

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2017

KEITH KING,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF NEW YORK,
APPELLATE DIVISION, FIRST DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

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February 18, 2018

QUESTIONS PRESENTED

1. The constitutional right to a public trial is fundamental, and courtroom closure should be “rare.” *Waller v. Georgia*, 467 U.S. 39, 45 (1984). Thus, a party seeking to close a courtroom must first “advance an overriding interest that is likely to be prejudiced” by open-court testimony. *Id.* at 48. As this case demonstrates, New York courts find that this requirement is met virtually every time an undercover police officer testifies in a drug trial.

Do the generic risks inherent in undercover police work satisfy *Waller*’s first requirement of “an overriding interest that is likely to be prejudiced” by open-court testimony ?

2. In *Presley v. Georgia*, 558 U.S. 209, 215 (2010), the Court summarily reversed the petitioner’s conviction because the trial court failed to consider alternatives to closing the courtroom. As in *Presley*, the trial court in petitioner Keith King’s case closed the courtroom to the public without any mention of alternatives. The state appellate court nevertheless upheld the closure, holding that “it can be implied that the [trial] court determined that no lesser alternative would suffice.” *People v. King*, 58 N.Y.S.3d 40, 41-42 (N.Y. App. Div. 2017) (citing *People v. Echevarria*, 21 N.Y.3d 1, 14-18 (N.Y. 2013)).

Does this Court’s requirement that trial judges consider reasonable alternatives to closure allow that consideration to be “implied”?

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All parties appear in the caption of the case on the cover page.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2017

KEITH KING

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF NEW YORK,
APPELLATE DIVISION, FIRST DEPARTMENT

Keith King 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 opinion of the Supreme Court of the State of New York, Appellate Division, First Department is reported at *People v. King*, 58 N.Y.S.3d 40 (N.Y. App. Div. 2017). Appendix (“App.”) A. The November 21, 2017, Order of Hon. Janet DiFiore, Chief Judge of the New York Court of Appeals, denying petitioner’s application for leave to appeal is reported at *People v. King*, 30 N.Y.3d 1020 (Table) (2017). App. B. The Decision and Order of the trial court,

the New York Supreme Court, New York County (Goldberg, J.), dated November 13, 2014, granting the prosecution’s motion to close the courtroom to the public during the trial testimony of an undercover police officer was dictated orally into the record and is unreported. The transcript of the hearing upon the prosecution’s motion to close the courtroom to the public, including the Decision and Order of the trial court closing the courtroom to the public is App. C.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257. 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).

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.

This case also involves the Fourteenth Amendment, which provides, in relevant part, that no state shall “deprive any person of . . . liberty, . . . without due process of law.” U.S. Const. amend. XIV.

STATEMENT OF THE CASE

Petitioner's arrest and prosecution closely resemble those of most criminal defendants arrested for street-level drug sales in "buy-and-bust" cases in New York City. In nearly all of these cases, including petitioner's, the trial court excludes the general public, with no exception made for the press, from the courtroom during the heart of the prosecution's case. It is thus the commonplace nature of petitioner's case that merits this Court's review.

A. The Arrest.

The New York City Police Department (NYPD) conducts "buy-and-bust" operations daily. During these operations, an undercover police officer typically makes a one-time purchase of drugs from anyone he encounters selling them at a certain location. Another undercover officer, called the "ghost," is often charged with following the undercover, transmitting information about his actions to a back-up team, and indicating when the undercover has made a "positive buy sign." Once there is a positive buy sign, a back-up team arrests the alleged seller.

On March 6, 2014, petitioner Keith King was arrested during a buy-and-bust operation in the Port Authority bus terminal in New York City and charged with selling \$40 worth of crack cocaine to an undercover police officer, referred to as "UC 276." Keith King was indicted for criminal sale of a controlled

substance in the third degree, a class B felony in New York, as well as criminal possession of a controlled substance in the seventh degree, a misdemeanor.

