CAL No. ____-____

Oral Argument By:
Alexis Arsenault

New York Supreme Court

APPELLATE DIVISION – FIRST DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

Against

ENOCH THOMPSON

Appellant,

BRIEF FOR ENOCH THOMPSON

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1. Did the People present legally sufficient evidence to establish that the defendant was guilty of criminal sale of a controlled substance in the third degree on a theory of accomplice liability by merely repeating an undercover's inquiry about where to find drugs and saying "any time," when the undercover thanked him?
2. Did the trial court err in granting courtroom closure during the testimony of an undercover officer, when the officer was no longer working in the same area and received no particularized threats to his safety to establish an overriding interest that was likely to be prejudiced?

INTRODUCTION

Defendant-Appellant Mr. Enoch "Nucky" Thompson appeals a ruling from the Supreme Court, New York County, convicting him of criminal sale of a controlled substance in the third degree and sentencing him to four years imprisonment. The defendant asserts that the People failed to establish legally sufficient evidence to establish the crime charged on a theory of accomplice liability. In order to prevail on a claim of accomplice liability, the People needed to prove that the defendant knowingly and unlawfully assisted in the crime, and, in some way solicits, requests, commands, importunes or intentionally aids criminal conduct. The People merely established that the defendant was present at the time of the sale and that he uttered a few words to the undercover officer. Therefore, there was insufficient evidence to establish accomplice liability.

Further, the defendant asserts that the trial court erred in granting courtroom closure during the testimony of the undercover officer because the People did not establish that there was an overriding interest that was likely to be prejudiced by his open-court testimony.

STATEMENT OF FACTS

On January 3, 2021, at about 3:55pm, the Manhattan North Narcotics Division arrested Mr. Thompson as part of a buy-and-bust operation at West 104th Street and Amsterdam Avenue. (T. 35).

Earlier that day, the field team involved in the operation, eight members of the Manhattan North Narcotics Division, attended a tactical planning meeting where they received specific assignments. (T. 36). Shield Number 1357 (henceforth referred to as "the undercover") was assigned to make field observations that day. (T. 36). At that meeting, communication equipment was distributed, and the undercover received a point-to-point radio and a ghost kit to take into the field. (T. 37). Despite their availability, the team did not make use of Kel transmitters, which are often used in buy-and-bust operations, and, unlike point-to-point radios, allow for recording. (T. 84). Detective Dionne, the arresting officer in this case, provided the undercover with about $100 in pre-recorded buy money. (T. 39).

The field team arrived in the area of arrest between 3:45pm and 3:50pm. (T. 66). In addition to the undercover, the field team included an unmarked car with Detective Dionne and Sergeant Barrett, two chase cars, and a police van. (T. 87).

Some time before 3:56pm, the undercover saw a group of men standing together on the corner of West 104th Street and Amsterdam Avenue. (T. 41). He approached the group of men and, when standing about five feet away, made eye contact with one of them, later identified as the defendant, Mr. Thompson. (T. 41). Mr. Thompson said, "Hey. What's happening?" and the undercover responded, "Who's working? I'm looking for quarters." (T. 41). Another individual, later identified as Eddie Kessler, asked, "What?" (T. 41). Mr. Thompson responded, "He needs some quarters." (T. 41).

Mr. Kessler, who was about five feet away from the undercover, motioned him over, and the undercover moved closer to him. (T. 42). Mr. Kessler asked him how many he wanted, and the undercover said he wanted two. (T. 42). Mr. Kessler then reached into his pocket and pulled out two twists. (T. 42). The undercover gave Mr. Kessler $50 of pre-recorded buy money. (T. 45).

During the sale, Mr. Thompson was standing about five feet away with two other men. (T. 45). According to the undercover's testimony, Mr. Thompson was discussing a book he was reading by the French existentialist Jean-Paul Sarte. (T. 45). The entire interaction lasted between one or two minutes, and the undercover testified that he was face-to-face with Mr. Thompson for only "a couple of seconds." (T. 45).

