No. _____

In The
Supreme Court of the United States

October Term, 2020

LIONEL LEWIS,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of New York Appellate Division, First Department

MOTION TO PROCEED *IN FORMA PAUPERIS*

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March 18, 2021

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OF THE UNITED STATES

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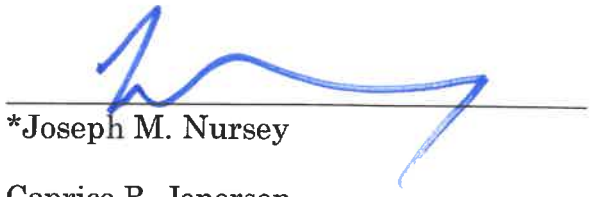
MOTION TO PROCEED *IN FORMA PAUPERIS*

Petitioner, Lionel Lewis, respectfully seeks leave to file the Petition for a Writ of Certiorari and proceed *in forma pauperis* in this case. Petitioner has been granted leave to so proceed at his trial and on direct appeal in the state courts of the State of New York. He was assigned counsel due to his indigence in the state trial court and on appeal in the New York Supreme Court, Appellate Division. Counsel was assigned in the state courts pursuant to N.Y. County Law § 722.

Respectfully submitted,



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QUESTION PRESENTED

Defendants have a fundamental right to a public trial under the Sixth Amendment. *See Waller v. Georgia,* 467 U.S. 39, 45 (1984). To protect that important right, this Court has fashioned a demanding test to ensure that any courtroom closures are a "rare" exception—not the rule. *See id.* Over time, however, New York courts have deviated from the Court's standard in *Waller* and established a de facto rule that permits closing the courtroom whenever the witness is an undercover officer and that officer may have ongoing undercover work in the geographical area where a defendant's family members (or members of the public) reside. This rule creates a categorical exception to the Sixth Amendment right to a public trial, which is neither contemplated in the plain language of the amendment nor this Court's jurisprudence.

The Question Presented is:

Does an undercover officer's interest in potentially continuing undercover work in the general area where a defendant's family members reside categorically override the defendant's Sixth Amendment right to a public trial?

PARTIES TO THE PROCEEDING

The following were parties to the proceedings in the Supreme Court of the State of New York, Appellate Division, First Department:

1. Lionel Lewis, the petitioner on review, was defendant-appellant below.

2. The People of the State of New York, the respondent on review, was respondent-appellee below.

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PETITION FOR WRIT OF CERTIORARI

Lionel Lewis respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of the State of New York, Appellate Division, First Department.

OPINIONS BELOW

The decision of the trial court, the New York Supreme Court, New York County (Konviser, J.), dated August 17, 2017, granting the prosecution's motion to close the courtroom to petitioner's family member during the trial testimony of an undercover officer was dictated orally into the record and is unreported. *People of the State of New York v. Lewis*. The transcript of the hearing on the motion and decision begins at Appendix ("App.") 1. The trial court, New York Supreme Court, New York County (Konviser, J.), sentenced petitioner for his conviction orally into the record on September 12, 2017. *People of the State of New York v. Lewis*. The transcript of the sentencing begins at App. 42. The opinion of the Supreme Court of the State of New York, Appellate Division, First Department, is reported at *People v. Lewis,* 127 N.Y.S.3d 33 (N.Y. App. Div. 2020). App. 49-52. The Order of Hon. Leslie E. Stein, Associate Judge of the New York Court of Appeals denying petitioner's application for leave to appeal is reported at *People v. Lewis,* 35 N.Y.3d 1114 (N.Y. 2020). App. 53.

JURISDICTION

The Court of Appeals of New York issued a decision denying petitioner's application in criminal cases for leave to appeal on October 20, 2020. App. 49. On

March 19, 2020, this Court "extended" "the deadline to file any petition for a writ of certiorari due on or after" that date "to 150 days." The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). Petitioner asserts, as he did in the state courts below, that he has been deprived of his federal constitutional rights. *See* 28 U.S.C. § 1257(a) ("Final judgments or decrees rendered by the highest court of a State . . . may be reviewed by the Supreme Court by writ of certiorari . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution.).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioner's case involves the Sixth Amendment to the United States Constitution, which provides, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a [] public trial. . . ." U.S. Const. amend. VI.

STATEMENT OF THE CASE

Petitioner was convicted of selling drugs to an undercover police officer who testified about the transaction at petitioner's trial. Despite petitioner's Sixth Amendment right to a public trial, *see Waller v. Georgia*, 467 U.S. 39 (1984), the trial court ordered that the courtroom be closed during the officer's testimony, thereby excluding, among other members of the public, petitioner's 76-year-old grandmother.

This kind of courtroom closing is, unfortunately, anything but an anomaly in New York courts. To the contrary, petitioner's arrest and prosecution closely resemble those of most criminal defendants arrested for street-level drug sales in New York in that the undercover officers are universally permitted to testify in a closed courtroom. That is because New York state courts have created a rigid de facto rule that an

undercover officer's interest in returning to work always overrides a defendant's constitutional right to a public trial.

A. The Arrest

The New York City Police Department (NYPD) conducts "buy-and-bust" operations daily. On January 20, 2017, the NYPD conducted a buy-and-bust operation in Harlem, an area that spans four large police precincts (23rd, 25th, 28th, and 32nd) and makes up "part of Manhattan North." App. 11, 22. As a result of this operation, petitioner was arrested and charged with selling $40 worth of crack to an undercover police officer, referred to as "UC 365" in the transcript.[1] App. 2-41.

Petitioner was indicted for criminal sale of a controlled substance in the third degree, a class B felony in New York.

B. The Trial Court's Closure Order

Prior to the testimony of the undercover officer at petitioner's trial, the prosecution requested—as it does in essentially every buy-and-bust trial in New York City—that the trial court close the courtroom to the public during the officer's testimony. The trial court then held what New York courts call a "*Hinton* hearing" to determine if closure was appropriate under this Court's decision in *Waller*. 467 U.S.

[1] Although the trial court hearing was closed to the public, the transcript was not sealed in the state appellate record. As is customary during courtroom closure trials involving the testimony of an undercover officer, the undercover officer is not identified by name in the record.

39.[2] Specifically, the trial court considered whether to exclude petitioner's grandmother—a 76-year-old woman with no criminal record—from attending the most critical portion of her grandson's trial: the undercover officer's testimony.

At the *Hinton* hearing, the undercover officer offered no reason why her safety would "likely" be compromised by giving open-court testimony at petitioner's trial—a requirement of *Waller's* first prong. *See Waller,* 467 U.S. at 48. Nevertheless, the court ordered that the courtroom be closed to petitioner's grandmother because she resided in an area where the undercover officer could resume undercover work at some unknown point in time in the future. In doing so, the trial court reasoned that the grandmother was not "particularly young" or "particularly old" and "walk[ed] well on her own" and could potentially see the officer "and blow an operation or harbor some anger and interrupt an operation." App. 39. As a result of this speculation, the undercover officer's alleged fear of testifying in open court in front of the grandmother was sufficient, even though she had at best alleged a generalized fear of testifying in front of anyone. *See* App. 19. In fact, she confirmed that she would have concerns about her safety if she were to testify before the "defendant's family, friends, or members of the public." App. 19.

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[2] Waller requires that (1) the party seeking closure "advance an overriding interest that is likely to be prejudiced," (2) "the closure be no broader than necessary to protect that interest," (3) the trial court "consider reasonable alternatives to closing the proceeding," and (4) the trial court "make findings adequate to support the closure." *Id.* at 48.

The officer recited what has essentially become a template script at *Hinton* hearings. She testified that she takes precautions to conceal her identity as a police officer; that she has been threatened as a result of her work (but never by anyone associated with petitioner); that she has "open cases" (cases involving arrested suspects that are pending in court) and "lost subjects" (people from whom she had purchased drugs but whom the officers had not arrested, although she uncertain as to where they might be in Manhattan north); and that she plans in the future to return to the "area" or "vicinity" where petitioner had been arrested eight months earlier. App. 13, 14, 17, 21-22. These factors establish that the officer continues to perform her job and that the nature of undercover work is risky. But none of them shows that open-court testimony in petitioner's case posed any additional risk to the officer than testimony in any other case would.

Even if the officer's testimony had established that she planned to return the next day to the precise block on which petitioner's grandmother resided, the officer failed to explain why her interest in doing so was so compelling that it should override petitioner's public-trial right. The officer, for instance, never testified that petitioner had any criminal associates and that these associates were at large in the area where petitioner's grandmother lived. The officer only offered the kinds of generalized concerns that are inherent in all undercover work.

The court nevertheless ordered the grandmother to be excluded from the courtroom during the trial testimony of the undercover officer. App. 40. The court found that the prosecution showed that there was an overriding interest sufficient to

justify closing the courtroom to petitioner's grandmother based on safety concerns inherent in her prospective undercover work in the area where the grandmother resided, *i.e.*, one of the four precincts where the officer was to return to work at some point in the future, which is home to more than 250,000 residents (or members of the public). App. 21-22, 35-37.

C. Conviction and Sentence

By judgment entered on September 12, 2017, petitioner was convicted of criminal sale of a controlled substance in the third degree. App. 42-48. He was sentenced to a term of six years of incarceration followed by one and a half years of post-release supervision. App. 46.

