer continued activity in the Bronx "'would in effect sanction a rule of *per se* closure for undercover officers'"); People v. Tapia, 207 A.D.2d 286, 287, 615 N.Y.S.2d 380, 381 (1st Dep't) ("[N]ot[ing] that the New York Court of Appeals in *Martinez* rejected *per se* rule."), *appeal denied,* 84 N.Y.2d 910, 645 N.E.2d 1228, 621 N.Y.S.2d 528 (1994); *see also* People v. Brown, 172 A.D.2d 844, 846, 847, 569 N.Y.S.2d 208, 210, 211 (2d Dep't 1991) (Balletta, J., dissenting) (noting that although an undercover witness's identity must be kept secret, particularly because criminals no longer hesitate to use deadly force against police officers, "the Court of Appeals has yet to indicate that an officer's undercover status *per se* warrants closure of the courtroom. . . . [U]nless and until the Court of Appeals softens its stance . . . I feel constrained to vote that the trial court committed reversible error [in closing the courtroom].").

[179] 895 F. Supp. 571 (S.D.N.Y. 1995).

[180] *Id.* at 578. In *Jones v. Henderson*, for example, where the only evidence in support of closure was that the undercover agent "was, at that time [of trial], still working in an undercover capacity," the court ruled that the "overriding interest" prong of *Waller* was not satisfied. 683 F. Supp. at 923. To justify closure, the court ruled, the state must offer "specific evidence which demon-

Therefore, in order to determine if the prosecution has satisfied the first prong of the *Waller* test, a court must judge whether there is a "link" between the undercover officer's concerns for personal safety and the officer's testimony in open court in the particular case,[181] indicated by "spatial and temporal factual support for the officer's concerns."[182] Important evidence regarding this link is the scope of the geographical area in which the officer is working undercover.[183] The scope of the geographical area indicates the likelihood that a spectator observing the trial would pose a danger to the officer or ongoing undercover investigations.[184] In contrast with other New York case law,[185] both the Second Circuit and the

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strate[s] the compelling character of this interest under the particular circumstances of [this] trial." *Id.*

Similarly, in *Ip v. Henderson,* the court ruled that the trial court may not rely on "general findings that would apply to almost any witness." 710 F. Supp. 915, 919 (S.D.N.Y. 1989). The court criticized the trial judge's reliance on "the witness's assertion that he feared for his life, rather than considering the individual circumstances of the case . . . ." *Id.* The only evidence in support of closure was that the witness, who was cooperating with the government, testified that he feared for his safety. *Id.* at 918. Instead, "[t]he facts of each case must be evaluated individually." *Id.* The court stressed that in assessing whether there is an overriding interest, "the court may not enact a *per se* rule in favor of closing the courtroom in certain instances, rather, the trial judge must look to the particular circumstances of each case." *Id.* Other courts applying *Waller* have agreed that "[i]nquiries and findings supporting closure must be made on a case-by-case basis; they must be tailored to factual and circumstantial particulars." *Okonkwo*, 895 F. Supp. at 577; *Ip,* 710 F. Supp. at 918; *see also Ayala*, 1995 WL 373419, at *3 ("Courts must evaluate the facts of each case individually and make determinations regarding closure on a case-by-case basis.").

[181] People v. Martinez, 82 N.Y.2d 436, 443, 624 N.E.2d 1027, 1031, 604 N.Y.S.2d 932, 936 (1993).

[182] People v. Abdul-Aziz, 628 N.Y.S.2d 272, 274 (1st Dep't), *appeal denied*, 86 N.Y.2d 788, 656 N.E.2d 601, 632 N.Y.S.2d 502 (1995).

[183] Report & Recommendation at 11-12, Brown v. Andrews, No. 94-CV-3253 (S.D.N.Y. Oct. 19, 1995).

[184] Vidal v. Williams, 31 F.3d 67, 69 (2d Cir. 1994), *cert. denied,* 115 S.Ct. 778 (1995).

[185] People v. Miller, 190 A.D.2d 609, 609, 593 N.Y.S.2d 812, 813 (1st Dep't) (upholding closure where, *inter alia*, officers were testifying in Manhattan and the crime occurred in Brooklyn "given the proximity and ease of access between the two counties . . . especially in light of the substantial number of

New York courts applying the *Waller* test have held that "testimony that an officer still works undercover in an area as large as a borough does not justify closure. . . . Rather, closure will be justified only if the officer still works undercover in a narrow geographic area near where the defendant was arrested or lives or where the trial is occurring."[186]

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narcotics cases from the five counties of the City of New York being tried in the Central Narcotics Parts in New York County"), *appeal denied,* 81 N.Y.2d 974, 615 N.E.2d 232, 598 N.Y.S.2d 775 (1993) ; People v. Brown, 172 A.D.2d 844, 846, 569 N.Y.S.2d 208, 210 (2d Dep't 1991) (upholding closure where the witness had been working elsewhere for eight months, and "reasonably expected that she would be working in the same community where she was about to testify" because she had applied for a transfer).

