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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 59

ALEX ECHEVARRIA,

Appellant.

PEOPLE,

Respondent,

-against-

No. 60

ANDREW MOSS,

Appellant.

PEOPLE,

Respondent,

-against-

No. 61

MARTIN JOHNSON,

Appellant.

27 Madison Avenue
New York, New York
March 18, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA

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1 CHIEF JUDGE LIPPMAN: 59, 60, and 61,
2 Echevarria, Moss, and Johnson.

3 MR. DEAN: I'd like one minute.

4 CHIEF JUDGE LIPPMAN: Yeah, good. One
5 second, counselor.

6 Okay. Go ahead. I'm sorry. You wanted
7 one minute for rebuttal?

8 MR. DEAN: One minute for rebuttal.

9 CHIEF JUDGE LIPPMAN: Sure. Go ahead,
10 counselor.

11 MR. DEAN: May it please the Court, Robert
12 Dean for the appellant, Mr. Echevarria. Under
13 Presley v. Georgia, Waller's third prong requires a
14 judge to consider alternatives to closure even if the
15 judge has to consider them sua sponte. Here - - -

16 JUDGE SMITH: And that's true even if we -
17 - - even if we can't tell from the record that they
18 were acceptable alternatives, he has to - - - if he
19 failed to mention the existence of alternatives, even
20 on acceptable alternatives, that's an automatic
21 reversal?

22 MR. DEAN: Well, that's what Presley v.
23 Georgia says, yes.

24 JUDGE SMITH: Does it - - - I mean, Presley
25 v. Georgia was a case involving seating in the

1 courtroom where the judge had staring at him a whole
2 row of empty seats that he could have put the people
3 in. Isn't this a little different?

4 MR. DEAN: There's no distinction in the
5 right to the public trial between the voir dire and
6 the rest of the trial, if that's what your question
7 is.

8 JUDGE SMITH: Well, I'm suggesting the
9 alternatives - - - I know, I know - - -

10 MR. DEAN: Well, the alternatives - - -

11 JUDGE SMITH: Of course - - - of course,
12 I'm not using - - - the alternative in Presley - - -
13 in Presley was, hey, Judge, why don't we put the - -
14 - well, yeah, what about putting the jurors on the
15 other side of the courtroom? Here, we have these
16 much more - - - I mean, ex - - - one of the judges in
17 the Appellate Division, you say, oh, well, the
18 witness could have worn a disguise. Are you
19 seriously saying that he has to say, well, I've
20 considered the possibility of putting a false
21 mustache on this witness and I've rejected it?

22 MR. DEAN: The - - - the typical
23 alternative that judges use, and they use it all the
24 time, by the way, you just don't see those cases,
25 those public trial cases, is they station a court

1 officer at the door who will check ID and therefore
2 keep out any malefactors.

3 JUDGE SMITH: Couldn't that reasonably be
4 thought just too cumbersome and - - - and perhaps a
5 worse remedy?

6 MR. DEAN: Judge - - - judges do it all the
7 time.

8 CHIEF JUDGE LIPPMAN: What is allowing the
9 family in? That goes to - - - to - - -

10 MR. DEAN: That goes - - -

11 CHIEF JUDGE LIPPMAN: - - - prong 2?

12 MR. DEAN: - - - to the breadth of - - -

13 CHIEF JUDGE LIPPMAN: Yeah.

14 MR. DEAN: - - - the closure which is prong
15 2.

16 CHIEF JUDGE LIPPMAN: Rather than the
17 alternative.

18 MR. DEAN: It does not go to alternatives
19 to closure. This court has deemed limitation on the
20 duration of the closure and allowing in family
21 members to go to the breadth of the closure, not as
22 an alternative to closure.

23 And in fact, if you look at the Presley
24 case itself, the result we're asking for is dictated
25 because in Presley, the Georgia trial judge closed

1 the trial to the general public only during the voir
2 dire, so limited duration, and the defense counsel
3 said to the judge, can we let in the uncle, at least?
4 And the trial judge said, no, there's no reason the
5 uncle has to be here.

6 JUDGE SMITH: How does the stationing the
7 officer at the door work? Somebody shows up, wants
8 to come in, the officer says wait a minute; what
9 happens then?