After receiving the drugs from Mr. Kessler, the undercover started walking away. (T. 46). As he was leaving, the undercover said to Mr. Thompson, "Thanks, man," and Mr. Thompson replied, "Any time." (T. 46). Mr. Kessler, Mr. Thompson and the two others then walked northbound on the east side of Amsterdam Avenue toward 105th Street. (T. 46).

From a distance, the undercover informed the field team via radio transmission that he had made a positive narcotics purchase and gave directions to where Mr. Kessler and Mr. Thompson were going. (T. 47). The description he provided was as follows: "One male black wearing a black jacket, blue jeans. Second male is wearing black jacket and blue jeans." (T. 48). Detective Dionne testified that he received the transmission at about 3:56pm, and recognized the voice as the undercover. (T. 67).

In response, the field team approached and observed four individuals walking northbound between 104th Street and 105th Street. (T. 68). Dionne and his team stopped them, and all four individuals were put up against a wall and frisked. (T. 89). The undercover then identified the

two individuals in dark shirts and blue jeans as the people he believed participated in the sale via radio transmission. (T. 91). The two other men were let go. (T. 91).

Detective Dionne testified that the two other men were stopped "because they were with the two individuals wearing dark jackets and blue jeans." (T. 92). He further admitted that he had no idea who these other two people were and whether they were with Mr. Kessler and Mr. Thompson at all. (T. 92). Despite this, a Form 250, which police are required to complete when someone is stopped and frisked and ultimately let go, was never filled out. (T. 91-92).

Detective Dionne searched Mr. Kessler and recovered one clear Ziploc containing marijuana and $235 including $50 pre-recorded buy money. (T. 73). He then searched Mr. Thompson and recovered a small glass pipe and $5.76 from his pockets. (T. 76). He found no drugs nor pre-recorded buy money on Mr. Thompson. (T. 95).

A field test positively identified the drugs purchased from Mr. Kessler as crack cocaine. (T. 42). According to Detective Dionne, he filled out the paperwork involved in the vouchering process about three hours after the time of recovery. (T. 75). The Arrest Report, which Detective Dionne claimed that he filled out and another officer typed, mistakenly charged Mr. Kessler with violating Penal Law § 221.10, which is for having marijuana burning or open to public view. (T. 100). The report, which was submitted into evidence at trial, included a hand-written note that further charged Mr. Kessler with violating Penal Law § 220.39, Criminal Sale of a Controlled Substance in the Third Degree. (T. 100). Despite making this hand-written change after the report had been printed, Detective Dionne did not correct the mistaken § 221.10 charge. (T. 102).

Mr. Thompson was charged with the crime of Criminal Sale of a Controlled Substance in the Third Degree, in violation of Penal Law § 220.39(1). (T. 4). Mr. Thompson's first trial ended in a mistrial in May 2021. (H. 15). At the start of the second trial, in January 2022, the People

filed a motion to close the courtroom to the public during the testimony of the undercover. (H. 3). The defendant refused this motion. (H. 3). On January 28, 2022, the Court held a *Hinton* Hearing to address the issue of courtroom closure. (H. 3).

Testimony from the *Hinton* Hearing revealed that, in the time since the arrest, the undercover has been relocated to the Staten Island Narcotics Division. (H. 4). His undercover assignment in Staten Island is temporary and expected to last 15 months. (H. 7). After the assignment, he expects he will be transferred back to Manhattan North, where he would once again cover the area of Manhattan from 96th Street north, river to river. (H. 7).

At the time of the *Hinton* Hearing, he had about 12-15 open cases pending, 8-10 of which were in Manhattan courts, some of which included arrests around the area of 104th Street and Amsterdam Avenue. (H. 7). A few defendants in his open cases were out on bail, and he had six or eight "lost subjects" in Manhattan, from whom he had purchased drugs, but had not yet been apprehended. (H. 6).

He testified that he does not carry a badge, a weapon, or any police paraphernalia in his undercover work, and only travels in unmarked cars to keep his identity hidden. (H. 10-11). On the day of the *Hinton* Hearing, he parked his car near the intersection of Leonard and West Broadway, about six blocks from the courthouse. (H. 14). In order to park in a no-parking zone, he placed his police-issued parking permit in his car window. (H. 14).