[186] Report & Recommendation at 11-12, *Brown,* No. 94-CV-3253; People v. Martinez, 82 N.Y.2d 436, 443, 624 N.E.2d 1027, 1031, 604 N.Y.S.2d 932, 936 (1993); People v. Tapia, 207 A.D.2d 286, 287, 615 N.Y.S.2d 380, 381 (1st Dep't), *appeal denied,* 84 N.Y.2d 910, 645 N.E.2d 1228, 621 N.Y.S.2d 528 (1994). For example, in *Vidal v. Williams,* the court ruled that evidence that the undercover officer continued to work in the Bronx and the defendant's family also lived in the Bronx was insufficient to justify closure to defendant's family members. Vidal v. Williams, 31 F.3d 67, 69 (2d Cir. 1994), *cert. denied,* 115 S.Ct. 778 (1995). The court reasoned that:

> [T]he Bronx covers 41 square miles and has 1.2 million residents. . . . A chance meeting somewhere in the Bronx was unlikely. The exclusion was not justified. . . . In New York City, two locations three miles apart are hardly in the same vicinity. Almost seventy percent of the Bronx and 830,000 people could fit within three miles of [the site of the arrest]. . . . Given the scope of the drug problem in the Bronx, there is minimal risk that two people who happen to live near a high drug area will have a chance meeting with a specific undercover officer working throughout the borough.

Id.; see also Martinez, 82 N.Y.2d at 443, 624 N.E.2d at 1031, 604 N.Y.S.2d at 936 (upholding closure in companion case where undercover officer worked at the Port Authority in Manhattan, the site of defendant's arrest); People v. Rivera, 632 N.Y.S.2d 122, 123 (1st Dep't 1995) (ruling that the undercover officer's current assignment in Manhattan's 34th precinct, ("155th to 203rd Streets") was not in the "same vicinity" as East 100th Street, the site of the arrest, under *Vidal v. Williams*); People v. Badillo, 207 A.D.2d 742, 743, 616 N.Y.S.2d 619, 620 (1st Dep't) (upholding closure where the undercover officer continued to work "in the vicinity of Broadway between 31st and 33rd Streets," the site of defendant's arrest), *appeal denied,* 84 N.Y.2d 1009, 647 N.E.2d 126, 622 N.Y.S.2d 920 (1994); People v. Skinner, 204 A.D.2d 664, 664, 612 N.Y.S.2d

The state can present strong evidence supporting closure where the undercover officer will return to the exact location of the arrest to continue undercover operations. Under such circumstances, a court may permit closure if the undercover officer fears that one of the defendant's friends involved in the officer's open drug operations "might" be present in the courtroom,[187] or if the officer does not know whether the defendant's friends or family might be involved in the drug trade in the neighborhood, even if the defendant is not tied to such open investigations.[188]

In determining whether there is the necessary "overriding interest" needed to satisfy the first prong of *Waller*, the court may also consider specific evidence that reveals the degree to which the officer has been exposed to the public and indicates the "value or effectiveness of closure."[189] The court may consider the ease of

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419, 420 (2d Dep't) (ruling closure was proper where drug sale "occurred at 150th Street and Beaver Road, Queens, the undercover officer had worked in that neighborhood during the two weeks immediately prior to the defendant's trial, and he would be returning to that neighborhood in his undercover capacity"), *appeal denied,* 84 N.Y.2d 910, 645 N.E.2d 1227, 621 N.Y.S.2d 527 (1994).

Compare these holdings with *People v. Miller,* a case that does not apply the *Waller* test. 190 A.D.2d 609, 593 N.Y.S.2d 812 (1st Dep't), *appeal denied,* 81 N.Y.2d 974, 615 N.E.2d 232, 598 N.Y.S.2d 775 (1993). In *Miller*, the court ruled that closure of the courtroom was proper where the undercover officers worked in "the surrounding northern Brooklyn communities where defendant was arrested," even though the officers testified in Manhattan. *Id.* at 609, 593 N.Y.S.2d at 813. The court stated:

> That the officers were testifying in a Manhattan courtroom, rather than one in Kings County where the crime allegedly occurred and the officers are assigned, does not change the result given the proximity and ease of access between the two counties, especially in light of the substantial number of narcotics cases from the five counties of the City of New York being tried in the Central Narcotics Parts in New York County.

Id. (citation omitted).

[187] People v. Dorcas, 630 N.Y.S.2d 796 (2d Dep't), *appeal denied,* 87 N.Y.2d 845 (1995); People v. Aguayo, 200 A.D.2d 541, 542, 606 N.Y.S.2d 694, 695 (1st Dep't), *appeal denied,* 83 N.Y.2d 963, 639 N.E.2d 756, 616 N.Y.S.2d 16 (1994).

[188] *Aguayo,* 200 A.D.2d at 542, 606 N.Y.S.2d at 695.