B. *The Trial Court's Closure Order.*

Prior to the testimony of the undercover officer at Keith King'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 officers' testimony. The trial court then held what New York courts call a *Hinton* hearing¹ to determine if closure was appropriate under this Court's decision in *Waller v. Georgia*, 467 U.S. 39 (1984).²

At the *Hinton* hearing, the undercover officer offered no out of the ordinary reason why his safety would “likely” be compromised by giving open-court testimony at Mr. King's trial—a requirement of *Waller*'s first prong. *See Waller*, 467 U.S. at 48. Instead, his testimony established that he possessed the general safety concerns inherent in undercover work.

The officer recited what has essentially become a script at *Hinton* hearings. UC 276 testified that he takes precautions to conceal his identity as

¹ The hearing is named for *People v. Hinton*, 31 N.Y.2d 71 (N.Y. 1972).

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.

a police officer; that in the past he has been threatened as a result of his work (but never by anyone associated with Keith King); that he has “open cases” (cases involving arrested suspects that are pending in court) and “lost subjects” (people from whom he had purchased drugs but whom the back-up officers had not arrested); and that he plans in the future to return to the “area” or “vicinity” where petitioner had been arrested several months earlier. App. C. 6-8, 17-18.

These factors establish that the officer continued to perform his job and that the nature of undercover work is risky. But none of them shows that open-court testimony in Keith King’s case posed any additional risk to the officer than testimony in any other case would.

Specifically, UC 276 testified that he buys drugs in six Manhattan precincts, principally the First, Fifth, and Seventh Precincts. App. C. 4. The Port Authority bus terminal is in the Fourteenth Precinct, or Midtown South, where he has one or two open cases with “lost subjects.” App. C. 4-5. He is involved in long-term investigations in Manhattan, but none in the Fourteenth Precinct. App. C. 23. He typically goes to the area of the Fourteenth Precinct about five times a month and there are one or two defendants in his cases from the Fourteenth Precinct who are at liberty, whom he had seen on the street. App. C. 6. He also had “about three” open cases in New York County, in the courthouse across the street from the one where he was testifying. App. C. 6-7. He has

previously seen people who have sold him drugs in the vicinity of the courthouse. App. C. 7.

UC 276 had never been physically threatened when buying drugs. App. C. 9. Neither Keith King nor anyone connected with him had contacted UC 276 or threatened him. App. C. 17. In fact, no one involved with a pending case had ever threatened him. App. C. 18. However, when he tried to purchase drugs once, an individual had said he knew he was a cop; he had been threatened and told to leave. App. C. 8. He had also been patted down for weapons or listening devices, App. C. 9, and been recognized as a police officer when trying to buy drugs. App. C. 10. He had been asked whether he's a cop or recognized as a police officer over ten times—he's "worked in the same area pretty much for two and a half years." App. C. 21.

When UC 276 is not on duty, he "go[es] about [his] life." App. C. 18. He spends time in Manhattan, including with his family. *Id.* He's never run into anyone who knows him from his work as an undercover or had any problems in Manhattan. *Id.* Under questioning from the court, UC 276 testified that if the courtroom remained open for his testimony, he "probably wouldn't be able to function as an undercover anymore" because his "identity would be revealed." App. C. 23. He also agreed with a leading question from the court that he was concerned that, if he had to give his name, his "safety and [his] family would be

compromised.” App. C. 23-24. UC 276 testified that no one associated with Keith King had ever contacted him. App. C. 17.

After determining that no one from petitioner’s family planned to attend the trial, the trial court ordered the courtroom closed to the general public during UC 276’s trial testimony; no exception was made for the press. Only the prosecution and defense attorneys with “identification as attorneys” and their investigators could remain in the courtroom. App. C. 28. The court also held that UC 276 could testify anonymously, using only his shield number. The trial court found:

I found the undercover to be a credible witness, I credit his testimony, he works as an undercover, he named a number of precincts, so in Manhattan, so it is a large portion of Manhattan that he works as an undercover. He talked about his working in the 14th Precinct, he goes out as an undercover four to five times a week, he expects to be going back to the area at the 14th Precinct I believe he said this week, he’s encountered people who he’s purchased drugs from. He has been threatened, he said that the person said he would F [sic] him up. He does not admit to people who say that he is a cop that he is a cop. He preserves the fact that his identity as being a police officer and undercover when he comes to court, he identified all the precautions that he takes, he has, he is involved in long-term investigations, presently has two lost subjects and the people out on warrant or have open cases, he’s seen people when he comes to court or recognizes people he sold to [sic], he did not reveal his identity to them but arrests were made, so I think that he has, he has more -- and he said if the courtroom were open he wouldn’t be able to function as an undercover. Clearly people whoever came in would know he is an undercover and that would compromise his ability to function as an undercover. Equally -- and, of course, it would threaten his safety, and the same thing with respect to his giving his name in court. So I think that there

is sufficient basis to allow him just to testify with his shield number and to close the courtroom to other than attorneys, your supervisors, any investigators you have who are associated with counsel or the People, otherwise the courtroom will be closed. And at this time relying that you said nobody was coming for the defendant, so I don't see that I have to address that because otherwise if you knew who they were she could ask the officer and there could be inquiry made of that.

App. C. 27-28.

The court did not state that it considered any alternatives to closing the courtroom to the general public.

C. *Conviction and Sentence.*

By judgment entered on December 9, 2014, petitioner Keith King was convicted of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the seventh degree. He was sentenced to a cumulative term of six years of incarceration and three years of post-release supervision.

D. *The Direct Appeal.*

On appeal, petitioner argued that the trial court's closure of the courtroom violated his Sixth Amendment right to a public trial. He argued that the prosecution failed to advance an overriding interest likely to be prejudiced by open-court testimony, as required by *Waller's* first prong. Citing *Presley v. Georgia*, 558 U.S. 209 (2010), petitioner also argued that reversal was mandated

because the trial court failed to consider any alternatives to closure, as required by *Waller*'s third prong.

The New York Supreme Court, Appellate Division, First Department, affirmed petitioner's conviction and sentence. *People v. King*, 58 N.Y.S.3d 40 (N.Y. App. Div. 2017); App. A. On the issue of the trial court closing the courtroom to the public during the testimony of the two undercover police officers, the state appellate court held:

The evidence at a *Hinton* hearing established an overriding interest that warranted a limited closure of the courtroom (*see Waller v Georgia*, 467 US 39 [1984]; *People v Echevarria*, 21 NY3d at 12-14). The undercover officer gave testimony of a type that "has consistently been held to demonstrate a substantial probability that the officer's undercover status and safety would be jeopardized by testifying in an open courtroom" (*People v Gonzalez*, 145 AD3d 586 [1st Dept 2016], *lv denied* 28 NY3d 1184 [2017]), and it satisfied the requirement of a particularized showing. The record also sufficiently shows that the court fulfilled its obligation to consider alternatives to closure, and "*it can be implied that the . . . court . . . determined that no lesser alternative*" would suffice (*see Echevarria*, 21 NY3d at 15).

King, 58 N.Y.S.3d at 41-42; App. A. 3-4 (emphasis added; ellipsis in original).

On November 21, 2017, the Chief Judge of the Court of Appeals of the State of New York denied Keith King's timely application for leave to appeal to that court. *People v. King*, 30 N.Y.3d 1020 (Table) (N.Y. 2017); App. B.

REASONS FOR ALLOWING THE WRIT

This Court should address New York’s routine closure of courtrooms whenever an undercover police officer testifies—a practice in violation of *Waller* and *Presley* and in stark contrast to the practices of other jurisdictions.

This Court repeatedly has recognized the fundamental nature of the Constitution’s requirement of a public trial in criminal cases. *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). It has observed that “[t]he roots of open trials reach back to the days before the Norman Conquest[.]” *Press-Enterprise Co.*, 464 U.S. at 505. And the Court frequently has extolled the benefits of keeping a courtroom open so that “*anyone* is free to attend.” *Id.* at 508 (“Openness [] enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.”); *see also Waller*, 467 U.S. at 46 (openness “encourages witnesses to come forward and discourages perjury”).