D. The Direct Appeal

On appeal, petitioner argued that the trial court's closure of the courtroom to his grandmother violated his Sixth Amendment right to a public trial. He argued that the prosecution had failed to advance an overriding interest, as required by *Waller's* first prong, pointing to the fact that the officer had participated in approximately 140 undercover operations and never testified in an open courtroom as the very antithesis of the requirement that courtroom closure be "rare." Consistent with *Weaver v. Massachusetts*, petitioner argued that reversal was mandated because his public-trial right was violated, thus amounting to a structural error. 137 S. Ct. 1899, 1908-10 (2017). Specifically, he reasoned that general concerns about resuming undercover operations in an area where a member of the public resides (*i.e.*, his grandmother) is an interest that is insufficient to override the public-trial right, particularly when no

showing was made to prove that the member posed a threat to the officer's safety or was the subject of any ongoing operations. Finally, petitioner argued that the trial court failed to consider reasonable alternatives to the "partial" closure, which resulted in the *only* attendee being excluded from the courtroom, and that the findings in the record did not support closing the courtroom to petitioner's grandmother.

The New York Supreme Court, Appellate Division, First Department, affirmed petitioner's conviction and sentence. *People v. Lewis,* 127 N.Y.S.3d 33 (N.Y. App. Div. 2020); App. 49-52. On the issue of the trial court closing the courtroom to the public during the testimony of the undercover officer, the state appellate court held as follows:

> The court providently exercised its discretion in excluding defendant's relative from the courtroom based on the relative's residence in the area in which the testifying undercover officer expected to continue her operations within a short time (*see People v Campbell*, 16 NY3d 756 [2011]; *People v Alvarez*, 51 AD3d 167,175 [1st Dept 2008], lv denied 11 NY3d 785 [2008]). The court properly factored in the officer's distinctive appearance, which would readily enable defendant's relative to recognize her and reveal her identity to others, and the size of the geographic area. We have considered and rejected defendant's remaining arguments on this issue.

Lewis, 127 N.Y.S.3d at 33-34; App. 50-51.

On October 20, 2020, the Associate Judge of the Court of Appeals of the State of New York denied petitioner's timely application for leave to appeal to that court. App. 53.

REASONS FOR GRANTING THE PETITION

NEITHER THE CONSTITUTION NOR THIS COURT'S PRECEDENT HAS CREATED A CATEGORICAL RULE EXCEPTING UNDERCOVER OFFICERS FROM A DEFENDANT'S EXERCISE OF HIS RIGHT TO A PUBLIC TRIAL.

A. The Sixth Amendment Public-Trial Right Is Intended to Preserve the Legitimacy of the Criminal Adjudication Process and Can Be Overridden Only In Exceptional Cases.

The right to a public trial in a criminal proceeding is fundamental under the Constitution. *See, e.g., Press-Enterprise Co. v. Superior Court of California,* 464 U.S. 501, 508 (1984); *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 605 (1982); *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 573 (1980). Violations of this right are treated as a structural error, meaning that a defendant who objects to closure at trial and raises the issue on direct appeal will be entitled to a new trial if his right is found to have been violated. *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1910 (2017). The government cannot "deprive the defendant of a new trial by showing that the error was harmless beyond a reasonable doubt." *Id*. This "Court has said that a public-trial violation is structural . . . because of the difficulty of assessing the effect of the error" and an open trial "furthers interests other than protecting the defendant against unjust conviction." *Id*. (internal quotations omitted).

Although it is solely the defendant who enjoys the right to a public trial under the Sixth Amendment, "[t]he public-trial right also protects some interests that do not belong to the defendant." *Id*.; *United States v. Sorrentino*, 175 F.2d 721, 722-23 (3d

Cir. 1949) (explaining that rights guaranteed to criminal defendants, including the right to a public trial, "are in a broad sense for the protection of the public generally" and are "in a very special sense privileges accorded to the individual member of the public who has been accused of crime"). Specifically, it preserves "the rights of the public at large" and "the press" to attend criminal trials, thus ensuring that they are conducted with transparency, integrity, and legitimacy. *Weaver*, 137 S. Ct. at 1910; *Globe Newspaper Co.,* 457 U. S. at 606 ("Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process . . ."). A public or open courtroom promotes "the basic fairness of the criminal trial and the appearance of fairness"—both of which are "essential to public confidence in the system." *Press-Enterprise Co.,* 464 U.S. at 508.

"The traditional Anglo-American distrust for secret trials" date back to the Spanish Inquisition, the English Court of Star Chamber, and the French monarchy. *In re Oliver*, 333 U.S. 257, 268-67 (1948). These institutions and the practices and excesses used therein "symbolized a menace to liberty." *Id*. The public-trial right enshrined in the Constitution was intended to reject such institutions and certain methods associated therewith. *Legal History: Origins of the Public Trial*, 35 Ind. L.J, Vol. 2 (1960). Indeed, the public-trial right was adopted to assure the validity of a trial that would adjudicate a defendant's guilt or innocence. *Id*. The legitimacy of that trial depended on the proceeding being open, thereby protecting a criminal defendant from having "his *other* fundamental rights" violated in secret and with impunity. *Id*.; *Sorrentino*, 175 F.2d at 722-21 (listing the rights "guarantee[ed] to persons accused

of crimes in the federal courts," including the right to a "trial by jury, the right to a speedy trial, the right to a trial in the state and district wherein the crime has been committed, the right to be informed of the nature of the accusation, the right be confronted with witnesses, the right to have a compulsory process, and the right to have the assistance of counsel").

This Court has also observed that an open trial "discourage[s] perjury, the misconduct of participants, and decisions based on secret bias or impartiality." *Weaver*, 137 S. Ct. at 1910. It allows the public to see that the defendant "is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions…." *Waller,* 467 U.S. at 46. As such, there is a presumption of openness to ensure that closing the courtroom is "rare and only for cause shown." *Presley,* 558 U.S. at 213 (citing *Waller,* 467 U.S. at 45); *accord Press Enterprise Co.,* 464 U.S. at 509.

In keeping with these important values, this Court has set forth a demanding test that must be satisfied before closure may be ordered, assuring protection of the right to a public trial. A courtroom cannot be closed to members of the public unless certain requirements are met: (1) "the party seeking closure [must] advance an overriding interest that is likely to be prejudiced;" (2) the trial court must ensure that "the closure order [is] no broader than necessary to protect that interest;" and (3) the court must "consider reasonable alternatives to closing the proceeding." *Waller,* 467 U.S. at 48. In addition, the trial court authorizing closure under this framework must "make

findings adequate to support the closure." *Id.* Failure to meet this standard violates the right to a public trial and demands a new trial—"regardless of the error's actual effect on the outcome." *Weaver*, 137 S. Ct. at 1910.

B. New York Courts Have Established A Categorical Exception to the Public-Trial Right That Applies to Undercover Officers With Ongoing Operations.

The case-specific nature of the *Waller* requirements leaves little room for categorical rules in favor of closing the courtroom in criminal trials. But New York courts have effectively exempted the testimony of undercover officers from the right to a public trial that the Sixth Amendment guarantees. Specifically, New York courts over the course of more than a decade have routinely issued rulings that, taken together, amount to a de facto categorical rule permitting trial courts to close the courtroom during the testimony of an undercover officer whenever there is a possibility that the officer will return to the geographical area where members of the public, including a defendant's family member, reside.

Examples of this categorical rule are legion. For example, in *People v. Batista*, 11 N.Y.S.3d 858, 858 (N.Y. App. Div. 2015), the court stated: "We find no violation of defendant's right to a public trial. The court providently exercised its discretion in ruling that the relatives identified by defendant should be excluded from the courtroom based on their residence in or near areas in which the testifying undercover officers were conducting ongoing investigations." Likewise, in *People v. Johnson*, 938 N.Y.S.2d 531, 533 (N.Y. App. Div. 2014), the court observed that "[t]he

court's decision to exclude defendant's sister, who lived within two blocks of the location where the officer bought drugs from defendant and where he continued to work undercover, is consistent with our prior holdings." *See also People v. Campbell*, 888 N.Y.S.2d 472, 473 (N.Y. App. Div. 2009) ("The court properly ruled that defendant's aunt and cousin would be excluded from the courtroom while the undercover officer testified. . . . [because] [t]he two relatives lived within the area of the undercover operations . . . ."); *People v. Alvarez*, 854 N.Y.S.2d 70, 77 (N.Y. App. Div. 2008) ("Here . . . the prosecutor's *Hinton* application was specifically directed at the exclusion of the defendant's girlfriend from the outset, and the record clearly shows that the basis for the prosecution's concern was her residence in the specific area of continuing undercover operations."); *People v. Reyes*, 900 N.Y.S.2d 862, 863 (N.Y. App. Div. 2010) (finding no violation of the defendant's right to public trial when the "[d]efendant's relatives lived within the immediate vicinity of the officers' continued undercover operations"); *People v. Foxworth*, 759 N.Y.S.2d 173, 173 (N.Y. App. Div. 2003) (affirming closure with respect to a defendant's mother and friend "who lived within the area of the undercover operations"); *People v. Lauriano*, 665 N.Y.S.2d 664, 664 (N.Y. App. Div. 1997) (affirming closure on grounds that "[t]he *Hinton* hearing testimony established the necessary spatial and temporal relationship among the courthouse, the location of defendant's arrest, and the anticipated geographic location of the undercover officer's future investigative work").