[189] *Okonkwo,* 895 F. Supp. at 577-78.

transportation between the location of the arrest, the defendant's home and the courthouse.[190] Other relevant specific evidence tending to satisfy the first prong of *Waller* is whether the undercover officer had received any threats in connection with testifying at the trial or open investigations.[191] Courts have also considered whether the undercover officer "regularly took precautions to conceal his or her identity,"[192] such as whether the officer used the public entrance to the courthouse,[193] used a public elevator within the courthouse,[194] arrived at the courthouse in a marked police car[195] or wore a uniform to court.[196] Courts also consider the number of buy-and-bust operations in which the undercover officer had participated during his or her career,[197] the number of times the officer expected to testify about other undercover narcotics operations taking place near the drug sale at issue in defendant's trial,[198] the number of times the officer testified in front of a grand jury[199] and whether the officer testified in open

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[190] People v. Abdul-Aziz, 628 N.Y.S.2d 272, 274 (1st Dep't), *appeal denied,* 86 N.Y.2d 788, 656 N.E.2d 601, 632 N.Y.S.2d 502 (1995).

[191] *Okonkwo*, 895 F. Supp. at 577 ("[A]n inquiry into specific threats against the witness is of considerable importance to any determination affecting closure."); Report & Recommendation at 13, Brown v. Andrews, No. 94-CV-3253 (S.D.N.Y. Oct. 19, 1995) (recommending that closure is improper where, *inter alia*, undercover officer "neither gave details of any specific threats nor connected testifying at [petitioner's] trial with threats or danger to him").

[192] People v. Rosario, 214 A.D.2d 345, 345, 625 N.Y.S.2d 19, 19 (1st Dep't) (finding closure proper because the officer took such precautions), *appeal denied,* 86 N.Y.2d 801, 656 N.E.d 614, 632 N.Y.S.2d 515 (1995).

[193] *Id.* (ruling that closure is proper where, *inter alia*, the undercover officer "had utilized a non-public entrance to the courthouse"); *see also Okonkwo*, 895 F. Supp. at 578 (noting that the trial court erred by failing to inquire whether the undercover officer arrived at the courthouse by police car, whether he entered the courtroom through a public or private entrance and whether he wore a uniform to court).

[194] *Court Is Closed to Public to Shield Undercover Agent*, 209 N.Y. L.J. 25 (1993) [hereinafter *Court Is Closed*].

[195] *Okonkwo,* 895 F. Supp. at 578.

[196] *Id.*

[197] *Id.* at 577.

[198] *Court Is Closed, supra* note 194, at 25.

[199] *Okonkwo,* 895 F. Supp. at 577.

court.[200] Further, in deciding to close the courtroom, a court may find it compelling that the courtroom is in a part of the courthouse regularly used to try narcotics cases.[201] The above factors may indicate "law enforcement's efforts to protect their undercover officers and the number of people who pose a threat of exposing the officer."[202]

B. The Second and Third Prongs: Breadth and Alternatives

The second and third prongs of *Waller* require that closure "be no broader than necessary to protect" the government's interest, and that the court "consider reasonable alternatives to closing the proceeding" to the public.[203] A common ground for appeal is that the trial court erred by not considering less restrictive means of protecting the undercover witness.[204]

After *Waller*, as the court in *Ayala v. Speckard*[205] noted, "it remains unclear whether the trial court or the party objecting to closure has the burden of raising alternatives"[206] or making suggestions of less broad means of closure for the trial court's consideration. In *Ayala*, the court explicitly refused to impose a burden on the courts to create alternatives *sua sponte*[207] or to ask the defendant whether he wanted specific spectators present.[208]

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[200] Daniel v. Kelly, No. CV-78-830E, 1990 WL 130523, at *7 (W.D.N.Y. Aug. 31, 1990).

[201] People v. Gross, 179 A.D.2d 138, 140, 583 N.Y.S.2d 832, 832-33 (1st Dep't), *appeal denied,* 80 N.Y.2d 832, 600 N.E.2d 643, 587 N.Y.S.2d 916 (1992).

[202] *Okonkwo*, 895 F. Supp. at 577-78.

[203] Waller v. Georgia, 467 U.S. 39, 48 (1984).

[204] *E.g.,* Report & Recommendation at 17, Brown v. Andrews, No. 94-CV-3253 (S.D.N.Y. Oct. 19, 1995); Ayala v. Speckard, No. 94-CV-7850, 1995 WL 373419, at *4 (S.D.N.Y. June 21, 1995); *Okonkwo,* 895 F. Supp at 578; People v. Badillo, 207 A.D.2d 742, 742-43, 616 N.Y.S.2d 619, 620 (1st Dep't), *appeal denied,* 84 N.Y.2d 1009, 647 N.E.2d 126, 622 N.Y.S.2d 920 (1994).

[205] No. 94-CV-7850, 1995 WL 373419 (S.D.N.Y. June 21, 1995).