Because of the strong presumption of openness, the Court has held that a courtroom may not be closed to the public unless four 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

broad than necessary to protect that interest;” (3) the court must “consider reasonable alternatives to closing the proceeding;” and (4) it must “make findings adequate to support the closure.” *Waller*, 467 U.S. at 48. When this four-prong test is properly applied, courtroom closure will be “rare.” *Presley*, 558 U.S. at 213 (citing *Waller*, 467 U.S. at 45); accord *Press Enterprise Co.*, 464 U.S. at 509 (“Closed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness.”).

However, despite this Court’s mandate that closure remain rare, the opposite is the rule in New York. Indeed, New York courts have even cited the fact that a specific undercover officer has *never* testified in a courtroom opened to the public to justify closure in a particular case. 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).

New York courts routinely disregard this Court’s guidance. Undercover officers’ testimony constitutes the heart of the prosecution’s evidence in buy-and-bust trials. Yet, trial courts almost always order the courtroom closed for the entirety of the this testimony. This Court should grant certiorari in order to decide (1) whether *Waller*’s first requirement that closure be justified by “an overriding interest that is likely to be prejudiced” by public testimony can be

satisfied by generalized concerns that apply to nearly all undercover officers; and (2) whether *Waller*'s third requirement, that the trial court consider reasonable alternatives to closure, can be met through "implication," gleaned from a silent record.

Without this Court's intervention, an entire category of criminal trials in the country's third most populous state will continue to be shielded from the scrutiny of the public and the press. The effects are significant: the vast majority of those arrested in buy-and-bust cases are charged with criminal sale of a controlled substance in the third degree and/or criminal possession of a controlled substance in the third degree, which are the second and third most commonly charged felonies at New York City arraignments. Criminal Court of the City of New York, *Annual Report*, 30 (2016).³

A. *This Case Presents an Ideal Opportunity to Determine Whether Generic Concerns Can Justify Courtroom Closure.*

New York stands alone when it comes to the routine closure of courtrooms during undercover officers' testimony. Back in 1996, the practice was "strictly a New York phenomenon." Robin Zeidel, Note, *Closing the Courtroom For Undercover Police Witnesses: New York Must Adopt a Consistent Standard*, 4 J.

³ Available at:
<https://www.nycourts.gov/COURTS/nyc/criminal/2016-Annual-Report-Final.pdf>

L. & Pol’y 659, 663 (1996). It remains so today. So dramatic is this disparity that a search of reported decisions in all 50 States over the past twenty-five years concerning courtroom closure during the testimony of undercover police officers reveals 444 such cases. Of these, 434 cases, or more than 98% of the total, come from New York.⁴

The practice of routinely closing the courtroom is likewise unheard of in federal court – including in the Southern District of New York, which is located only a few blocks from where Keith King’s case was tried. Even during trials involving international drug conspiracies, large-scale organized crime, and terrorism, federal courtrooms are open to all those who wish to attend. Indeed, these courtrooms are often filled to capacity with spectators.

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 constitute an “overriding interest likely to be prejudiced” by open-court testimony. *Waller*, 467 U.S. at 48. Other state courts, by contrast, reverse trial courts’ closure orders when they are based on such general concerns.

⁴ The following two “all states” Lexis “boolean” searches produced the results set out above: “courtroom /s clos! /p undercover /p officer”; and, “controlled substance AND 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.

Review by this Court is thus needed to resolve the disagreement among state courts regarding when generalized concerns about a witness's safety can satisfy *Waller's* first prong. Because the testimony of the undercover officer in petitioner Keith King's case epitomized the general concerns that form the basis of hundreds of closure orders in New York, his case presents an ideal opportunity to consider this question.

1. *The Trial Court Permitted the Undercover Officer in Petitioner's Case to Testify in Secrecy Based on Concerns that Apply to Almost All Undercover Officers.*

As described in the Statement of the Case, the officer in Keith King's case provided the rote testimony that has become the hallmark of New York's *Hinton* hearings – testimony that does not distinguish this officer from most active undercover officers in New York City. UC 276 testified that he had “open cases” and “lost subjects;” that he had received threats while working (though never from anyone associated with Mr. King); that he took precautions to conceal his identity; and that he intended to return soon to the same general location where Mr. King was arrested.