He has worked in an undercover capacity for four years, and goes to the courthouse about once a month. (H. 9). In that time, he has never encountered any of his subjects in or around the courthouse. (H. 9). He further testified that to protect his identity, he enters the courthouse through a side door near the District Attorney's office. (H. 10). The side entrance is about 50 feet from the main entrance and is within sight of those standing in front of the courthouse. (H. 12).

Upon approaching the courthouse that day, he stopped and spoke to an Assistant District Attorney who he knew from previous cases and talked to her for a couple of minutes. (H. 13).

In his four years working undercover, he has been searched by subjects, has been threatened around six times, and has encountered subjects who carry weapons about eight times. (H. 8-9). He has never publicly testified in previous cases. (H. 11).

The undercover testified against Mr. Thompson at his first trial that ended in a mistrial in May 2021, while he was still assigned to the Manhattan North Narcotics Division. (H. 15). The courtroom was closed to the public during his testimony, but Mr. Thompson was present. (H. 15).

At the conclusion of the *Hinton* Hearing, the Court granted the People's motion to close the courtroom, citing an overriding interest that was likely to be prejudiced, and the trial proceeded. (T. 2).

Based on a theory of accomplice liability, the People presented their case against Mr. Thompson, which included testimony from the undercover, Detective Dionne, and Josephine Delacruz, the criminalist who examined the drugs purchased from Mr. Kessler. (T. 109).

At the conclusion of the People's case, the defense moved to dismiss on the basis that the People had not met the burden of proof presenting legally sufficient evidence that Mr. Thompson committed the crime charged. (T. 117). The defense's motion for dismissal was denied. (T. 187).

The jury found Mr. Thompson guilty of Criminal Sale of a Controlled Substance in the Third Degree. (T. 184). At a proceeding on March 1, 2022, the court sentenced Mr. Thompson to four years imprisonment. (T. 189). The defendant now appeals.

ARGUMENT

"Legally sufficient evidence" is defined as competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof. McKinney's CPL § 70.10. In considering the legal sufficiency of evidence, the court must view the evidence in the light most favorable to the People and determine whether there is a "valid line of reasoning and permissible inferences to support the factfinder's verdict." People v. Rupert, 987 N.Y.S.2d 678, 680 (2014).

In order to establish guilt based on a theory of accomplice liability, the People rely on Penal Law § 20.00: "When one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct." N.Y. Penal Law § 20.00.

The Sixth Amendment guarantees a criminal defendant the right to a speedy and public trial. U.S. Const. amend. VI. Courts have discretionary power to exclude the public from a courtroom, but must exercise such discretion sparingly and only when unusual circumstances necessitate it. People v. Hinton, 286 N.E.2d 265, 266 (1972). Any closure of a suppression hearing of the objections of the accused must meet the criteria outlined by the Supreme Court in Waller v. Georgia, the first prong of which states, "the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced [by open-court testimony.]" Waller v. Georgia, 467 U.S. 39, 48 (1984). The proponent of closure must assert that a substantial probability of prejudice to a compelling interest will result from an open proceeding; thus, a nexus between the overriding interest and open-court testimony must be established. People v. Jones, 750 N.E.2d 524, 527 (2001).

Here, the defense asserts, first, that the trial court should have granted the motion to dismiss because the People did not present legally sufficient evidence to establish guilty of the crime charged on a theory of accomplice liability. Furthermore, the defense asserts that the court erred in granting the People's motion for courtroom closure because there was insufficient evidence that there was an overriding interest likely to be prejudiced by the undercover officer's open-court testimony.

POINT I

THE TRIAL COURT ERRED IN REFUSING TO DISMISS THE CASE BECAUSE THERE WAS NO LEGALLY SUFFICIENT EVIDENCE THAT THE DEFENDANT HAD THE REQUISITE CULPABLE MENTAL STATE OR ACTED IN FURTHERANCE OF THE SALE AS REQUIRED TO ESTABLISH GUILT ON A THEORY OF ACCOMPLICE LIABILITY.