[206] *Ayala,* 1995 WL 373419, at *4.

[207] "*Sua sponte*" is defined as "[o]f his or its own will or motion; voluntarily; without prompting or suggestion." BLACK'S LAW DICTIONARY 1424 (6th ed. 1990).

[208] *Ayala,* 1995 WL 373419, at *4.

Other courts have been reluctant to create alternatives *sua sponte* or to suggest less broad means of closure without clear authority to do so.[209] The burden is therefore on the defendant to suggest alternatives or request narrower means of closure.[210] If the defendant fails to raise alternatives or less broad means of closure, and if no evidence of other reasonable options exist, a reviewing court may not find error in the trial court's failure to propose alternatives or less broad means of closure.[211] A reviewing court may even bar a defendant's claim that the trial court failed to consider alternatives or other options if the defendant did not suggest or request other options at trial.[212]

Objections as to the breadth of closure commonly arise where the defendant's family members are excluded from the courtroom when it is closed to the public during the testimony of an undercover officer.[213] Recently, the Second Circuit and the New York

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[209] Pearson v. James, No. 94-CV-1499, 1995 WL 617331, at *2 (S.D.N.Y. Oct. 20, 1995); Martinez v. Sullivan, No. 88-CV-7335, 1989 WL 63103, at *4 (S.D.N.Y. June 7, 1989), *aff'd,* 914 F.2d 240 (2d Cir. 1990); People v. Martinez, 82 N.Y.2d 442, 443-44, 624 N.E.2d 1027, 1031-32, 604 N.Y.S.2d 932, 936-37 (1993); People v. Badillo, 207 A.D.2d at 743, 616 N.Y.S.2d at 620.

[210] Report & Recommendation at 15, 17, Brown v. Andrews, No. 94-CV-3253 (S.D.N.Y. Oct. 19, 1995).

[211] *E.g., Pearson,* 1995 WL 617331, at *2 (ruling that trial court was not required to "propose, *sua sponte*, alternative means" to closure where the petitioner did not suggest any at trial and "there is no evidence that any reasonable alternatives were available").

Some courts have ruled that the closure was "no broader than necessary" simply because the trial court closed the courtroom only during the undercover officer's testimony. *E.g.,* Burton v. Senkowski, No. CV-94-3836, 1995 WL 669908, at *3 (E.D.N.Y. Nov. 5, 1995) (ruling that closure was no broader than necessary because "[t]he judge closed the trial only for the testimony of the undercover officers whose identities needed protection").

[212] Okonkwo v. Lacy, 895 F. Supp 571, 578 (S.D.N.Y. 1995) (ruling that petitioner's claim that the trial court did not consider alternative to closure was barred because the Appellate Division ruled that the defendant did not object on this ground); *Badillo,* 207 A.D.2d at 743, 616 N.Y.S.2d at 620 (ruling that defendant's claim that trial court failed to consider "other, narrower means" to protect the overriding interest was "waived" where defendant made no "suggestions or requests").

[213] Vidal v. Williams, 31 F.3d 67, 69 (2d Cir. 1994), *cert. denied,* 115 S.Ct. 778 (1995); Report & Recommendation at 16, 17, *Ayala,* 1995 WL 373419, at

Court of Appeals have reemphasized the Supreme Court's concern that defendants have their family members present at trial, holding that exclusion of a defendant's family members may exceed the precautions necessary to protect the state's interest in assuring an undercover officer's safety.[214] In *Vidal v. Williams*,[215] the Second Circuit Court of Appeals refused to hold that "a courtroom can be closed to a defendant's relatives as long as the relatives live (or, presumably, work) in the county where the undercover officer operates," particularly where the defendant's parents were not inclined to harm or encounter the officer during an operation.[216] In *People v. Gutierez*,[217] the New York Court of Appeals upheld closure to the general public, but held that the trial court's exclusion of the "defendant's close family members was broader than constitutionally tolerable."[218] The court stated that "[a]lthough the undercover officer indicated that he feared his life and ongoing drug investigations would be jeopardized, he never claimed to hold those fears with respect to defendant's wife and children and did not otherwise advance any valid ground for excluding defendant's family during the officer's testimony."[219] In the short time since the New York Court of Appeals' decision in *Gutierez*, lower state courts have generally ruled that in order to

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*4; Brown v. Andrews, No. 94-CV-3253 (S.D.N.Y. Oct. 19, 1995); People v. Gutierez, 86 N.Y.2d 817, 818, 657 N.E.2d 491, 633 N.Y.S.2d 470, 470 (1995); People v. Martinez, 82 N.Y.2d 436, 444, 624 N.E.2d 1027, 1031, 604 N.Y.S.2d 932, 936 (1993); People v. Kan, 78 N.Y.2d 54, 58, 574 N.E.2d 1042, 1044, 571 N.Y.S.2d 436, 439 (1990); People v. Green, 627 N.Y.S.2d 21, 22 (1st Dep't 1995); People v. Ocasio, 628 N.Y.S.2d 651, 652 (1st Dep't), *appeal denied,* 86 N.Y.2d 845, 658 N.E.2d 232, 634 N.Y.S.2d 454 (1995).