Thus, nothing UC 276 said distinguished the risks of his 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 closure order evidenced this deficiency: The court closed the courtroom because the officer:

goes out as an undercover four to five times a week, he expects to be going back to the area at the 14th Precinct I believe he said this week, he's encountered people who he's purchased drugs from. He has been threatened, he said that the person said he would F [sic] him up. He does not admit to people who say that he is a cop that he is a cop. He preserves the fact that his identity as being a police officer and undercover when he comes to court, he identified all the precautions that he takes, he has, he is involved in long-term investigations, presently has two lost subjects . . .

App. C. 27.

The New York appellate court affirmed the trial court's order without any discussion of the evidence presented at the *Hinton* hearing. The appellate court merely stated that "the undercover officer gave testimony of a type that has consistently been held to demonstrate a substantial probability that the officer's undercover status and safety would be jeopardized by testifying in an open courtroom." *King*, 58 N.Y.S.3d at 41 (internal quotation marks and cite omitted); App. A. 3.

Numerous decisions from New York's appellate courts illustrate the general applicability of the factors cited by the trial court in its *Waller* prong-one analysis here. For years, these courts have relied on a handful of unexceptional factors to affirm closure. As in Keith King's case, the undercover officers testify at *Hinton* hearings that they take precautions to conceal their identity as police

officers;⁵ that they still work in the “area” of the defendant’s arrest⁶; and, that they have been threatened as a result of their work.⁷ These courts also frequently cite undercover officers’ “open cases”⁸ and “lost subjects.”⁹

⁵ See, e.g., *People v. Lewis*, 51 N.Y.S.3d 526, 527 (N.Y. App. Div. 2017); *People v. Johnson*, 983 N.Y.S.2d 531, 532-33 (N.Y. App. Div. 2014); *People v. Harris*, 941 N.Y.S.2d 111, 112 (N.Y. App. Div. 2012); *People v. Hinds*, 940 N.Y.S.2d 264, 266 (N.Y. App. Div. 2012); *People v. Mickens*, 917 N.Y.S.2d 630, 630 (N.Y. App. Div. 2011); *People v. Crayton*, 915 N.Y.S.2d 247, 248 (N.Y. App. Div. 2011); *People v. Plummer*, 889 N.Y.S.2d 572, 572 (N.Y. App. Div. 2009); *People v. Loney*, 841 N.Y.S.2d 444, 444 (N.Y. App. Div. 2007); *People v. Ortiz*, 835 N.Y.S.2d 101, 102 (N.Y. App. Div. 2007); *People v. McNair*, 808 N.Y.S.2d 689, 690 (N.Y. App. Div. 2006); *People v. Spears*, 790 N.Y.S.2d 106, 106 (N.Y. App. Div. 2005); *People v. Jemmott*, 782 N.Y.S.2d 862, 863 (N.Y. App. Div. 2004); *People v. Shelby*, 772 N.Y.S.2d 820, 820 (N.Y. App. Div. 2004); *People v. Linares*, 759 N.Y.S.2d 76, 77 (N.Y. App. Div. 2003); *People v. DeJesus*, 757 N.Y.S.2d 852, 852-53 (N.Y. App. Div. 2003).

⁶ See, e.g., *Lewis*, 51 N.Y.S.3d at 527; *Johnson*, 983 N.Y.S.2d at 532-33; *Harris*, 941 N.Y.S.2d at 112; *Hinds*, 940 N.Y.S.2d at 266; *Mickens*, 917 N.Y.S.2d at 630; *Yancey*, 929 N.Y.S.2d at 134; *Crayton*, 915 N.Y.S.2d at 248; *People v. Manning*, 912 N.Y.S.2d 183, 184-85 (N.Y. App. Div. 2010); *Plummer*, 889 N.Y.S.2d at 572; *James*, 849 N.Y.S.2d at 671; *People v. Owens*, 842 N.Y.S.2d 94, 95 (N.Y. App. Div. 2007); *Loney*, 841 N.Y.S.2d at 444; *Gonzalez*, 843 N.Y.S.2d at 633; *Ortiz*, 835 N.Y.S.2d at 102; *McNair*, 808 N.Y.S.2d at 690; *People v. Thomas*, 808 N.Y.S.2d 644, 645 (N.Y. App. Div. 2006); *People v. Campbell*, 795 N.Y.S.2d 193, 194 (N.Y. App. Div. 2005); *People v. Lopez*, 798 N.Y.S.2d 473, 474 (N.Y. App. Div. 2005); *People v. Lopez*, 795 N.Y.S.2d 6, 7 (N.Y. App. Div. 2005); *Jemmott*, 782 N.Y.S.2d at 863; *People v. Torres*, 787 N.Y.S.2d 237, 238 (N.Y. App. Div. 2004).