A person is guilty of criminal sale of a controlled substance in the third degree when he knowingly and unlawfully sells a narcotic drug. N.Y. Penal Law § 220.39(1). A person acts "knowingly" with respect to conduct or to a circumstance described by a statute defining a defense when he is aware of such nature or that such circumstance exists. N.Y. Penal Law § 15.05(2).

N.Y. Penal Law § 20.00 provides that a person may be held criminally liable as an accomplice when he or she performs certain acts and does so with the mental culpability required for the commission of the substantive crime. N.Y. Penal Law § 20.00; People v. Kaplan, 76 N.E.2d 415 (1990). Accomplice liability requires, at a minimum, "awareness of the proscribed conduct and some overt act in furtherance of such." People v. Hibbert, 725 N.Y.S.2d 305 (2001).

Further, a defendant's mere presence at the time of a drug sale, with knowledge of what was transpiring at that time is insufficient to establish the defendant's guilt of criminal sale of a controlled substance in the third degree on a theory of accomplice liability. People v. Moreno,

145 N.Y.S.3d 126, 129 (2021); *see also, People v. Reyes, 440 N.Y.S.2d 674 (1981) ("Mere presence at the scene of a crime with knowledge of its perpetration does not render the observer accessory liable therefor").*

Rather, some additional element is required to establish that, "in furtherance of the crime, [the defendant] solicited, requested, commanded, importuned or intentionally aided the principal in the commission of the crime." People v. Bello, 705 N.E.2d 1209, 1211 (1998); N.Y. Penal Law § 20.00. When applied to a charge of criminal sale of a controlled substance, courts must consider whether a defendant "exhibited any calculated or direct behavior that purposefully affected or furthered the sale." Id. Evidence, therefore, must show that the defendant shared the seller's intention in bringing about the transaction and must act in some way to further the sale along, as opposed to merely providing assistance, "believing it probable" that he was rendering aid. People v. Johnson, 657 N.Y.S.2d 27, 28 (1997); People v. Wylie, 580 N.Y.S.2d 401, 402 (1992); People v. Rosario, 597 N.Y.S.2d 357 (1993).

Courts have consistently made clear that to establish accomplice liability on a charge of criminal sale of a controlled substance, both the knowledge element and some action in furtherance of the sale is required. In People v. Rosario, the defendant was asked by an undercover officer where narcotics could be purchased, and the defendant called to an individual named Stephens who he rereferred to as "Panama." Rosario, 597 N.Y.S.2d at 357. The undercover then purchased crack cocaine from Stephens using pre-recorded buy money. Id. The Court noted that "[w]hile this evidence certainly demonstrated that the defendant was able to identify a local purveyor of narcotics, it did not show, as would have been necessary to sustain his conviction as an accomplice for criminal sale of a controlled substance, that he shared the seller's intent to bring the transaction about." Id. Furthermore, by merely responding to the

undercover officer's question about who had drugs for sale, the defendant "did nothing to solicit or request, much less demand or importune the illicit sale." Id. *See also, Johnson, 657 N.Y.S.2d at 28, finding that, in response to an undercover officer's question about who was working, the defendant's response, "Yeah. My boy right here will hook you up," and motioning to the co-defendant was insufficient to establish the requisite culpable mental state or any act in furtherance of the sale.*

In People v. Moreno, the defendant was arrested on a theory of accomplice liability after he was present when co-defendant Robert Alvarado sold heroin to an undercover officer. Moreno, 145 N.Y.S.3d at 128. The defendant was in the car with Alvarado while he coordinated a meeting with the undercover officer. Id. When the undercover officer reached the meeting place, he was initially unable to locate Alvarado's vehicle, and described his location to Alvarado over the phone. Id. During that conversation, the undercover officer heard the defendant in the background state to Alvarado, "no, he's over in this direction compared to you, tell him to come towards the service road. Id. The undercover then walked toward the service road and observed the defendant in the passenger seat. Id. The defendant made a hand gesture "as f to wave the undercover officer to approach the vehicle." Id. The undercover officer then got into the back seat of the car and purchased 25 bags of heroin from Alvarado for $140. Id. The exchange lasted for about a minute and a half to two minutes, during which time the officer spoke only to Alvarado, and the defendant did not say or do anything. Id.