[214] *Gutierez*, 86 N.Y.2d at 818, 657 N.E.2d at 491, 633 N.Y.S.2d at 470; *Vidal*, 31 F.3d at 69 (excluding a defendant's parents from the courtroom during an undercover officer's testimony is unjustified if the parents are not "inclined to harm" the officer or "encounter him" during undercover operations). *But cf.* People v. Abdul-Aziz, 628 N.Y.S.2d 272, 274 (1st Dep't) ("[N]o further showing was required simply because the exclusion affected a family member."), *appeal denied,* 86 N.Y.2d 788, 656 N.E.2d 601, 632 N.Y.S.2d 502 (1995).

[215] 31 F.3d 67 (2d Cir. 1994), *cert. denied*, 115 S.Ct. 778 (1995).

[216] *Id.* at 69.

[217] 86 N.Y.2d 817, 657 N.E.2d 491, 633 N.Y.S.2d 470 (1995).

[218] *Id.* at 818, 657 N.E.2d at 491, 633 N.Y.S.2d at 470.

[219] *Id.*

exclude a defendant's family members, the prosecutor must establish that the family members live in or frequent an area in very close proximity to the undercover officer's current area of operations,[220] and the officer must have specific concerns regarding the family members.[221] It remains unclear, however, whether courts will follow the holding in *Gutierez* if the defendant does not specifically request at trial that his or her family members remain in the courtroom.[222]

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[220] People v. Navarro, 632 N.Y.S.2d 598, 598-99 (2d Dep't 1995) (ruling that there was no evidence that defendant's mother visited Queens, the undercover officer's area of operations, "for any purpose other than to attend her son's trial").

[221] People v. Green, 627 N.Y.S.2d 21, 22 (1st Dep't 1995) (ruling that the state's reason for excluding the defendant's family and girlfriend, that they "made the officer uncomfortable," was inadequate). When the defendant requests that the trial court exempt certain people from the closure order, the prosecution must prove that "those individuals threaten an overriding interest of the witness." People v. Johnson, 635 N.Y.S.2d 49, 50 (2d Dep't 1995) (reversing conviction where the record did not demonstrate that the defendant's family "posed a threat to the undercover officer").

[222] In *Vidal*, *Kan* and *Gutierez*, the defendants specifically requested that their family members remain in the courtroom during the undercover officer's testimony, and *Vidal* and *Kan* have been distinguished on that ground. The court in *Ayala v. Speckard* distinguished *Vidal* on the ground that in *Vidal*, the defendant requested that his parents remain in the courtroom, which was not the case in *Ayala*. No. 94-CV-7850, 1995 WL 373419, at *3 (S.D.N.Y. June 21, 1995). Similarly, in *People v. Martinez*, the court of appeals distinguished *Kan* on the ground that in contrast to *Kan,* the defendant in *Martinez* had not requested exemption of the closure order for particular friends and family. 82 N.Y.2d 442, 443, 624 N.E.2d 1027, 1031, 604 N.Y.S.2d 932, 936 (1993).

Generally, the defendant must specifically raise the issue at trial in order for the court to consider excepting a defendant's family members from the closure order. People v. Ocasio, 628 N.Y.S.2d 651, 652 (1st Dep't), *appeal denied,* 86 N.Y.2d 845, 658 N.E.2d 232, 634 N.Y.S.2d 454 (1995); People v. Badillo, 207 A.D.2d 742, 743, 616 N.Y.S.2d 619, 620 (1st Dep't), *appeal denied,* 84 N.Y.2d 1009, 647 N.E.2d 126, 622 N.Y.S.2d 920 (1994); People v. Santos, 154 A.D.2d 284, 286, 546 N.Y.S.2d 587, 588 (1st Dep't 1989), *appeal denied,* 75 N.Y.2d 817, 551 N.E.2d 1245, 552 N.Y.S.2d 567 (1990). For example, in *People v. Bouche*, defense counsel's mere suggestion that a family member "may be" in court the following day was not a sufficient request that the trial court consider exempting him from a closure order. 208 A.D.2d 445, 446, 617 N.Y.S.2d 715, 716 (1st Dep't), *appeal denied,* 84 N.Y.2d 1009, 647 N.E.2d 127, 622 N.Y.S.2d

New York courts have not focused attention on exploring other alternatives to closure of courtroom proceedings where an undercover officer testifies as a witness. Options, however, exist that would impose less strain on a defendant's right to a public trial while still protecting the undercover witness from exposure. For example, in the Eighth Circuit, where closure is not a general practice, the Circuit Court of Appeals agreed with the district court that the use of a screen during the testimony of an undercover officer was the most effective way to protect the identity of the

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921 (1994). *See also* Report & Recommendation at 16, Brown v. Andrews, No. 94-CV-3253 (S.D.N.Y. Oct. 19, 1995):

> Petitioner Brown did not notify the trial court that she wanted her father to be present at trial and exempt from the closure order. The only reference to her father was in a single question to the undercover officer, as to whether his fears would be allayed "if [defense counsel] told [the undercover witness] that since the trial began, we have had no spectators here other than the defendant's father." . . . This question suggests that there was no need to close the courtroom at all because the trial was so sparsely attended; it does not squarely ask the trial judge to consider exempting petitioner's father from a closure order. . . . Accordingly, the trial court did not err in not exempting Brown's father from the closure order.