A New York defendant asserting his Sixth Amendment right to a public trial thus faces a daunting wall of authority permitting closed courtrooms during the testimony

of undercover officers. Indeed, the de facto rule has become sufficiently ingrained over the years that New York courts now routinely point to the fact that the particular undercover officer has never testified publicly as a basis for once again closing the courtroom during that officer's testimony. *See, e.g., People v. James,* 849 N.Y.S.2d 670, 671 (N.Y. App. Div. 2008); *People v. Gonzalez,* 843 N.Y.S.2d 632, 633 (N.Y. App. Div. 2007); *People v. Hargett,* 742 N.Y.S.2d 638, 639 (N.Y. App. Div. 2002); *People v. Rodriguez,* 685 N.Y.S.2d 252, 252 (N.Y. App. Div. 1999).

This case provides a vivid illustration of how one closure leads to another. Here, the undercover officer stated at the *Hinton* hearing that she had never testified publicly, and the trial court then took that testimony into account in deciding to close the courtroom to petitioner's grandmother. As a result, closure was permitted with respect to petitioner's grandmother just because she resided "in the area in which the testifying undercover officer [was] expected to continue her operations within a short time." *Lewis,* 127 N.Y.S.3d at 415-16. It is just that kind of offhand analysis that turns a "rare" exception into a forbidden categorical rule.

C. Other State Courts Have Not Adopted the Same Rule and Have Expressly Rejected Categorical Exclusions to the Public-Trial Right.

The all-but-automatic closing of courtrooms during the testimony of undercover officers results in New York being a conspicuous outlier among the several States with respect to the testimony of undercover officers during trial. So dramatic is this disparity that a search of reported decisions in all 50 States concerning courtroom closure during the testimony of undercover police officers reveals 574 such cases. Of

these, 542 cases—or more than 94% of the total—come from New York.[3]

The reason for New York's status as an outlier is apparent: Its courts apply *Waller's* first prong differently than other state courts. New York courts find that the generic safety concerns of undercover officers and efficacy of investigations constitute an "overriding interest likely to be prejudiced" if the undercover testifies in open court, *Waller,* 467 U.S. at 48, and they do so regardless of (i) whether such safety concerns are present in the particular case or related to the individuals seeking to attend trial or (ii) whether any actual investigations remain pending.

Other state courts have held that factors that apply to a class of witnesses, such as undercover officers, or to a category of cases do not satisfy *Waller's* first prong.

In particular, state courts outside New York have held that factors applying generally to a class of witnesses, such as undercover officers, or to a category of cases do not satisfy *Waller's* first prong. Thus, in *State v. Bone-Club,* 906 P.2d 325, 329 (Wash. 1995), the Washington Supreme Court, sitting *en banc,* reversed the defendant's conviction where the courtroom was closed during the testimony of an undercover officer based upon the lower court's assessment that public testimony would threaten "any" undercover officer. The court continued: "We immediately question the characterization of this generalized evidence as a compelling interest:

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[3] The following "all states" Westlaw "boolean" searches produced the results set out above: "courtroom /s clos! /p undercover /p officer". These searches also returned several cases that did not involve closing the courtroom during the testimony of undercover officers; those cases are not included in the above-referenced totals.

only evidence of a particularized threat would likely justify encroachment into a defendant's constitutionally guaranteed fair trial rights." *Id.*

Similarly, in *State v. Mahkuk,* 736 N.W.2d 675, 683-84 (Minn. 2007), the trial court excluded alleged members of a gang from the courtroom based on concerns of witness intimidation. The trial court had relied on a gang expert's testimony about the 'crimes committed by the gangs [involved in the case] and the tensions between them.'" *Id.* at 685. But the Minnesota Supreme Court deemed the closure improper, finding that "closure of a trial based on generalized gang expert testimony would allow closure in virtually every trial involving allegations of gang involvement." *Id.* Similarly, in *State v. Tucker,* 290 P.3d 1248, 1258 (Ariz. Ct. App. 2012), where the trial court closed the courtroom to everyone except the press due to concerns that audience members might have been intimidating jurors and witnesses, the court observed, in dictum, that "[g]iven the ubiquitous use of cell phones for a variety of purposes, including taking photographs, the public routinely could be excluded from trial if concerns about their use were sufficient to override a defendant's public-trial right. But the right cannot be so easily denied."

The Court of Appeals of Ohio reversed the convictions in *State v. Washington,* 755 N.E.2d 422, 423-24 (Ohio Ct. App. 2001), and *State v. Brown,* No. 73060, 1998 WL 827566, at *3 (Ohio Ct. App. 1998), because the trial courts had closed the courtroom to avoid jeopardizing a confidential informant's safety. Because the closure was based solely on generic concerns, the court held that *Waller's* first prong was not satisfied. *Washington,* 755 N.E.2d at 425; *Brown,* 1998 WL 827566, at *4.

In sum, cases from other states illustrate that New York applies a significantly less rigorous standard than other states when evaluating whether *Waller's* first prong has been met. As one commentator has stated: "Courtroom closure to protect the identity of a police undercover officer is 'strictly a New York phenomenon.' Though New York is not alone in having a massive crime problem, no other state has well-established procedural law allowing closure for this purpose." Aron Goldschneider, *Choose Your Poison: A Comparative Constitutional Analysis of Criminal Trial Closure v. Witness Disguise in the Context of Protecting Endangered Witnesses at Trial*, 15 Geo. Mason U. Civ. Rts. L.J. 25, 37 (2004) (citations omitted). *See also* Robin Zeidel, *Closing the Courtroom for Undercover Policy Witnesses: New York Must Adopt a Consistent Standard*, 4 J.L. & Pol'y 659, 663 (1996).

To state the obvious, there is no reason that New York, alone among the several States, should be able to close its courtrooms on a regular basis, particularly when the interests being advanced are no more than general concerns associated with routine undercover work. As the cases from other states demonstrate, a careful case-by-case analysis—precisely the kind of analysis called for in *Waller*—is the proper approach, not only in cases involving undercover officers but also in cases where factors inherent in a group of witnesses or defendants raise concerns about a witness' open-court testimony, such as cases involving confidential informants. The Sixth Amendment demands no less.

D. This Case Presents an Ideal Opportunity to Determine Whether Categorical Rules In Favor of Closing the Courtroom Are Permissible Under the Sixth Amendment.

Although New York courts take into account whether the undercover officer might return to the same general area in the future, that consideration does little, if anything, to narrow the scope of the general rule permitting closure. Instead, the possible location at which the undercover officer may return to work has been used to *authorize* closure rather than *deny* closure in New York, thus operating to categorically exclude individuals based solely on their address. This de facto rule makes little sense.

Undercover officers are members of the community in which they work. It is typical for a trial to occur near to where the alleged crime occurred, which tends to be in the jurisdiction where the undercover officer is assigned to perform his duties. The practical implications of this categorical rule are that members of the community where an undercover officer works will always be at risk of being barred from attending trial during the undercover officer's testimony. This is the case even if no other reason exists to warrant their exclusion from the courtroom. Such an outcome is inconsistent with the plain language and original intent of the public-trial right, as explained above.

The holding in this case as well as other New York precedent effectively carves out undercover officers from the public-trial right's ambit when they work in the area where the public lives. This carve out or categorical rule has no parameters as to how

large a community may be, no certainty as to the duration of time between the officer's in-court testimony and when the officer may to return to the area, and no need for additional facts to support closure. This one-size-fits-all approach to balancing an undercover officer's interest with a defendant's interest is the opposite of what this Court contemplated in *Waller*. By its terms, *Waller* calls for an exacting inquiry that is contingent on the trial court articulating particularized facts germane to the parties in interest (whether it be the general public or individual family members) who the defendant has a right to have present in the courtroom. These facts must be balanced against the purported interests of the proponent of closure, subjecting such interests to scrutiny and weighing them in favor of an open courtroom.

As described above, the officer in petitioner's case provided rote testimony that has become the hallmark of New York's *Hinton* hearings—testimony that does not distinguish the officer from most active undercover officers in New York City. Her testimony was predicated on the vicissitudes of her work as an undercover and general concern about testifying before anyone in light of the possibility that she could resume her undercover operations in the area where the grandmother resides. Nothing the officer said distinguished the risks of her testifying in public in petitioner's trial from the risks presented by open-court testimony by any undercover police officer in any trial. The trial court's oral ruling evidenced this deficiency. App. 1.

There is no dispute about the serious nature of and risk involved with undercover

work. But those interests can only override a defendant's right when the interests are "compelling"—not universal. If compelling, then closure must not be broader than necessary (*e.g.*, closing the courtroom to the general public but allowing specific individuals to attend). The mere fact that an undercover officer might continue to work in an area where a member of the public resides is to be expected for an undercover officer and falls short of meeting that exacting standard.[4]

In short, New York courts should not be free to create its own idiosyncratic exception to the Sixth Amendment by routinely allowing an undercover officer to testify behind closed doors based on his or her expectation of returning to work, particularly as such witnesses tend to provide the most critical testimony during a criminal trial. "New York leads the country in denying public trials. Unlike courts in other jurisdictions, New York courts close their doors and hear secret testimony almost routinely in undercover drug cases." Randolph N. Jonakait, *Secret Testimony and Public Trials in New York*, 42 N.Y.L. Sch. L. Rev. 407 (1998).

This Court should grant review to address this wholesale denial of Sixth Amendment rights.

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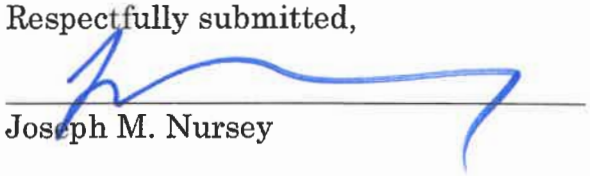
[4] The appellate court noted that the trial court "court properly factored in the officer's distinctive appearance, which would readily enable defendant's relative to recognize her and reveal her identity to others, and the size of the geographic area." *Lewis,* 127 N.Y.S.3d at 416. Merely citing "uniqueness" about an officer's physical appearance further degrades the "compelling" standard, as no individual is physically identical to another individual except for identical twins.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
March 18, 2021

Respectfully submitted,



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March 18, 2021

APPENDIX

APPENDIX

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CRIMINAL TERM: PART 31
----------X

THE PEOPLE OF THE STATE OF NEW YORK :

-against- : INDICTMENT NO.