10 MR. DEAN: Can I see some ID?

11 JUDGE SMITH: Can I see some ID, okay. And
12 then - - - but anyone with ID gets to go in?

13 MR. DEAN: All I can say, Judge, is - - -

14 JUDGE SMITH: If you were the undercover,
15 would they make you a little nervous?

16 MR. DEAN: Judge, the undercovers are
17 nervous all the time. They're - - -

18 JUDGE SMITH: Yeah.

19 MR. DEAN: Every - - -

20 JUDGE SMITH: Yeah.

21 MR. DEAN: Every case, the undercover - - -

22 JUDGE SMITH: I guess - - -

23 MR. DEAN: - - - comes in - - -

24 JUDGE SMITH: - - - I'm really saying
25 couldn't a - - -

1 MR. DEAN: - - - and says I want the
2 courtroom closed.

3 JUDGE SMITH: Couldn't a rational judge say
4 maybe undercoverers are nervous people, but I - - - I
5 am going to indulge his nervousness in this case and
6 I'm not going to station an officer at the door; I'm
7 going to - - - I'm going to have a closed courtroom,
8 as would - - - if he had done that, if he had - - -
9 if he had - - - if he had said what I just said, it
10 wouldn't be reversible error, would it?

11 MR. DEAN: That would be - - - well, first
12 of all, that would be a different case - - -

13 JUDGE SMITH: Yeah, well, but I - - -

14 MR. DEAN: - - - because the judge did
15 consider alternatives.

16 JUDGE SMITH: But I guess what I'm saying
17 is, aren't you - - - aren't you essentially requiring
18 a ritual here? You're requiring a judge to say some
19 words and reject an alternative even when we - - -
20 even when we - - - can't say that the alternative
21 would have worked. In Presley, the alternative - - -

22 MR. DEAN: Since Presley - - -

23 JUDGE SMITH: - - - obviously would have
24 worked.

25 MR. DEAN: - - - judges have been saying

1 that more and more. They have been considering
2 alternatives.

3 JUDGE GRAFFEO: I guess I'm trying to
4 understand what - - - what's the minimum that you
5 want the judge to say?

6 MR. DEAN: The judge has to say, in this
7 circumstance I've considered the alternatives of thus
8 and so and thus and so, and then this court can look
9 at it. Now we're in the realm of discretion.

10 JUDGE PIGOTT: Before you go, did you want
11 to talk about the agency defense in the charge?

12 MR. DEAN: I did want to.

13 CHIEF JUDGE LIPPMAN: Go ahead, quickly,
14 counselor. Go ahead.

15 MR. DEAN: Okay. Okay. So does an agency
16 defense here have - - -

17 CHIEF JUDGE LIPPMAN: Here, he omitted - -
18 - the court omitted all but two factors?

19 MR. DEAN: Right, and the two - - -

20 CHIEF JUDGE LIPPMAN: And why is that - - -

21 MR. DEAN: - - - factors were negative to
22 the defendant. And in fact, one of the factors was -
23 - - was whether it was a prior relationship. This is
24 what the judge said: "Finding little or no prior
25 relationship with the undercover would negate the

1 argument the defendant was acting solely on the
2 undercover's behalf." He's convicted right there.
3 The agency defense is out the door right there.
4 That's the end of the case for the defendant.

5 CHIEF JUDGE LIPPMAN: So this can't be
6 harmless, in your view?

7 MR. DEAN: No, because he raised the valid
8 agency defense. And furthermore, you know, what the
9 Appellate Division is saying is that it's only the
10 selfless drug addicts who are the ones who are
11 entitled to the agency defense. So you might as well
12 say only the Easter Bunny is entitled to the agency
13 defense.

14 CHIEF JUDGE LIPPMAN: Okay. Okay.

15 MR. DEAN: It's a contradiction in terms.

16 CHIEF JUDGE LIPPMAN: Thanks, counselor.
17 You'll have your rebuttal.

18 Okay, Mr. Ross, you're on Moss. Go ahead.

19 MR. ROSS: One minute for rebuttal, Your
20 Honor.

21 CHIEF JUDGE LIPPMAN: One minute. You've
22 got it. What about the issue of the courtroom here?

23 MR. ROSS: What about the issue - - -

24 CHIEF JUDGE LIPPMAN: Of the arrangements
25 for - - - he allowed the family to attend, and there

1 was - - - there was - - - what about the court
2 officer outside the door here? That satisfied the
3 requirement?