Id.

In *Gutierez*, however, the New York Court of Appeals did not indicate whether the defendant had requested an exception for his family. This suggests that the New York Court of Appeals does not find it dispositive whether the defendant requested that family members remain, and therefore requires trial judges to consider exempting a defendant's family *sua sponte* when considering a request to close the courtroom. However, like *Gutierez*, most courts reversing convictions under *Gutierez* have not based their decisions on whether defendants requested a family exemption; nor, however, have they decided that such request is no longer required under *Gutierez*. People v. Carrington, 633 N.Y.S.2d 47, 47-48 (2d Dep't 1995); People v. Pankey, 631 N.Y.S.2d 766, 767 (2d Dep't 1995). *Cf.* People v. Johnson, 635 N.Y.S.2d 49, 50 (2d Dep't 1995) ("When the defendant seeks to limit closure to permit the attendance of certain individuals, the People must present evidence that those individuals threaten an overriding interest of the witness."); People v. Green, 633 N.Y.S.2d 521, 522 (2d Dep't 1995) (finding that closure was broader than necessary under *Gutierez* where defendant objected to exclusion of family members). Thus, defendants should specifically ask the trial court to exempt their family members from a closure order.

witness as well as the defendants' right to a public trial.[223] The screen allowed spectators to hear the officer, but not to see her, "while not interfering with the ability of the defendants, the court, or the jury to see her when she testified."[224] In addition to the use of a screen,[225] possible alternatives to closure alluded to by New York courts in *dicta* include stationing a guard at the door[226] and limiting closure to spectators who habituate the area under investigation by the undercover officer.[227]

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[223] United States v. Lucas, 932 F.2d 1210, 1217 (8th Cir.), *cert. denied,* 502 U.S. 869, 112 S.Ct. 199 (1991).

[224] *Id.*

[225] Pearson v. James, No. 94-CV-1499, 1995 WL 617331, at *2 (S.D.N.Y. Oct. 20, 1995); People v. Martinez, 82 N.Y.2d 436, 444, 624 N.E.2d 1027, 1031-32, 604 N.Y.S.2d 932, 936–37 (1993).

[226] *Martinez,* 82 N.Y.2d at 444, 624 N.E.2d at 1031-32, 604 N.Y.S.2d at 936-37.

[227] People v. Bonet, 176 A.D.2d 641, 642, 575 N.Y.S.2d 294, 295 (1st Dep't 1991) (finding unreasonable defendant's suggestion of "the deactivation or relocation of the undercover officer"), *appeal denied,* 79 N.Y.2d 853, 588 N.E.2d 760, 580 N.Y.S.2d 725 (1992). Despite the seeming lack of alternatives to closure in New York, the court in *Okonkwo v. Lacy* emphasized that such alternatives be explored because "an inquiry into the feasibility of disguise in the field (and, perhaps, in court) is merited by the constitutional importance of this issue." 895 F. Supp. 571, 578 (S.D.N.Y. 1995). One may attribute this lack of alternatives to closure to defendants' failure to make suggestions, and the reluctance of trial judges to accept the responsibility. *E.g.,* Burton v. Senkowski, No. CV-94-3836, 1995 WL 669908, at *3 (E.D.N.Y. Nov. 5, 1995) ("While there is no indication in the record that the trial judge considered alternatives to sealing the courtroom, neither were any alternatives presented to the court."); Pearson v. James, No. 94-CV-1499, 1995 WL 617331, at *2 (S.D.N.Y. Oct. 20, 1995); People v. Martinez, 82 N.Y.2d 436, 444, 624 N.E.2d 1027, 1031-32, 604 N.Y.S.2d 932, 936–37 (noting that where defendant made no requests, alternatives to closure "might well be investigated in future cases, but on this record the trial court did not err in failing to consider them"). New York State Supreme Court Justice Gerges has noted that the alternative of closing the courtroom to only some spectators, or partial closure, is apparently a "middle ground" between the defendant's and witness's competing interests. Gerges, *supra* note 35, at 2. However, Justice Gerges believes "it can have unforeseen repercussions. The confidential witness' safety may still be jeopardized by the individuals allowed to remain in the courtroom." Gerges, *supra* note 35, at 2. In the Eastern District of New York, Chief Judge Charles P. Sifton expressed disbelief in the existence of a suitable alternative to closure: "[T]here are no