LIONEL LEWIS, : 388/2017

Defendant. :

----------X

100 Centre Street, Room 1333
New York, New York 10013
Thursday, August 17, 2017

MINUTES OF HEARING,
PRETRIAL PROCEEDINGS

B E F O R E:

THE HONORABLE JILL KONVISER,

Supreme Court Justice

A P P E A R A N C E S:

FOR THE PEOPLE:

OFFICE OF THE SPECIAL NARCOTICS PROSECUTOR
80 Centre Street
New York, New York 10013
BY: AARON TEITELBAUM, ESQ.
Assistant District Attorney

FOR THE DEFENDANT:

GARY KOOS, ESQ.
225 Broadway, Suite 1804
New York, New York 10007

James W. Johnson, RPR
Senior Court Reporter

THE CLERK: Calling the case on hearing for Lionel Lewis. From the back, please.

(Defendant present before the Court.)

THE COURT: Appearances, please.

MR. TEITELBAUM: Good morning, Your Honor. Aaron Teitelbaum for the People.

MR. KOOS: Gary Koos, K-O-O-S, 225 Broadway, New York, New York, for the defendant. Good morning, Your Honor.

THE COURT: Good morning.

Good morning, Mr. Lewis.

This case is on for a Hinton hearing and then for trial today. I assume both sides are ready to proceed; is that correct?

MR. TEITELBAUM: Yes, Your Honor.

MR. KOOS: Yes, Your Honor.

THE COURT: Okay. With respect to the Hinton portion of this hearing, which I'm ready to begin, there is someone in the audience. Is that a family member of your client?

MR. KOOS: It's his grandmother, Your Honor.

THE COURT: It's his grandmother. Do you have any reason to speak to your undercover or have any objection to his grandmother staying? And, if so, what's your objection?

MR. TEITELBAUM: Your Honor, for the purpose of the hearing I would ask, just out of an abundance of caution, that the courtroom be sealed, at least until I have a chance to get basic pedigree information for the grandmother. I'm not suggesting that I'm going to oppose her presence during the --

THE COURT: I'm not going to do it now. I'm not closing the courtroom to the defendant's grandmother on a whim that perhaps there's some reason to exclude her, so if you want to speak to your undercover or do whatever you want to do -- I would point out when the defendant walked out of the back pen he said hello to her. They're obviously acquainted, and I can't imagine closing the courtroom unless there's a good reason to do so from her.

MR. TEITELBAUM: Understood, Your Honor. May I have a brief moment to confer with defense counsel?

THE COURT: Yes.

People, let me know when you're ready.

MR. TEITELBAUM: Will do. Thank you, Judge.

Your Honor, I'm in the process of asking one of my colleagues to just do a very brief check through eJustice of the defendant's grandmother, but initially what I would ask -- the defendant, the defendant's grandmother's address is [redacted], which, based on my understanding of the numbering system in Manhattan, is

essentially [redacted] Street and [redacted] Avenue.

That is very much in the vicinity, within approximately two to three blocks, of where this incident occurred, and also where Undercover 365 routinely operates, and so I can provide case law to the Court.

I'm not suggesting that there's anything untoward about Ms. Lewis herself, but the mere fact that she does live in the area where Undercover 365 operates and that through this, her presence at this hearing she will learn what Undercover 365 looks like, that that poses a very severe safety risk to Undercover 365.

And so what I can cite to the Court is People versus Alvarez, which is a First Department case from 2008, 51 A.D. Third 167, which states that the closure of a courtroom, including exclusion of a defendant's family member, will be justified -- and I'm quoting here -- "when such family member lives in the area where the officer is actively engaged in undercover operations.

"Indeed, appellate courts have uniformly held that such a showing will establish a substantial probability that an overriding interest will be prejudiced by the undercover's open court testimony."

And so for those reasons I would ask that Ms. Lewis, in the first instance, be excluded from the Hinton hearing, and then if the Court wants to hear further

argument about the remainder of the trial, then I'm certainly happy to provide additional authority. That would also give my colleagues time to complete an additional background check.

THE COURT: Mr. Koos?

MR. KOOS: Your Honor, I -- I would seek a little clarification on, from the District Attorney on, does he intend on closing the courtroom only when this undercover officer testifies?

THE COURT: Well, let's take this in pieces.

MR. KOOS: Okay.

THE COURT: He is seeking first to exclude her just from the Hinton hearing, and the reason for that is so I can then make a determination whether or not this might present a danger to the undercover. In other words, I haven't heard from the undercover yet.

MR. KOOS: Right.

THE COURT: I've only heard what the DA believes the undercover might say, and I've had undercovers in here say, I'm no longer working in that area, I was transferred to Kings County, I don't have lost subjects in that area and I don't plan on going back to that area.

I've had undercovers come in and say, not only will I go back to that area; I'm going back today, I've got a buy-and-bust operation happening, and therefore my safety

could be compromised.

So he is simply asking at this juncture to close it for the Hinton so that I can have a better understanding of the background of this undercover and whether or not there is an actual threat, and then the second part will be whether or not at the time the undercover testifies, only that, and nothing more than that, would I then preclude it based on what he or she says at the Hinton hearing about safety.

MR. KOOS: Okay. If I can just have one moment.

THE COURT: Yes, of course.

(Mr. Koos conferred with the defendant's grandmother.)

MR. KOOS: Your Honor, Ms. Lewis is going to leave and come back after lunch.

THE COURT: Okay. Obviously I'm not making a ruling on Hinton yet. I want to hear what the undercover has to say. I won't exclude a family member unless, of course, she or any family member could affect the safety or the efficacy of the undercover's work, and I don't know that yet. So the issue at this moment is moot, but I assume that we're ready for the Hinton hearing, correct?

MR. TEITELBAUM: Correct, Your Honor.

THE COURT: And who is in the front row? Who are you?

MR. TEITELBAUM: That's a deputy bureau chief from my office.

THE COURT: Do you have an objection to that person being here?

MR. KOOS: No.

THE COURT: Okay, so what I'm telling you is that this courtroom is closed except for the deputy who is in the front row, as well as the court and chambers staff. For purposes of the hearing the courtroom is closed. And, with that, you can call your witness.

MR. TEITELBAUM: The People call Undercover 365.

COURT OFFICER: Witness entering.

(Undercover 365 entered the courtroom.)

THE CLERK: Do you solemnly swear or affirm that the testimony you're about to give to the Court will be the truth, the whole truth, and nothing but the truth?

THE WITNESS: Yes.

THE CLERK: Have a seat.

COURT OFFICER: Please state for the record --

THE COURT: Shield.

COURT OFFICER: Your shield or undercover number.

THE WITNESS: UC 365.

THE COURT: Okay, I'm going to ask you to please use that microphone. Get as close to it as you can. Speak slowly. Speak clearly. Everything is being transcribed.

Your witness.

MR. TEITELBAUM: May I inquire?

THE COURT: You may.

DIRECT EXAMINATION

BY MR. TEITELBAUM:

Q. Officer, who is your current employer?

A. NYPD.

Q. How long have you worked for the NYPD, total?

A. Approximately three and a half years.

Q. If you could, speak a little bit louder and a little bit slower. What is your current command?

A. Narcotics Borough Manhattan North.

Q. How long have you worked for Narcotics Borough Manhattan North?

A. Approximately 10 months.

Q. In what capacity do you work at Narcotics Borough Manhattan North?

A. I'm undercover.

Q. How long have you worked as an undercover?

A. Approximately 10 months.

Q. Have you ever held a non-undercover position?

A. Yes.

Q. In Manhattan North Narcotics?

A. Not in Manhattan North, but in NYPD, yes.

Q. Prior to your time at Manhattan North Narcotics?

A. Yes.
Q. Are you familiar with the term "case buy operation?"
A. Yes.
Q. What is a case buy operation?
THE COURT: I know what that is.
MR. TEITELBAUM: Understood.
Q. Are you familiar with the term "buy-and-bust operation?"
A. Yes.
Q. Are you familiar with the term "primary undercover?"
A. Yes.
Q. What does the primary undercover do?
A. Primary undercovers are, they're the ones that purchase drugs for NYPD.
Q. Approximately how many times have you worked as a primary undercover either for a case buy operation or a buy-and-bust, total?
A. Approximately 60 to 70 times.
Q. And that includes --
THE COURT: Say it again.
THE WITNESS: Sixty to seventy times.
THE COURT: Six-zero?
THE WITNESS: Yes.
Q. Does that include both buy-and-busts and case buys?
A. Yes.

Q. Are you familiar with the term "ghost undercover?"

A. Yes.

Q. What is a ghost undercover?

A. A ghost undercover is an undercover that looks after the primary for safetywise, and also to put a subject over that the primary is talking to, and, if it's positive, to let the field team know.

Q. Approximately how many times have you worked as a ghost undercover?

A. I would say approximately 70 times.

Q. When you work as a primary undercover do you carry a badge?

A. No.

Q. Why don't you carry a badge?

A. Safety reasons more so, just in case a subject or a pat-down, or just always be --

THE COURT: Keep your voice up, please. Everyone has to hear you.