⁷ See, e.g., *Lewis*, 51 N.Y.S.3d at 527; *Johnson*, 983 N.Y.S.2d at 532-33; *People v. Tate*, 972 N.Y.S.2d 719, 720 (N.Y. App. Div. 2013); *Harris*, 941 N.Y.S.2d at 112; *Hinds*, 940 N.Y.S.2d at 266; *Mickens*, 917 N.Y.S.2d at 630; *Crayton*, 915 N.Y.S.2d at 248; *People v. Yancey*, 929 N.Y.S.2d 133, 134 (N.Y. App. Div. 2011); *People v. King*, 877 N.Y.S.2d 82, 82 (N.Y. App. Div. 2009); *People v. James*, 849 N.Y.S.2d 670, 671 (N.Y. App. Div. 2008); *Gonzalez*, 843 N.Y.S.2d at 633; *Jemmott*, 782 N.Y.S.2d at 863; *DeJesus*, 757 N.Y.S.2d at 852.

⁸ See, e.g., *Lewis*, 51 N.Y.S.3d at 527; *Tate*, 972 N.Y.S.2d at 719, 720; *Harris*, 941 N.Y.S.2d at 112; *Hinds*, 940 N.Y.S.2d at 266; *Mickens*, 917 N.Y.S.2d at 630; *Crayton*, 915 N.Y.S.2d at 248; *Manning*, 912 N.Y.S.2d at 185; *Plummer*, 889 N.Y.S.2d at 572;

Some of the factors cited by these courts show that undercover work is inherently dangerous. But, as the numerous (and far from exhaustive) citations in the footnotes above demonstrate, these factors can be recited by almost all active undercover officers. Thus, because New York courts permit an officer to testify behind closed doors based on these ubiquitous concerns alone, the most critical testimony in most every drug trial in New York involving an undercover officer is taken in secret.

2. *State Courts Disagree Regarding Whether Generalized Concerns can Satisfy Waller's First Prong.*

Unlike New York's courts, 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 *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

McNair, 808 N.Y.S.2d at 690; *King*, 877 N.Y.S.2d at 82; *Linares*, 759 N.Y.S.2d at 77; *DeJesus*, 757 N.Y.S.2d at 852.

⁹ See, e.g., *Johnson*, 983 N.Y.S.2d at 532-33; *Tate*, 972 N.Y.S.2d at 719, 720; *Harris*, 941 N.Y.S.2d at 112; *Yancey*, 929 N.Y.S.2d at 134; *Crayton*, 915 N.Y.S.2d at 248; *Manning*, 912 N.Y.S.2d at 185; *James*, 849 N.Y.S.2d at 671; *Gonzalez*, 843 N.Y.S.2d at 633; *Ortiz*, 835 N.Y.S.2d 101, 102; *Thomas*, 808 N.Y.S.2d 644, 645; *Lopez*, 795 N.Y.S.2d at 7; *Campbell*, 795 N.Y.S.2d at 194; *Shelby*, 772 N.Y.S.2d at 820; *Jemmott*, 782 N.Y.S.2d at 863; *Linares*, 759 N.Y.S.2d at 77; *DeJesus*, 757 N.Y.S.2d at 852.