C. *Adequate Findings and Appropriate Remedies*

Waller's fourth prong requires the trial court to "make findings adequate to support the closure."[228] These findings allow a reviewing court to evaluate whether the court properly entered the closure order.[229] "[B]road and general" findings cannot justify closure;[230] instead, "the court must consider the individual facts of the case."[231] Accordingly, "the bare finding that an undercover officer will continue to operate in a given area and believes personal safety may be jeopardized from exposure of his or her identity does not, in and of itself, satisfy the Supreme Court's guidelines for the application of the Sixth Amendment."[232] In order to make adequate findings that will survive review, a trial court must "substantiate its assumptions" about both the defendant's and the state's interests in a case.[233]

If, after examining the trial court's application of the four prongs of the *Waller* test, a reviewing court finds that the closure violated defendant's right to a public trial, *Waller* supports but does

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feasible alternatives to sealing a courtroom when the purpose behind the sealing is to secure testimony from undercover agents." *Burton*, 1995 WL 669908, at *3. Although courts have noted inventive alternatives to closure, they have not been instrumental in seeing that these alternatives are put into practice and thus evaluated.

[228] Waller v. Georgia, 467 U.S. 39, 45 (1984).

[229] Report & Recommendation at 17, Brown v. Andrews, No. 94-CV-3253 (S.D.N.Y. Oct. 19, 1995).

[230] *Id.* at 48.

[231] Report & Recommendation at 18, Brown v. Andrews, No. 94-CV-3253 (S.D.N.Y. Oct. 19, 1995); *see also* Ip v. Henderson, 710 F. Supp. 915, 919 (S.D.N.Y.), *aff'd without opinion*, 888 F.2d 1376 (2d Cir. 1989) (granting petition for writ of habeas corpus where the courtroom was closed for an accomplice witness who feared for his safety, but where there was no finding of any specific grounds for this fear).

[232] Okonkwo v. Lacy, 895 F. Supp. 571, 578 (S.D.N.Y. 1995); *see also* Report & Recommendation at 18, *Brown*, No. 94-CV-3253 (recommending that the trial court's finding that "the undercover officer was still active in Manhattan, and feared for his safety" did not justify closure).

[233] *Okonkwo*, 895 F. Supp. at 579.

not require a new trial.[234] The Supreme Court has ruled that courts granting writs of habeas corpus are free "to fashion the remedy as law and justice require,"[235] when they find that closure violated the defendant's right to a public trial. Yet most state and federal courts finding closure improper have granted a new trial as a remedy.[236]

One recent decision, *Okonkwo v. Lacy*,[237] took a novel approach to the question of remedy. Ruling that the state trial court made insufficient findings to justify closure, the court granted a conditional writ of habeas corpus and remanded the case to the trial court for additional findings consistent with the requirements of *Waller*.[238] The *Okonkwo* court acknowledged, however, that the trial court's lack of "well-reasoned findings. . . . [did] not necessarily mean that the government's interest was insufficient to merit closure in this case."[239] Instead, the lack of findings signified that the record itself was simply insufficient to support closure.[240] Therefore, on remand, the court directed the trial judge to "issue

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[234] Waller v. Georgia, 467 U.S. 39, 50 (1984) (ordering a new suppression hearing as opposed to a new trial because "the remedy should be appropriate to the violation").

[235] Davis v. Reynolds, 890 F.2d 1105, 1112 (10th Cir. 1989); *see also* Carafas v. LaVallee, 391 U.S. 234, 238-39 (1968) ("The federal habeas corpus statute . . . does not limit the relief that may be granted to discharge of the applicant from physical custody. Its mandate is broad with respect to the relief that may be granted.").

[236] The following cases granted a conditional writ of habeas corpus permitting a new trial: Vidal v. Williams, 31 F.3d 67, 69 (2d Cir. 1994), *cert. denied,* 115 S.Ct. 778 (1995); Ip v. Henderson, 710 F. Supp 915, 919 (S.D.N.Y.), *aff'd without opinion*, 888 F.2d 1376 (2d Cir. 1989); Jones v. Henderson, 683 F. Supp. 917, 924 (E.D.N.Y. 1988); *see also* People v. Martinez, 82 N.Y.2d 436, 444, 642 N.E.2d 1027, 1032, 604 N.Y.S.2d 932, 937 (1993) (ordering new trial). *But cf. Waller*, 467 U.S. at 50 (granting new suppression hearing where public trial violation only occurred during suppression hearing).

[237] 895 F. Supp. 571 (S.D.N.Y. 1995).

[238] *Id.* at 579. The findings were insufficient because the trial court "did not substantiate its assumptions about the officer's and the government's interests." *Id.*

[239] *Id.* at 577.