Q. When you work as an undercover do you wear a police uniform?

A. No.

Q. Why don't you wear a police uniform?

A. Because we're in disguise as --

Q. If you were to wear a police uniform while attempting to work as an undercover what would the result be?

A. Probably I wouldn't be able to buy drugs.

THE COURT: People wouldn't buy drugs from a cop?

THE WITNESS: Yes.

THE COURT: If they knew they were a cop?

THE WITNESS: Correct.

Q. Do you ever wear a police uniform in public now that you work as an undercover officer?

A. No.

Q. Now, I'd like to specifically direct your attention to the area surrounding 110th Street to 125th Street and between Eighth Avenue and Second Avenue in New York County. Have you ever participated in a buy-and-bust operation there?

A. Yes.

Q. About how many times?

A. Approximately, approximately 10 times.

Q. Have you ever participated in a case buy operation there?

A. Yes.

Q. About how many times?

A. Approximately two to three times.

Q. Have you participated in any operations, either case buys or buy-and-busts -- and I'm referring to either as a ghost or a primary -- in that area since January 20th of 2017?

A. Yes.

Q. Do you expect to participate in any operations of that

type in that area in the future?

A. Yes.

THE COURT: How do you know that?

THE WITNESS: That's considered Manhattan North, so wherever they need us, that's where we go.

THE COURT: Is there something special about this area?

THE WITNESS: No. It's one of the areas, one of the areas that we cover.

THE COURT: Is it a particular area that's known to Manhattan North for high traffic? Do you have community complaints? Or is it just --

THE WITNESS: Yes.

THE COURT: Yes. Okay.

Q. Are the people that you purchase drugs from, either in a buy-and-bust or a case buy operation, always arrested?

A. Not always.

Q. What do you call the people who are not arrested after a case buy or a buy-and-bust operation?

A. Lost subjects.

MR. KOOS: What was that?

THE WITNESS: Lost subjects.

MR. KOOS: Lost.

Q. As you sit here today are you aware of any lost subjects for your own cases involving buys in the area around

the vicinity that we just discussed?

A. At this moment I can't recall.

Q. In addition to this case do you have any open cases pending in the Manhattan courts?

A. Yes.

Q. Do you ever come to the area around these courthouses -- and when I say, "these courthouses," I mean 100 Centre Street and the surrounding buildings -- for work?

A. Yes.

Q. What mode of transportation do you use to get here?

A. Department vehicle.

Q. Is that department vehicle marked or unmarked?

A. Unmarked.

Q. Do you ever arrive in marked police cars?

A. No.

Q. When you enter the --

THE COURT: Why not?

THE WITNESS: As an undercover cover I do not.

THE COURT: Huh?

THE WITNESS: As an undercover cover I do not.

THE COURT: Why not?

THE WITNESS: Because I'm an undercover, so I won't, my identity won't be known as a police officer.

Q. When you enter the courthouses -- and when I say "the courthouses" I really mean the buildings at 100 Centre Street,

80 Centre Street and 111 Centre Street -- do you use the main, front entrances?

A. I do not.

Q. What entrances do you use?

A. I use the side entrances.

Q. And why do you use side entrances instead of the main entrances?

A. So I don't run into any subjects that I have encountered.

Q. When you're --

THE COURT: You have lost subjects in Manhattan North?

THE WITNESS: Yes.

Q. When you're waiting to testify in a court proceeding where in the courthouse do you wait?

A. There's a designated area, room, for undercovers.

Q. Are you referring to the undercover room that's located in Special Narcotics?

A. Correct.

Q. Do you ever use on-line social media websites like Facebook or Instagram?

A. Personally use? Yes.

Q. Do you use your real name on those sites?

A. Yes.

Q. On those sites do you identify yourself as a police

officer?

A. No.

Q. Why not?

A. Because as an undercover I wouldn't want to put that out there.

Q. For what reason?

A. Safety reasons. I'm sorry.

Q. Do you take any special precautions with your social media profiles in terms of the security settings?

A. Yes. It's locked. On private. I'm sorry.

Q. In other words, can any member of the public see your social media profile?

A. No.

Q. That requires approval from you?

A. Yes.

Q. Have you received --

THE COURT: You do that for what reason?

THE WITNESS: Because I only want people that I know to be a part of my page, to see where I am.

THE COURT: Why?

THE WITNESS: I feel that it's easy for people to just put your name in it, so, being that I am undercover, if my name was to be found I wouldn't want them to know who I am, my family, and that I associate with.

THE COURT: Because?

THE WITNESS: Safety.

Q. Have you received specialized training to become an undercover officer?

A. Yes.

Q. During that training did you learn if narcotics suspects are ever armed?

A. Yes.

Q. What kind of weapons did you learn that narcotics suspects may be armed with?

A. It could be anywhere from brass knuckles, knives, guns.

Q. As a result of that knowledge are you concerned about potentially armed suspects while you are conducting undercover operations?

A. Yes.

Q. And what type of concern is it that you have about potentially armed suspects?

A. That they could hurt me.

Q. Have you ever been asked by a suspect if you are a police officer during a narcotics operation?

A. Yes.

Q. When you are asked do you tell them that you are in fact a police officer?

A. I do not.

Q. Why not?

A. Safety reasons, of course. And also to be able to purchase narcotics.

Q. Have you ever been frisked or patted down for weapons or recording devices by a suspect?

A. Yes.

Q. About how many times?

A. Approximately two times.

Q. That's within the past 10 months?

A. Yes.

Q. Have you ever been threatened by a subject in a buy operation?

A. Yes.

Q. About how many times?

A. Oh, approximately two to three times.

Q. Can you give an example of a threat that you received.

A. Yes. A subject said that the next time I see her in the street I'm going shoot her in the head.

Q. So, just to be clear, the suspect said to you that the next time that she saw you --

A. Correct.

Q. -- in the street she would shoot you in the head? That's correct?

A. Yes.

Q. Thank you.

Have you ever worked with other undercover police

officers in the field?

A. Yes.

Q. Are you ever seen in public with other undercover officers while you're working?

A. Yes.

Q. What effect would it have on you if the defendant, his family, or people that he knows were to learn of your real name?

A. It would be a negative effect. I would be concerned about safety.

Q. Would that put you in more danger or less danger in your capacity as an undercover officer?

A. More danger.

Q. And why specifically is that?

A. Because if I see them out on the street they could let other people know who I am and what I do and whatever their reactions are.

Q. What about specifically if they were to learn your real name, your first and last name? What effect would that have?

A. Also a negative effect, because they could look me up anywhere.

THE COURT: And you wouldn't want that?

THE WITNESS: No, I wouldn't.

THE COURT: Why not?

THE WITNESS: Safety reasons.

THE COURT: If your identity was revealed, would it affect any pending cases that you have as an undercover?

THE WITNESS: Yes.

THE COURT: How so?

THE WITNESS: I believe if they, if it gets out there to the public, it spreads, and now I will be known as an undercover, a cop, and then I wouldn't be able to do my job.

Q. Officer, do you have a driver's license?

A. I do.

Q. Is your real name on your driver's license?

A. It is.

Q. Are your name and address on file with the Department of Motor Vehicles?

A. Yes.

Q. Are your name and address on file with the Social Security Administration?

A. Yes.

Q. Is your name and address on file with other agencies, such as the cable company or the electric company?

A. Yes.

Q. If the defendant's family, friends, or members of the public saw you testifying as an undercover police officer would you fear for your safety?

A. I would.

Q. Would you please explain why.

A. Because now they know who I am. Once again, if they see me out on the street they could tell other people, they could take actions on themselves, harm me or my family.

Q. In addition to compromising your safety would it in any way compromise your ability to do your job as an undercover?

A. Yes.

Q. How so?

A. Because they will let the public know, and the public would know I'm an officer, and I wouldn't be able to purchase narcotics.

Q. You stated before that you've been seen in public with other undercover officers while you're working. If your identity as an undercover officer became known would you fear for the safety of the other undercovers?

A. I would.

Q. Why is that?

A. Because I would believe they would -- knowing that I'm a cop, they would know that they're a cop associating with a cop.

Q. And would that have an effect on -- in addition to compromising the safety of those other undercovers, would it in any way compromise their ability to do their jobs?

A. Yes.

Q. How so?

A. The streets will also know, the people in the streets will also know that they're cops too.

Q. Based on your training and experience as an undercover officer, if a seller of narcotics knows that the person that they are interacting with is a police officer, in the vast majority of circumstances will they sell narcotics to that person?

A. No.

Q. Officer, when is the next time that you anticipate you will go back to the area that we've been discussing? And that's between 110th and 125th Streets between Eighth Avenue and Second Avenue.

THE COURT: Ballpark.

A. Within -- within the next couple of weeks, a week to a month.

THE COURT: You have been there in the last couple of weeks?

THE WITNESS: Yes.

THE COURT: Are you going back?

THE WITNESS: Yes.

THE COURT: When?

THE WITNESS: When they put me out there.

THE COURT: It could be tomorrow, the next day?

THE WITNESS: Correct.

THE COURT: Are you sure that you'll be back in

that area?

THE WITNESS: Yes.

Q. Officer, would you please just tell the Court what the total geographical confines are of Manhattan North. Roughly.

A. It deals with the 25th Precinct, the 28th Precinct, 32nd, 23rd, Harlem.

Q. Is it fair to say that, at the very at least, it includes all of Manhattan north of Central Park?

A. Yes.

Q. And is the area between 110th Street and 125th Street in Manhattan one of the areas that Manhattan North Narcotics focuses on in its enforcement operations?