testimony would threaten “any” undercover officer. The court stated: “We immediately question the characterization of this generalized evidence as a compelling interest: only evidence of a particularized threat would likely justify encroachment into a defendant’s constitutionally guaranteed fair trial rights.” *Id.* See also *State v. Hood*, 320 P.3d 522, 526-27 (N.M. Ct. App. 2014) (“the record reveals that the State provided no evidence regarding identification of any persons whose presence during [the officer’s] testimony may have imperiled ongoing investigations or have threatened the officer’s safety in those investigations . . . Accordingly, as the district court did not issue findings as to any specific threats to [the officer’s] identity, safety, or the viability of his undercover operations, nor as to the breadth of or reasonable alternatives to closure, the district court did not comply with the fourth *Waller* prong”).

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 also reversed the conviction in *State v. Washington*, 755 N.E.2d 422, 423-24 (Ohio Ct. App. 2001), because the trial court 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.

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. This Court’s review is needed to decide if generic concerns ever satisfy this prong and to ensure the uniform application of the Court’s precedents. As other states’ cases demonstrate, this Court’s ruling would shed light not only on cases involving undercover officers, but also on 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 and gangs.

* * *

Because of the fundamental nature of a defendant's right to a public trial, this Court has emphasized that courtroom closure must be "rare." *Presley*, 558 U.S. at 213. Yet, New York courts permit the exclusion of the public and press from virtually all buy-and-bust cases in the state. The New York courts have essentially granted a lifetime exemption from public testimony to New York's undercover officers. This Court should grant certiorari here to determine whether New York's practice violates the Sixth Amendment.

B. *New York Courts Have Eliminated Consideration of the Third Prong of Waller's Four-Prong Test – That Trial Courts Must Consider Reasonable Alternatives to Closure.*

This Court should also grant certiorari to determine if the New York appellate court properly applied *Waller's* third requirement that trial courts "consider alternatives to closure even when they are not offered by the parties." *Presley*, 558 U.S. at 214. In its order closing the courtroom to the public during the testimony of UC 276 at Keith King's trial, the trial court did not even mention any possible alternatives to closure, much less consider them. *See App.*

C. 27-28. The state appellate court in reviewing the issue of whether the trial court considered reasonable alternatives to closure, held: “The record also sufficiently shows that the court fulfilled its obligation to consider alternatives to closure, and ‘*it can be implied* that the . . . court . . . determined that no lesser alternative’ would suffice (*see Echevarria*, 21 NY3d at 15).” *King*, 58 N.Y.S.3d at 41-42 (emphasis added; ellipsis in original); App. A. 3-4.

The state appellate court based its holding in petitioner’s case upon the New York Court of Appeals’ decision in *People v. Echevarria*, 21 N.Y.3d 1 (N.Y. 2013), in which that court held that the *Waller* requirement that the trial court consider reasonable alternatives to closure before closing the courtroom to the public can be met without an on-the-record discussion about alternatives. *Echevarria*, 21 N.Y.3d at 18. It instead found that an appellate court can “imply” that the requirement was satisfied where “the record in a buy-and-bust case otherwise suffices to establish the need to close a particular portion of the proceeding.” Under *Echevarria*, a trial court need not utter a word about alternatives to closure. *See id.* at 19. Thus, the New York courts have tacitly read the third prong of out *Waller*’s four-prong test in disregard of *Presley*.

In *Presley*, this Court emphasized the independent importance of *Waller*’s third requirement. There, the Court summarily reversed *Presley*’s conviction

based *solely* upon the trial court's failure to consider alternatives to closure. *Presley*, 558 U.S. at 215-16. Even if closure were warranted in the first instance, this Court held, the trial court violated the defendant's Sixth Amendment rights by closing the courtroom during jury selection without any record-based indicia that the court had considered alternatives. *See id.* at 216.

Nonetheless, New York's highest court, in *Echevarria*, found that *Presley* "nowhere states that it is incumbent on trial courts, regardless of the circumstances, to engage in a verbal on-the-record review of all potential alternatives before opting for a limited closure." *Echevarria*, 21 N.Y.3d at 18. The *Echevarria* decision formed the precedential basis for the state appellate court's decision in petitioner Keith King's case, and *Echevarria* constitutes the binding authority for all state courts in New York.