4 MR. ROSS: The requirement of considering
5 reasonable alternatives?

6 CHIEF JUDGE LIPPMAN: Yeah.

7 MR. ROSS: No, Your Honor, not - - -

8 CHIEF JUDGE LIPPMAN: Why not?

9 MR. ROSS: Well, for one - - -

10 CHIEF JUDGE LIPPMAN: What is the - - -
11 when you talk about the minimum you have to do, why -
12 - - why putting the court officer stationed outside
13 the door, why isn't that obviously considering an
14 alternative and acting on it?

15 MR. ROSS: I think that putting a court
16 officer outside the door would be an alternative.
17 That's not what happened in this case.

18 CHIEF JUDGE LIPPMAN: What happened? Go
19 ahead.

20 MR. ROSS: In this case, trial counsel
21 proposed an alternative, though he need not have done
22 so under Martin or under Presley. And the trial
23 court not only failed to acknowledge it, but it did
24 not even consider it. There's no - - - not a word on
25 the record that suggests otherwise. That, in and of

1 itself, is enough to - - -

2 JUDGE SMITH: So you say "consider" means
3 talk about?

4 MR. ROSS: At a minimum. At a minimum - -
5 -

6 JUDGE SMITH: He can't just say, Your
7 Honor, I think - - - I think the - - - I think the -
8 - - the witness should testify behind a screen, the
9 judge says denied, that's not considering it?

10 MR. ROSS: That would be more than what
11 happened in this case.

12 JUDGE SMITH: Would that - - - would that
13 be reversible error?

14 MR. ROSS: At a minimum - - - reversible
15 error?

16 JUDGE SMITH: Yes.

17 JUDGE PIGOTT: Yes.

18 MR. ROSS: Yeah, it would. I think at a
19 minimum - - -

20 JUDGE SMITH: He has to explain why the
21 screen's a bad idea?

22 MR. ROSS: No. At a minimum, he should
23 say, or she should say, I have considered
24 alternatives and none of them are appropriate under
25 the facts of this case.

1 JUDGE SMITH: And should list them?

2 MR. ROSS: At a minimum, he should say that
3 he's - - - he or she should - - -

4 JUDGE SMITH: I mean, I guess I have the
5 same question I had for Mr. Dean. Aren't you
6 requiring a ritual here? Aren't you - - - aren't you
7 just going to make every judge read a script on pain
8 of reversal if he leaves something - - - he or she
9 leaves something out of the script?

10 MR. ROSS: In theory, if - - - if a judge
11 is going to say that they've considered alternatives,
12 one would hope that they've actually considered
13 alternatives.

14 CHIEF JUDGE LIPPMAN: Yeah, but isn't there
15 a difference between your case and Echevarria in that
16 it is out there, this stationing outside the door?
17 Why isn't that, at least, a difference that one could
18 - - - could look at as opposed to no discussion,
19 nothing raised, the judge doesn't mention it?

20 MR. ROSS: Well, there's no difference in
21 that the court - - -

22 CHIEF JUDGE LIPPMAN: You're saying in a
23 practical term there's no difference between the - -

24 -

25 MR. ROSS: In practical terms, there's no

1 difference in that the trial court did not
2 acknowledge or consider alternatives. Whether trial
3 counsel proposes an alternative or not is beside the
4 point.

5 CHIEF JUDGE LIPPMAN: So it's raised and
6 you say no, it's not enough?

7 MR. ROSS: The fact that it wasn't
8 considered is not enough. The fact that it - - -
9 that trial counsel raised it is almost - - -

10 CHIEF JUDGE LIPPMAN: But considered is not
11 - - -

12 MR. ROSS: - - - beside the point.

13 CHIEF JUDGE LIPPMAN: Considered is not
14 saying no or denying or whatever.

15 MR. ROSS: Considered is anything other
16 than this notion of implicit consideration that
17 respondent is pushing. That's - - -

18 JUDGE SMITH: But you - - - but the law
19 does, in your view, require consideration even of
20 alternatives that the judge could properly have
21 rejected.