A. Yes.

MR. TEITELBAUM: I don't have any further questions.

THE COURT: I have a couple of questions.

EXAMINATION BY THE COURT:

Q. With respect to the area where this alleged incident is alleged to have occurred, have you made other purchases in and around that area, cases of which are still currently pending in this courthouse?

A. I don't believe they're pending right now. I do have a case right now pending. I just can't remember right now what precinct that is, what area that's in right now.

Q. Okay, have you ever as an undercover testified in open

court?

A. No. I just did grand jury.

Q. But never in a courtroom?

A. No.

THE COURT: Okay, cross examination.

Q. Oh. Have you ever been recognized while you were out on the street as an undercover?

A. Not as an undercover, but -- not as a cop undercover; just as a regular person that they've seen.

Q. Right, but -- you've been frisked, but they haven't concluded, as far as you know, that you're a cop?

A. No. No.

THE COURT: Okay, go ahead.

CROSS EXAMINATION

BY MR. KOOS:

Q. Officer, I missed how long you've been a police officer. How long have you been a police officer?

A. Approximately three and a half years.

Q. Three and a half?

A. Yes.

Q. So prior to the last 10 months when you've been working undercover were you a uniformed officer on patrol?

A. Yes.

Q. In the same area of Manhattan North?

A. No, I was in Staten Island.

Q. Do you have any other duties besides being an undercover police officer trying to do controlled buys, et cetera?

A. No, just an undercover, a cop.

Q. Do you have, is there anything in particular about this case, the people that are involved in this case, such as my client, that would seem to you that you would have some sort of fear of physical danger to yourself?

A. Yes. Because now I feel like now he knows who I am, so anything out there -- I don't know what he could do if he's out there.

Q. Okay, is there any gang affiliation involved in this case, that you know of?

A. Not that I know of.

Q. No one has threatened you concerning this case?

A. Not this case, no.

MR. KOOS: I have nothing further, Your Honor.

THE COURT: I have a few more questions.

EXAMINATION BY THE COURT:

Q. If the defendant's grandmother were permitted to be here while you testified, knowing that she lives in the area where this alleged sale is alleged to have taken place, do you have a position with that? Would it affect you or not?

A. I would say yes.

Q. Tell me why.

A. I don't know his grandmother. I don't know, you know, how she is, or her background or anything like that, so I don't know what she's capable of or anything.

Q. And what are you concerned about, then, in that instance? What could happen?

A. Maybe that she could tell people who I am.

Q. And what does that mean?

A. Identify me as a police officer, as undercover, as someone that put her grandson in police custody.

Q. Meaning?

A. What do you mean, "meaning?" I don't --

Q. If she saw you on the street and she knew you testified against her grandson, how could that affect you, your personal safety or your cases, if at all?

A. Because if she sees me, she points me out and says, that's a cop, or an undercover, or gets a family member to harm me, I mean, I don't, I can't tell that action; I wouldn't know, but that is a concern.

THE COURT: Anything further from the People or the defendant?

MR. TEITELBAUM: Nothing for the People.

MR. KOOS: Nothing, Your Honor.

THE COURT: Okay, if you can give me one second -- just give me one second.

You can step down. Thank you.

(Undercover 365 left the courtroom.)

THE COURT: Okay, does either side wish to heard?

MR. TEITELBAUM: Yes, Your Honor.

THE COURT: I'm listening.

MR. TEITELBAUM: Your Honor, I submit that the People have made the necessary factual showing, based on overriding safety concerns of Undercover 365, that the courtroom should be completely sealed during the undercover officer's trial testimony, including as to the defendant's grandmother, and I can provide more detailed argument about that now.

THE COURT: This would be the moment.

MR. TEITELBAUM: As the Court is aware, the party seeking to close a hearing or a trial must advance an overriding interest that is likely to be prejudiced by the hearing not being closed or the trial not being closed. The closure must be no broader than necessary to protect that interest. The trial court must consider reasonable alternatives to sealing the proceeding, and the trial court must make adequate findings of fact to support the closure.

And that comes originally from the Supreme Court case Waller versus Georgia. Now, in this case, Judge, the People have advanced an overriding interest in closing the hearing completely, and that is not only Undercover 365's safety, but also the safety of all of the undercovers that

that officer works with.

Specifically, if Undercover 365 becomes known as a police officer in the area that the officer works, then not only will subjects in that area potentially be able to harm that officer and the officers that 365 works with, but also Undercover 365 will not be able to successfully purchase narcotics and do 365's job as an undercover, and neither will the officers that 365 works with.

Additionally, specifically with regard to the defendant's grandmother, while at this juncture I don't have any reason to believe that she's a member of a narcotics trafficking organization or that she has a criminal record -- in fact, one of my colleagues did do a check to confirm, based on her date of birth and her name. Based on the date of birth and name that I was provided, no criminal record was revealed.

However, with regard to the grandmother, her criminal history is entirely beside the point, because she lives right in the area, one of the areas where Undercover 365 operates.

And the scenario that was made clear from Undercover 365's testimony and from the Court's questions to 365 is a scenario where 365 and 365's colleagues are conducting operations in that area and by pure happenstance run into the defendant's grandmother, and there are many

very negative things that could happen at that point.

The defendant's grandmother could choose to inform other members of the public that 365 is a police officer. The grandmother could directly confront Undercover 365 in the middle of a potentially dangerous and precarious undercover operation.

And so, for all of those reasons, I do think that the People have advanced an overriding interest for closure of the courtroom to the general public, and also to the defendant's grandmother.

The case that I would cite once again for this proposition is People versus Alvarez, 51 A.D. Third 167, which is a 2008 First Department case, where because the People made a record that the undercover officer in that case continued to work in the neighborhood where this crime occurred and anticipated returning to that neighborhood in the future to do the same types of operations, and also the defendant's family member in that case lived in the area, then closure of the courtroom both to the general public and to that family member specifically was appropriate.

Additionally, going to the second, third and fourth factors set forth in Waller versus Georgia, there is no narrower solution in this instance to closure of the courtroom than closure of the courtroom. There are no reasonable alternatives, certainly, that occur to me at

this moment or that I've been able to find to closing the courtroom to the general public and to the defendant's grandmother during Undercover 365's testimony.

Really, that is the only way that the Court can ensure that the safety concerns of Undercover 365 and of 365's colleagues can be protected and also to ensure that Undercover 365 and 365's colleagues can continue to do their important police work in the future in the geographical area that we have been discussing.

Now, turning briefly to the issue of whether or not Undercover 365 should be permitted to testify under a shield number and not under a name, the test for evaluating this issue is set forth originally in People versus Stanard, S-T-A-N-A-R-D, 42 New York Second 74, and in that case the Court explained that, first, the People must come forward with some showing -- it's not as onerous of a test as in Waller -- of why a witness should be excused from providing a name, and then the burden shifts to the defense to demonstrate the materiality of the defendant's name or address or other identifying information.

And, finally, the trial court must balance the defendant's right to cross examination of the defendant -- excuse me -- of the witness with the witness's interest in some degree of anonymity, and here I do think that Undercover 365's testimony provides an ample basis for

finding that Undercover 365 can testify under a shield number without providing any other identifying information.

As you heard, 365's real name is on file with all sorts of government agencies, as is necessary to have a normal life as a citizen, DMV, the electric company, et cetera, and so if the officer's real name were to become known as a result of this proceeding the effect on the safety and security, both of the officer as well as the officer's family and friends, would be extremely severe, because the defendant or a member of the public could seek out Undercover 365, where that officer lives, and potentially severely endanger the safety of that officer or of the officer's family or friends.

And I can cite two cases to the Court for the general proposition that when a showing of this nature has been made it is appropriate to have an undercover officer testify under a shield number. Those cases are People versus Mulligan, M-U-L-L-I-G-A-N, which is a First Department case from 2002, 298 A.D. Second 233, and People versus Ortiz, a First Department case from 2010, 74 A.D. Third 672.

And so, for all of those reasons, the People respectfully request that the courtroom be sealed, both to the general public and as to the defendant's grandmother, for the duration of Undercover 365's testimony, and that

Undercover 365 be permitted to testify solely under a shield number. Thank you.

THE COURT: Go ahead.

MR. KOOS: If it please the Court, Your Honor, we would have no problem with the officer not revealing her name. From a practical standpoint, I believe the only person that has any interest in this trial that I know of is the grandmother. It's not like we're going to have a large number of people out here watching the trial, so it really comes down, I think, to whether to exclude her or not.

Obviously, there is public policy in favor of having open trials, having people be able to attend trials, and in, in -- there's also another consideration from the standpoint that the jury notices when people are here, specifically if the person appears to be in support of, say, a family member.

And that's a positive thing, that defense attorneys like to have someone in the audience so it doesn't appear that my client has just been forsaken by his family. From that standpoint we would ask that the grandmother be allowed to be present.

As far as the identity of the, of the undercover officer, obviously my client has seen her, and so I don't know that the grandmother would have that big of an effect

on her ability to do her job or her safety.

In cases where, that I've been involved in, one specifically, there were rival gang members that showed up in court every day, and obviously -- in fact, we had a fight break out in the middle of a trial, but those are situations that are unusual, and the judge was correct in clearing the courtroom, subject to being closed.

I go back to, again, the case which is, you know, the original case on this, where it says, "We only point out the discretion of the courts should be sparingly exercised, and then only when unusual circumstances necessitate."