The Appellate Division held that "the evidence was legally insufficient to establish that the defendant solicited, requested, commanded, importuned, or intentionally aided Alvarado in the commission of the heroin sale… or that the defendant shared Alvarado's state of mind to knowingly and unlawfully sell heroin." Id. Specifically, the court noted that "[t]he few words

uttered by the defendant… before the undercover officer entered the vehicle did not reflect the defendant's awareness of an imminent sale of heroin, let alone his intent to aid in the commission of the sale." Id. Furthermore, there was no evidence establishing that the defendant's alleged hand gesture was made in response to any request to purchase heroin, or that the defendant knew of the officer's reason for approaching the vehicle. Id. While it seems that the defendant was at least aware of the sale at the time it occurred within the car, this evidence was legally insufficient to establish guilt on a theory of accomplice liability. Id.

In contrast, the Court of Appeals in People v. Bello found that a Grand Jury could have found the evidence legally sufficient to establish the defendant's participation as an accomplice to a drug sale, where the defendant acted as a "screener" for potential buyers. Bello, 705 N.E.2d at 1211. In Bello, an undercover officer approached the defendants and asked about "nicks." Id. at 1210. In response, the defendant asked "how many [she] was looking for" and the officer responded "four." Id. The defendant then proceeded to ask the undercover if she was a "cop," to which she replied, "no." Id. The co-defendant then told the officer, "I only have dimes. Come with me." Id. The officer then followed the co-defendant and purchased one dime bag containing crack cocaine. Id.

There, the Court rejected the defendant's assertion that he was improperly charged as an accomplice, characterizing the defendant's questions as "[e]liciting information that enabled co-defendant Castellar to decide whether she could make the sale." Id. The Court held that the defendant knew the object of the sale was a narcotic drug, as evidenced by his response, "how many?" to the undercover officer's request for "nicks." Id. at 1211. By asking "how many?", it was the defendant who first prompted the transaction. Id. Moreover, the Court noted that the defendant "attempted to further screen the officer when he asked if she was a 'cop.'" Id. In doing

so, the defendant assisted in the transaction by screening the potential purchaser for identity and interest. Id.

Mr. Thompson's actions established in the facts of this case fall short of meeting the requirement that an accomplice act knowingly and in furtherance of the crime. The People established no proof that Mr. Thompson acted in any way to bring about, illicit or encourage the sale. Furthermore, the People did not even establish that Mr. Thompson had the required knowledge of the crime. The People's argument simply established that Mr. Thompson was present at the time of the sale, said "Hey. What's happening?", repeated the undercover's request for quarters when Mr. Kessler asked "What?", and said "any time" in response to the undercover officer's comment, "thanks, man." The People argue that Mr. Thompson's statement, "He needs some quarters" proves that he knew about the potential sale and acted in furtherance of it. However, this statement only functioned to parrot the undercover's inquiry, and proves no such knowledge. In fact, Mr. Thompson may have assumed the undercover was looking for spare change to go to the laundromat.

Furthermore, even if Mr. Thompson was aware that the undercover was looking for drugs, and even if he was aware of who could procure them for him, that is not enough to establish his participation as an accomplice. The People assume that, because a pipe was recovered from Mr. Thompson on his arrest, he must somehow be involved in the sale of drugs. While this may imply that Mr. Thompson has used drugs, or even that he may know where to find drugs, it does nothing to establish that he at any time participated in the sale of drugs.

Unlike in People v. Bello, Mr. Thompson did not ask questions or act "screen" the undercover in anyway. On the contrary, like was the case in People v. Moreno, Mr. Thompson's

presence when the crime occurred, and few words uttered did not reflect the defendant's awareness of an imminent drug sale, let alone any intent to aid the sale.

Mr. Thompson did not participate in the sale of the drugs and was engaged in a completely unrelated conversation when the undercover purchased the drugs from Mr. Kessler. At no time did the police recover any drugs or pre-recorded buy money from Mr. Thompson.

Finally, as the undercover was walking away, he thanked Mr. Thompson, to which he responded, "any time." Once again, this does not establish any participation in the sale on behalf of Mr. Thompson. This statement could have been simply polite response most people will use in conversation without thinking much about it, and certainly does not mean that Mr. Thompson was taking credit for the sale.