The state appellate court's decision in petitioner Keith King's case is a stark rejection of this Court's holdings in *Waller* and *Presley*. *See Echevarria*, 21 N.Y.3d at 23 (Lippman, C.J., dissenting) ("The constitutional presumption is that criminal trials are to be open to the public. If that presumption is to be overcome, it cannot be by implication, otherwise a reviewing court cannot ascertain that the closure is essential."). Unsurprisingly, no other state court has found that a silent record satisfies *Waller*'s third requirement. *See, e.g.,*

People v. Hassen, 351 P.3d 418, 421 (Col. 2015) (reversing in part because “the trial court failed to consider any potential alternatives to closing the courtroom”); *State v. Wise*, 288 P.3d 1113, 1118 (Wash. 2012) (finding there was no consideration of alternatives to closure when none was apparent from the record; “[w]e do not comb through the record to infer the trial court’s balancing of competing interests where it is not apparent in the record”); *Lilly v. State*, 365 S.W.3d 321, 329 (Tex. Crim. App. 2012) (“findings [of reasonable alternatives to closure] must be on the record and specific,” and “it is reversible error when the record fails to show that a trial court considered all reasonable alternatives to closure” [citing *Presley*]); *Tucker*, 290 P.3d at 1258 (reversing for, among other things, violation of *Waller*’s third requirement and noting that the court “generally would defer to a trial court’s finding that [] alternatives to closure were impracticable,” but “the court’s apparent failure to consider them in the first instance was error”); *McIntosh v. United States*, 933 A.2d 370, 378 (D.C. 2007) (even though the trial court mentioned an alternative, reversal required because the court could not “be confident [] that the court adequately considered alternatives in light of defense counsel’s consistent, albeit scant, opposition to closing the courtroom”); *State v. Dubose*, 884 N.E.2d 75, 87 (Ohio Ct. App. 2007) (reversing in part because “it does not appear as though the trial court considered alternatives to the closing of the courtroom”); *State v. Ortiz*, 981 P.2d

1127, 1138 (Haw. 1999) (reversing where “[n]o evidence *on the record* suggests that the circuit court engaged in” consideration of alternatives) (emphasis added); *Kendrick v. State*, 661 N.E.2d 1242, 1244-45 (Ind. Ct. App. 1996) (where courtroom was closed during informant’s testimony, remanding to the trial judge to enter specific findings regarding all four of *Waller*’s prongs); *Bone-Club*, 906 P.2d at 329 (“[T]he existence of a compelling interest [that satisfies *Waller*’s first prong] would not necessarily permit closure: the trial court must then perform the remaining four steps to weigh thoroughly the competing interests.”). *See also State v. Cox*, 297 Kan. 648, 656 (Kan. 2013) (“the lack of meaningful consideration of alternatives,” even when not offered by the parties, violated a defendant’s right to a public trial); *United States v. Gupta*, 699 F.3d 682, 687 (2d Cir. 2011)(“if a court intends to exclude the public from a criminal proceeding, it must first analyze the *Waller* factors and make *specific findings* with regard to those factors”) (emphasis added).

Not only does the state court’s holding in petitioner’s case run contrary to this Court’s express holdings in *Waller* and *Presley*, but it also renders meaningless *Waller*’s fourth prong, as the dissenters in the New York Court of Appeals’ *Echevarria* decision observed. *See Echevarria*, 21 N.Y.3d at 24 (Lippman, C.J., dissenting). That prong requires the trial court to “make findings adequate to support the closure,” which are “specific enough that a

reviewing court can determine whether the closure order was properly entered.” *Waller*, 467 U.S. at 45, 48 (internal quotation omitted). When an appellate court *implies* that a trial court considered alternatives, the trial court’s “findings” are not “specific”— they are non-existent.

This Court should grant certiorari to determine if a silent record can satisfy *Waller*’s third requirement – that the trial court first consider reasonable alternatives to closure. Given the frequency of courtroom closure in New York, this Court’s review is needed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
 February 18, 2018

Respectfully submitted,

 /S/
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