I'm not sure that this is a case of unusual circumstances. Undercovers have to testify at trials, and it happens quite, quite commonly, so I guess my argument would be that the grandmother would be allowed to be in the courtroom.

MR. TEITELBAUM: Judge, could I be heard extremely briefly once more?

THE COURT: Yes.

MR. TEITELBAUM: I would just -- within the case of Alvarez, I would specifically direct the Court to pages 175 to -- really, actually, all of page 175, where the Court said although the undercover did not expressly state his fear of testifying in front of the defendant's

girlfriend, the record makes clear that she was a specific focus of the prosecution's application, as the grandmother is here, because she lived in the neighborhood where the undercovers were actively operating.

And later on, in affirming the trial court's decision to close the courtroom even to a member of the defendant's family, the Court stated -- and I'm quoting once again -- "obviously, exposing their identities in this manner," meaning the undercovers, "could have dangerous consequences, and such danger cannot be overlooked merely because neither defendant nor any of his associates had personally threatened either officer in the past, and additionally, because both undercovers continue to work in an undercover capacity in the same area where the sale occurred and defendant's girlfriend lived, a credible and legitimate threat existed that the girlfriend might spot the officers on the street during their operations and recognize them from court."

And for that reason the First Department affirmed a closure as to family members or significant others as well.

THE COURT: Anything further from defense?

MR. KOOS: No, Your Honor.

THE COURT: Okay. This is my ruling.

This Court fully credits the testimony provided

by Undercover 365 at the Hinton hearing held just earlier today. As the People pointed out, the controlling case is Waller versus Georgia, a Supreme Court case from 1984 at 467 U.S. 39.

In that case we all know that the United States Supreme Court set out a four-prong test which has been adopted by the courts of our state for determining whether courtroom closure violates a criminal defendant's Sixth Amendment rights. The four-prong test alluded to by the parties requires the party seeking closure, the DA in this case, must advance, as we know, an overriding interest that is likely to be prejudiced.

The closure, of course, must be no broader than necessary to protect that interest. A trial court must consider, as we know, reasonable alternatives to closing that proceeding, and it must make findings adequate to support closure, and the New York courts through Alvarez, the case cited by the People, so reiterate the four prongs of the Waller case.

With respect to the first prong of Waller, this Court finds that the People have made a sufficiently particularized showing of an overriding interest justifying closure of the courtroom during the undercover's testimony. I'll speak specifically to the grandmother in a moment. And I'm relying on the Torres First Department case from

2004, 13 A.D. Third 183, and DeJesus, also the First Department, at 305 A.D. Second 170.

The People have established the following: The undercover will be returning to the area where the arrest took place to conduct further undercover drug operations. In fact, the undercover has been back in that area since the arrest of the defendant earlier this year.

And the undercover plans to go back to that area not just in Manhattan North, which is a portion but not all of Manhattan, but to that precise area as needed, as that's an area they go to with some frequency, according to the undercover, based on a variety of issues, including the community complaints.

Also established was that, although the undercover couldn't say there were lost subjects precisely in that minute location of Upper Manhattan, but that the undercover does have lost subjects in Manhattan North, that the undercover didn't say precisely in that area, and I saw the undercover testify, and the undercover hesitated as the undercover answered that question to the extent that the undercover seemed to be racking the undercover's brain to the extent of trying to figure out where the lost subjects in Manhattan North came from, and the undercover actually took a moment and said, "I have lost subjects, but I'm not exactly sure of the precise areas of Manhattan North, but I

have lost subjects."

I think that was a testament to the credibility of the undercover. Significantly, the undercover testified about being threatened in the past during operations in the area of Manhattan where the undercover does conduct these buy-and-bust operations.

One, the undercover has been frisked for -- I think, I think the testimony was for recording devices as well as for weapons during undercover operations, frightening in and of itself, but most compelling was being threatened by a subject, suspect -- I don't know what to call them -- that next time they saw the undercover they would shoot the undercover in the head. The testimony was as compelling as it was chilling.

Certainly, the undercover takes precautions to conceal identity while coming to this courtroom by traveling in unmarked cars, certainly no uniform, certainly no badge, by hanging out with other undercovers as opposed to uniformed personnel. The undercover has never testified in an open courtroom in connection with undercover activities.

The undercover takes great pains in the undercover's personal life relative to social media because, as the undercover said, the undercover has concerns about safety and concerns about the efficacy of

other operations in the field.

The undercover pointed out safety concerns not only to the undercover, but for the undercover's colleagues, other undercovers with whom the undercover works, as if someone were to see the undercover hanging out with other undercovers perhaps all of their identities would be known, thus compromising myriad investigations.

Additionally, the undercover testified about staying in subject rooms, private rooms, using the side entrances, all as a means to continue protecting the identity of the undercover. The undercover expressed specifically concerns about the undercover's own safety, but also that of the undercover's family and the undercover's ability to do the undercover's job, along with other undercovers being able to do their jobs.

What may not have jumped off the page of this transcript was the body language I was able to observe of this undercover, soft-spoken undercover, who exuded a certain amount of fear even being in this courtroom, this closed courtroom today.

Now, I will say that, based on these circumstances, I do find that the People have met their burden of establishing an overriding interest that is likely to be prejudiced by denying closure of the courtroom during the undercover's testimony within the meaning of

James, at 47 A.D. Third 947, Spears, S-P-E-A-R-S, 15 A.D. Third 312, Torres and DeJesus, the two cases I cited earlier as well, as well as the second Torres case, the same name, different year, 862 A.D. Second 364. That is an earlier case than the other Torres case I referenced before.

The People have also satisfied the second Waller factor in that the closure is no broader than necessary to protect the undercover's interest in that -- I should say that leaves me with the grandmother.

Here's my ruling. I agree with the defendant that jurors may notice when someone has family members. I don't think that argument is particularly compelling in this limited context, because there are myriad people, myriad witnesses on the People's list, and certainly the grandmother would be welcome to any and all of them, even jury selection. The application by the People is simply relative to the undercover for the reasons they've espoused and that I have found.

I will say -- I don't think I have to say this, but I am going to say it. I have never excluded a family member from the courtroom. Ever. I think the defendant's example about gang members and girlfriends is compelling. I understand that, I understand that to be slightly different, perhaps, than the facts here.

The problem I have here with the grandmother is twofold. One is that she lives exactly where this incident is alleged to have occurred. Actually, three things. Two, that the undercover said the undercover will be back in that precise area, and, relatedly, the third point is articulated best by the undercover. The undercover expressed that even if the grandmother -- who is, you know, the grandmother.

She's not a particularly young person, not a particularly old grandmother, but, you know, walks well on her own; I saw her walk into the courtroom, but she certainly could, the grandmother, that is, see the undercover and blow an operation or harbor some anger and interrupt an operation. That's two very dangerous situations.

Or -- and I don't want to disparage her, and I don't want this to be misunderstood -- certainly another family member could be contacted, or someone else. I do believe that being in that precise area, on that corner, living right where this occurred, right where this undercover is going back to work -- and I'm going to go out on a limb and say the undercover was actually somewhat unique. I'm going to leave it at that.

I think that that could disrupt operations. I think that could affect the safety of this undercover and

other undercovers, and, as a result, for the undercover's testimony I will preclude the grandmother. I will invite her to attend the entirety of the rest of this trial, certainly. I will also say that if other family members show up I am not precluding them at this moment.

If someone other in the family shows up we will have a hearing at that time. I will order my staff, who will be posted outside the door, to contact me if anyone seeks entry, so that I will tell defense counsel and the defendant who is here. I will hear your arguments if there's someone else who needs to be, who wants to hear and should hear that testimony, because there's no good reason to exclude them.

I will certainly stop and take a break and let you be heard on that topic. There's no question about that, and my court staff is here, and I am so ordering them in that regard now and will do so again.

I do believe this closure is limited. I do believe it is not so overbroad as to affect the defendant's Sixth Amendment rights, for the reasons I have espoused and within the meaning of Frost at 100 New York Second 129. I do believe there is the overriding interest justifying closure of this courtroom during the undercover's testimony, and including the grandmother.

I believe it is no broader than necessary. I

don't believe there are any alternatives to closure that have been either suggested or any that I can think of, and therefore the third prong of Waller has been satisfied within the meaning of Frost and Ayala, A-Y-A-L-A, at 90 New York Second 490; Riviera, 260 A.D. Second 301; and Laureano, 245 A.D. Second at pages 150 and 151.

I will say again, if anyone else appears we will stop. We will have a hearing. I am not precluding anyone else from entering, really, without knowing full well who they are and what effect they may have on this case. I will, for the foregoing reasons and within the meaning of some of the cases I've already cited, allow the undercover to testify with a shield number.

I will say, unless the defense tells me otherwise, at the time the undercover testifies I will tell the jury that an undercover police witness is entitled to use their undercover number and leave it at that.

This constitutes the decision and order of the Court. I am going to seal this record, but of course make it available to both sides for any future review.

The courtroom is now open.

We do have other pretrial matters to address. There was the issue of Molineux. Any further argument before I rule on the Molineux issue?

MR. TEITELBAUM: The People rely on their written

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CRIMINAL TERM
PART: 31

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THE PEOPLE OF THE STATE OF NEW YORK

Indictment
No: 00388/2017

-against-

LIONEL LEWIS

Defendant.

----------X

100 Centre Street
New York, NY 10013
September 12, 2017

BEFORE: HONORABLE JILL KONVISER,
Justice of the Supreme Court

A P P E A R A N C E S:

For the People:
CYRUS R. VANCE, JR., ESQ.
District Attorney, New York County
One Hogan Place
New York, New York 10013
BY: JESSE MATTHEWS, ESQ.