For these reasons, even assuming all of the People's factual claims are true, the evidence is legally insufficient to establish that Mr. Thompson participated in the sale under a theory of accomplice liability.

POINT II

THE PEOPLE'S MOTION FOR COURTROOM CLOSURE SHOULD HAVE BEEN DISMISSED BECAUSE THERE WAS INSUFFICIENT EVIDENCE OF AN OVERRIDING INTEREST LIKELY TO BE PREJUDICED.

A criminal defendant's right to a public trial is fundamental. People v. Martin, 949 N.E.2d 491 (2011. As precedent makes clear, "both the defendant and society at large have a vital stake in the concept of a public trial. People v. Martinez, 624 N.E.2d 1027, 1030 (1993); see also Hinton, 286 N.E.2d at 266; Waller, 467 U.S. at 104. Trial courts have the discretionary power to exclude the public, but must exercise that discretion "sparingly… and then, only when unusual circumstances necessitate it." Hinton, 286 N.E.2d at 267; see also Press v. Enterprise Co. v. Superior Ct., 464 U.S. 501, 509 (1984) ("closed proceedings, although not absolutely

precluded, must be rare and only for cause shown that outweighs the value of openness"); People v. Kin Kan, 574 N.E.2d 1042, 1044 (1991) ("closure remains only an exception to the mandatory postulate of open trials"). Thus, any party seeking to close the courtroom must advance an "overriding interest that is likely to be prejudiced [by open court testimony]. Waller, 467 U.S. at 48.

Courts have further insisted that the proponent of closure must assert a "substantial probability" that such overriding interest will be prejudiced. People v. Ramos, 685 N.E.2d 492, 496 (1997); Jones, 750 N.E.2d at 527. In general, protecting the safety of law enforcement officials "unquestionably constitutes a compelling interest… [however,] the mere possibility that this safety interest might be compromised by open court testimony does not justify abridgment of a defendant's constitutional right to a public trial." Ramos, 685 N.E.2d at 496. In buy-and-bust cases, meeting that standard requires more than "conclusory assertions that the officer remains an active undercover and fears for his or her safety." Id. Thus, a specific link must be made between the officer's safety concerns and his or her open-court testimony in the particular case. Id.

The court's own impressions of the general dangers of working undercover and insufficient to establish an overriding interest that is likely to be prejudiced. Martinez, 624 N.E.2d at 1027. Furthermore, an officer's testimony establishing only that he feared for his safety, without a further ongoing connection to the particular area where the defendant was arrested or the courthouse where the trial occurred, "does not suffice to establish the requisite nexus between the undercover officer's safety concerns and his testifying in open court." People v. Graves, 20 N.Y.S.3d 19, 20 (2015).

A defendant's Sixth Amendment right to a public trial "must not be lightly cast aside simply because the People claim that an undercover officer's safety or effectiveness is at risk,

and trial courts must vigilantly ensure that Waller's demanding first prong is satisfied before closing the courtroom." Ramos, 685 N.E.2d at 501. A violation of this fundamental right is not subject to harmless error and requires reversal. People v. Echevarria, 989 N.E.2d 9, 15 (2013.

In People v. Martinez, the Court of Appeals considered the issue of courtroom closure where an undercover's open cases were all "street level buy operations" in which arrests had already been made. Martinez, 624 N.E.2d at 1029. There, the People argued closure was warranted by the officer's continued work in "the whole of the Bronx." Id. The Court found that this was insufficient and too broad to establish an overriding interest that was likely to be prejudiced, noting that "[a]n officer's ongoing undercover operations in an entire borough of New York City – without greater specificity – did not satisfy the Waller standard." Id. The Court noted that "[n]o link was made… between the officer's fear for his safety throughout the Bronx area and open-court testimony in this buy-and-bust case." Id at 1031.

By contrast, the Court found closure to be proper in the companion case, People v. Pearson, where the officer identified a particular location—Port Authority in Manhattan—where "she had functioned daily for a month, and to which she would return as an undercover that very day to complete her work with drug dealers." Id. The main differentiating factor between Martinez and Pearson was the specificity and size of the geographic area in which the officer was active. Id.