[240] *Id.*

explicit findings."[241] If the findings justify the closure, "the writ shall not issue. Alternatively, if the findings compel the conclusion that closure was improper, or if sufficient evidence cannot be adduced at the hearing, then the petition shall be granted."[242]

This remedy, which one United States magistrate also recommended in a pending habeas corpus petition,[243] has a number of advantages. First, it allows the state trial court to make reviewable findings on the record.[244] Second, if the trial court determines that it appropriately closed the courtroom under *Waller*, it prevents the petitioner from gaining the windfall of a new trial.[245] Most importantly, this remedy adheres to "general notions of comity," by giving a state court "an opportunity to correct its own error."[246] This remedy of a conditional writ is perhaps the most compelling way to ensure that state courts will apply the *Waller* test—if they fail to apply the standards of *Waller* during trial, federal courts will force them to redo the inquiry on habeas corpus review.

New York courts must not continue to ignore *Waller* in favor of supporting closure where an undercover officer presently works on pending investigations in the same general geographical area of the arrest or trial or by applying other lax standards.[247] Prosecutors will find it extremely easy to satisfy such basic requirements. Undercover officers are often assigned to teams that initiate hundreds of buy-and-bust operations in one wide geographical area

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[241] *Id.* at 579.

[242] *Id.*

[243] Report & Recommendation at 18-19, Brown v. Andrews, No. 94-CV-3253 (S.D.N.Y. Oct. 19, 1995). Both the petitioner and the state have filed objections.

[244] *Okonkwo,* 895 F. Supp. at 581.

[245] *Id.* (citing Waller v. Georgia, 467 U.S. 39, 50 (1984)).

[246] *Id.* at 581 (citing Darr v. Burford, 339 U.S. 200, 204, (1950)) ("[I]t would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation."). The principle of comity "is that courts of one state or jurisdiction will give effect to laws and judicial decisions of another state or jurisdiction, not as a matter of obligation but out of deference and mutual respect." BLACK'S LAW DICTIONARY 267 (6th ed. 1990).

[247] *See supra* note 39 and accompanying text (describing the varying standards for closure applied by lower New York State courts).

for an extended period of time.[248] In every one of these cases, the officers can testify that they will return to the area of the arrest to continue further undercover operations. Closure during the most critical point of the trial will become the rule in a vast number of very low-level criminal trials, often involving drugs worth as little as ten or twenty dollars.[249] Such a standard does not give proper weight to the defendant's right to a public trial.

Even though active undercover officers certainly face serious dangers,[250] courts must not assume that the level of danger merits closure of the courtroom in every case. Risks from public testimony should not be assumed; rather, they should be substantiated by fact. The *Waller* test requires a searching inquiry that will reveal the exact circumstances of the undercover officer's activity in relation to the case. In applying the test, the trial court may learn, for example, that the dangers that the undercover officer faces are not due to public testimony, but are caused by other factors. The inquiry may reveal that the undercover officer is active in such a large or populous geographical area that the probability of exposure due to public testimony in a particular case is remote. Such specificity, which is rejected by a *per se* rule, is necessary to safeguard the defendant's constitutional right to a public trial. The *Waller* test, which allows the trial court to evaluate whether closure is proper based on extensive factual analysis, rejects this presumption of danger and reaffirms the presumption of an open trial granted by the Constitution.

CONCLUSION

New York, unlike any other jurisdiction, routinely permits closure during the testimony of undercover officers. The caselaw

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[248] *E.g.*, Report & Recommendation at 3, *Brown*, N. 94-CV-3253 ("Officer Fisher testified that during his twenty-one months as an undercover police officer assigned to Manhattan North Narcotics, he had made approximately 250 narcotics purchases in New York County, and had 'about 100, 150' open narcotics cases currently under investigation.").

[249] *E.g.*, *id.* at 2 (petitioner convicted of selling $10.00 of crack cocaine to an undercover officer).

[250] *See supra* note 73 (describing risks faced by undercover officers).

confirms that New York's loose standards regarding the closure of trial proceedings result in inconsistencies, and possibly, an impermissible *per se* rule for closure. New York must adopt a standard that protects the competing interests of an undercover officer's fear for safety and a defendant's right to a public trial. The Supreme Court's decision in *Waller v. Georgia* provides an adequate test for balancing these interests. Although lower courts have yet to fully interpret the Court's test, it outlines a stringent, fact-sensitive analysis that ensures that trial judges will seal courtrooms if and only if the circumstances warrant closure. This Note recommends that the New York State courts follow the example of the Second Circuit and its own Court of Appeals and consistently adopt *Waller* as a controlling standard. Until this is accomplished, this Note recommends that where state courts are remiss, reviewing courts should follow *Okonkwo v. Lacy* and remand cases to the trial court for application of the stricter *Waller* test. It is plain that unless courts accept the *Waller* test in full, New York State courts will continue to violate a defendant's right to a public trial in favor of dangers to undercover officers that they anticipate but do not substantiate. New York State courts can only fully evaluate the extent of danger to undercover witnesses and fairly determine whether this danger merits an exception to the defendant's right to a public trial by applying the stringent standards set out in *Waller*.