For the Defendant:
GARY KOOS, ESQ.
225 Broadway
New York, New York

KATHLEEN MONTEIRO, RPR
SENIOR COURT REPORTER

KM

THE CLERK: Number 52, for Lionel Lewis.

MR. KOOS: Gary Koos, 225 Broadway, New York, New York.

THE COURT: This is a sentence after conviction after trial.

I assume you have a file, People?

MR. MATTHEWS: Yes.

THE COURT: And so I have a probation report. Have both sides, and Mr. Lewis, had a chance to see the probation report?

MR. KOOS: Yes, your Honor.

MR. MATTHEWS: Yes.

THE COURT: Before I proceed to sentence, do the People wish to say anything?

MR. MATTHEWS: Yes, your Honor. The People recommend eight years in prison followed by three years post-release supervision. The defendant was convicted in a jury trial after rejecting an offer of one year jail in Part N, and 2.5 years prison in Part 22, and again in Tap B.

The defendant is a career criminal and serial recidivist with two felony drug convictions and two violent robbery convictions, as well as numerous misdemeanors. Moreover, the defendant took the stand and perjured himself, giving an implausible story of January 20, 2017 that differed starkly from the People's evidence. Clearly, the

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jury did not credit the defendant's testimony, they would have acquitted him if they had.

The defendant had a right to testify in his own defense, he did not have a right to commit perjury on the stand. In light of the defendant's violent and criminal career history, as well as his conduct at trial, a sentence above the mandatory eight years prison is appropriate.

THE COURT: Mr. Koos, you want to be heard?

MR. KOOS: Thank you, your Honor.

Your Honor is obviously quite familiar with this case, having gone through the trial and heard my client on the stand, as well. Just briefly, his felony convictions go back to when he was 17 years of age. He did six months on a Class D felony. Then, in 1999, it looks like he received a sentence of five years, as well as three to six years on an Attempted Robbery and a Criminal Sale in the Third Degree. That was when he was 20. And then at age 26, he had the Attempted Robbery and that was in 2007. He got five years on that. He was released in 2011/2012. Since that time, there are various misdemeanors, but basically, since 2012, there's been no more felony convictions.

As your Honor knows, this was a case that involved four rocks, or four bags of -- or five -- of crack cocaine, a street value of $40. Because he is a violent predicate, the minimum the Court can do is the six years. It would

KM

seem to me that that would be more than sufficient in this particular case, particularly involving the facts of the case.

I know Mr. Teiterbaum would like to convince the judge that my client perjured himself on the stand. However, he does have a right to testify on his own behalf, and he testified under oath. So it would seem to us that six years is more than sufficient in this case as a punishment for his actions. We would ask the Court not go beyond the six years.

THE COURT: Mr. Lewis, you have a right to be heard before I impose sentence, is there something you want to say, sir?

THE DEFENDANT: No.

THE COURT: I am fully familiar with the facts and circumstances of this case, having presided over the trial. The defendant's record, we know -- all of us do -- full well. He's got five felony convictions, not including his Youthful Offender Adjudication. Of those felony convictions -- I'm sorry, the four felony convictions -- two of them are violent, two of them are not. And the Youthful Offender Adjudication is a non-violent offense. He's got about 15 misdemeanors, a warrant history. He is a parole violator. He did have the benefit of participating in Willard at one point during his incarceratory phase.

KM

I will say that the defendant had a fair trial in this part, a good lawyer, a fair prosecutor, and the jury chose not to believe the defendant's account when he testified on his own behalf. I won't penalize the defendant for testifying in this case. The jury chose not to believe him, that was their purview.

The People said somehow the defendant should be punished for the way he acted in court. I assume they meant that he testified, from their view, untruthfully. I will say, he was always respectful in this part. He always followed the rules -- that does count from my perspective.

With that said, this was an undercover buy and bust, where, while the evidence was not traditional in the manner in which the sale went down, the defendant was certainly inextricably interwoven in the sale to the undercover. The evidence was, in fact, overwhelming.

In any event, for your conviction, Mr. Lewis to Criminal Sale of a Controlled Substance in the Third Degree, I sentence you to six years in state prison to be followed by one and a half years post-release supervision, the statutory minimum, which I think is appropriate in this case.

If you're interested in appealing your conviction, notify your attorney and he will file -- or handle it from there. The defendant is so sentenced.

KM

The fees of $375 are collected from other agencies. Good luck to you, Mr. Lewis.

THE CLERK: Has he been arraigned on the Predicate Felony?

THE COURT: I don't know, I thought he was.

Arraign the defendant on the Predicate Felony Statement.

THE CLERK: Darnell Strickland, the District Attorney has filed a statement with this court charging you with having a Predicate Felony conviction -- I'm sorry, Lionel Lewis, the District Attorney has filed a statement with this court charging you with having a Predicate Felony conviction. The statement reads as follows:

On January 8, 2007, in the Supreme Court of New York County, in the State of New York, the defendant was convicted of the felony of Attempted Robbery in the Second Degree, a violent felony as that offense is defined in Penal Law Section 70.02 sub 1. The ten-year period referred to in Penal Law 70.06 sub 1(v) has been extended by the defendant's incarceration at the New York State Downstate Correctional Facility from March 21, 2007 to June 30th of 2010.

You may controvert any allegations made in this statement. Any allegations uncontroverted shall be admitted by you. Do you admit that you are the person named in this

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statement?

THE DEFENDANT: What did he say?

THE CLERK: Do you admit that you are the person named in this statement?

THE DEFENDANT: Yes.

THE CLERK: Do you admit that the allegation in the statement is true?

THE DEFENDANT: Yes.

THE CLERK: Do you have any constitutional challenges to that conviction?

THE DEFENDANT: No.

THE COURT: The defendant is adjudicated a second violent felony offender, and within the meaning of the statutory crime work I am sentencing you for Criminal Sale of a Controlled Substance in the Third Degree, for your conviction on August 30th, to six years in state prison to be followed by one and a half years of post-release supervision.

A $375 fee will be collected from other agencies.

Good luck to you, Mr. Lewis.

* * *

It is hereby certified that the foregoing is a true and accurate transcript of the proceedings.

Kathleen Monteiro

KATHLEEN MONTEIRO
SENIOR COURT REPORTER

KM

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

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

LIONEL LEWIS,

Defendant-Appellant.

NOTICE OF ENTRY

Indictment No. 388/17

PLEASE TAKE NOTICE, that the within is a true copy of an Order duly filed and entered in the above-entitled action in the Office of the Clerk of the Supreme Court, Appellate Division, First Department on July 2, 2020.

Dated: New York, New York
July 2, 2020

CYRUS R. VANCE, JR.
District Attorney, New York County
One Hogan Place
New York, New York 10013
(212) 335-9000

STATE and COUNTY of NEW YORK

_____, being duly sworn, deposes and says, that on the ___ day of _____ 2020, per agreement between the parties, I served the within Order and Notice of Entry on the attorney for appellant (named hereafter) by electronic mail at the address designated for such service.

JOSEPH M. NURSEY
Office of the Appellate Defender
11 Park Place, Suite 1601
New York, NY 10007
OADfilings@oadnyc.org

STEFAN M. MILLER
Kirkland & Ellis LLp
601 Lexington Avenue
New York, NY 10022
stefan.miller@kirkland.com

_____

Sworn to before me this _____day of _____2020

_____
Notary Public

Richter, J.P., Kapnick, Webber, Gesmer, Moulton, JJ.

11740 The People of the State of New York, Ind. 388/17
Respondent,

-against-

Lionel Lewis,
Defendant-Appellant.

_____

Christina Swarns, Office of the Appellate Defender, New York (Joseph M. Nursey of counsel) and Kirkland & Ellis LLP, New York (Stefan M. Miller of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Stephen Kress of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Jill Konviser, J.), rendered September 12, 2017, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to a term of six years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis to disturb the jury's credibility findings. We note that "[o]ur review of the . . . weight of the evidence is limited to the evidence actually introduced at trial" *(People v Dukes*, 284 AD2d 236, 236 [1st Dept 2001], *lv denied* 97 NY2d 681 [2001]).

We find no violation of defendant's right to a public trial. The court providently exercised its discretion in excluding defendant's relative from the courtroom based on the relative's residence in the area in which the testifying undercover officer

expected to continue her operations within a short time (*see People v Campbell*, 16 NY3d 756 [2011]; *People v Alvarez*, 51 AD3d 167, 175 [1st Dept 2008], *lv denied* 11 NY3d 785 [2008]). The court properly factored in the officer's distinctive appearance, which would readily enable defendant's relative to recognize her and reveal her identity to others, and the size of the geographic area. We have considered and rejected defendant's remaining arguments on this issue.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters of trial strategy not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, because defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant

has not shown that counsel's alleged omissions fell below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived defendant of a fair trial or affected the outcome of the case.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 2, 2020

CLERK

State of New York
Court of Appeals

BEFORE: LESLIE E. STEIN, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

ORDER DENYING LEAVE

LIONEL LEWIS,

Appellant.

Appellant having applied for leave to appeal to this Court pursuant to Criminal Procedure Law § 460.20 from an order in the above-captioned case;*

UPON the papers filed and due deliberation, it is

ORDERED that the application is denied.

Dated: October 20, 2020

at Albany, New York

Leslie E. Stein

Associate Judge

*Description of Order: Order of the Appellate Division, First Department, entered July 2, 2020, affirming a judgment of the Supreme Court, New York County, rendered September 12, 2017.