In People v. Jones, the Court once again found that an officer's assigned geographic location plays an essential role in determining the extent of a threat to his or her safety. Jones, 750 N.E.2d at 526. In that case, an overriding interest was established where the co-defendant was still at large and a bench warrant had been issued. Id. Even then, only partial courtroom closure was warranted because "the undercover would not be returning to the Brooklyn area." Id.

In People v. Graves, the Court again held that an undercover officer's general fear for his safety did not alone warrant courtroom closure. Graves, 20 N.Y.S.3d at 19. The Court noted that although the officer "was still engaged in undercover narcotics work, he had been assigned to the Bronx for over a year and was no longer working in Brooklyn, where the charged sale had occurred. Id. Furthermore, the officer testified that he had never seen any of his unapprehended subjects in the courthouse, and "failed to identify any specific threats from defendant or his family, or to establish that associates of defendant or targets of investigation were likely to be present in the courtroom." Id. at 20. The officer's testimony failed to establish "the requisite nexus between the undercover's safety concerns and his testifying in open court," and that "the testimony only established that the undercover generally feared for his safety, but did not contain enough specificity to show an ongoing connection either to the area where the defendant was arrested or the courthouse where the trial occurred. Id. Therefore, the Court held that the People had not established an overriding interest that was likely to be prejudiced, and partial closure of the courtroom was improper. Id.

Here, the undercover failed to establish the necessary link between the overriding interest – his personal safety and effectiveness – and a substantial probability that such interest would be prejudiced by open-court testimony. Courts have consistently relied upon the officer's imminent return to the area of arrest to establish a likelihood that such prejudice exists. If, as the Court of Appeals held in Martinez, an undercover's continued work in an entire borough of New York City (the Bronx) was insufficient to establish this nexus, surely there is no link established in the present case, where the undercover was no longer even working in the same borough as the arrest.

The People rely on the fact that the undercover's assignment in Staten Island is temporary. Even assuming that the officer will be returning to the Manhattan North Narcotics Division when his assignment ends, the area he identified – "from 96th Street north, river to river" – is a large, unspecific area spanning several square miles. Clearly, this claim lacks the specificity required by the Court of Appeals in Martinez.

Additionally, even if the undercover is to return to the same area of arrest, it will not be for several months when his Staten Island assignment is complete. By contrast, in Pearson, courtroom closure was proper, at least in part because the undercover continued working in the same area of arrest and would be returning there within the same day. In the present case, the undercover will not be returning to the area of arrest imminently, if at all.

Furthermore, similarities can be drawn between the facts of this case and those of Jones and Graves, where the undercover officers were no longer working in the same borough in which the arrest had taken place. In Jones, the Court determined there was an overriding interest that was likely to be prejudiced because the co-defendant was still at large. Even then, only partial closure was warranted specifically because the undercover was no longer working in the area of arrest. Clearly, if full closure was not warranted in Jones, where a specific threat posed by the co-defendant existed, it should be improper here, where the co-defendant, Eddy Kessler, is incarcerated.

Finally, as was the case in Graves, the undercover officer has never encountered any subjects in or around the courthouse, has not received any threats specifically related to this case, and provided no reason to believe that any associates of the defendant would be present in the courtroom. As this Court has repeatedly found, the general fear associated with the risk of working as an undercover does not suffice to warrant courtroom closure. While the undercover

testified that he feared for his safety, his behavior the morning of the *Hinton* Hearing – using a police-issued parking permit and speaking openly to an Assistant District Attorney outside the courthouse – contradicts this assertion.

Because the undercover did not identify a specific neighborhood to which he would be returning imminently, and because there was no specific threat establishing a link between the officer's fear for his safety and this particular case, the People did not establish an overriding interest that was likely to be prejudiced by open court testimony in this case. Therefore, the People's motion for courtroom closure should have been denied.

CONCLUSION

For the reasons stated in this brief, the defense respectfully requests the trial court's ruling is reversed.

Dated: New York, New York
April 19, 2021

Respectfully submitted,

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