22 MR. ROSS: Yes, Your Honor.

23 JUDGE SMITH: And he - - - he must show
24 that - - - he must show that he or she considered
25 them?

1 MR. ROSS: Yes, Your Honor.

2 CHIEF JUDGE LIPPMAN: So in answer to Judge
3 Smith's question, what's the rule?

4 MR. ROSS: What is the rule?

5 CHIEF JUDGE LIPPMAN: What do you have to
6 do?

7 MR. ROSS: At the very minimum, the trial
8 court must explicitly state that he or she has
9 considered reasonable alternatives to closure as is
10 required by Martin, this court's decision - - -

11 CHIEF JUDGE LIPPMAN: In those - - - in
12 those words that's enough? I'm trying to get - - -

13 MR. ROSS: In those words - - -

14 CHIEF JUDGE LIPPMAN: - - - what's the
15 practical - - -

16 MR. ROSS: Those words would suffice or
17 their equivalent.

18 CHIEF JUDGE LIPPMAN: If a judge says, I
19 considered alternatives and I don't see any,
20 finished, closed, it's okay.

21 MR. ROSS: At the bare minimum, Your Honor.

22 CHIEF JUDGE LIPPMAN: Okay.

23 MR. ROSS: The bare minimum.

24 If I might turn for a moment to the - - -
25 2454's failure to return to the area.

1 CHIEF JUDGE LIPPMAN: Sure.

2 MR. ROSS: Undercover officer in this case
3 gave testimony that any undercover officer could have
4 given at any Hinton hearing in the state - - - in New
5 York City, and that's because there's absolutely
6 nothing case-specific about that testimony. If you
7 look at the - - - the testimony credited by the
8 Appellate Division in this case, it's all very
9 general. You have returning to a geographically
10 broad area, you have pending cases, you have two or
11 three threats in old and unrelated cases.

12 CHIEF JUDGE LIPPMAN: What's the rule here,
13 counselor? What do you have to demonstrate?

14 MR. ROSS: The rule should be what this
15 court set forth in Jones in 2000 - - - 2001, which is
16 a specific link test. There has to be a specific
17 link between the testimony of an undercover officer
18 where he's articulating fears - - -

19 JUDGE SMITH: But if trial counsel had made
20 that argument, couldn't - - - couldn't that - - -
21 mightn't that problem have been cured if he said,
22 wait a minute, Judge, you just said the area, then
23 somebody says, oh, wait a minute, then bring him back
24 here, what does he mean by "area"? Maybe he means -
25 - - maybe he means within - - - within three - - -

1 within a hundred yards.

2 MR. ROSS: Well, the burden is on the
3 prosecution to overcome the presumption of openness,
4 and that is not on trial counsel. Trial counsel
5 sufficiently preserved this issue; there's no
6 question as to that. So if there's ambiguity or a
7 failure to - - -

8 JUDGE SMITH: Well, no, not that he opposed
9 courtroom closure, but doesn't he have to - - - if
10 you're now picking on arguable ambiguity in the
11 testimony, shouldn't he have pointed that out? Isn't
12 that exactly what the preservation rule is for?

13 MR. ROSS: Well, allow me to rephrase it.
14 There's actually no ambiguity whatsoever. There - -
15 - there is no question - - -

16 JUDGE SMITH: Well, the area of 135th and
17 Broadway sounds ambiguous to me. Could mean the
18 whole island of Manhattan or it could mean a block.

19 MR. ROSS: Well, yes, that's the problem
20 with relying on return to the work in the area of the
21 crime, this vicinity or area of the crime. The
22 ambiguity is - - - is there. That's the ambiguity
23 you're describing. So - - - so that - - - that sort
24 of nonspecific testimony doesn't suffice to - - - to
25 establish this link, the specific link between the

1 fears of an undercover officer in open court
2 testimony in that particular case.

3 CHIEF JUDGE LIPPMAN: Okay, counselor.
4 You'll have your - - -

5 MR. ROSS: Thank you.

6 CHIEF JUDGE LIPPMAN: - - - your rebuttal.
7 Counselor, you're in - - - you're in
8 Johnson. Where's the overriding interest
9 demonstrated here?

10 MS. STEPHENS-DAVIDOWITZ: The overriding
11 interest? Well, I suppose - - - I mean, there was no
12 link in this case between the - - - the officer's
13 testimony in this case and Mr. Johnson's specif - - -
14 particular case. The off - - - the testimony that
15 the officers gave in this case was testimony that any
16 active undercover officer could have given.

17 CHIEF JUDGE LIPPMAN: Right. So there's no
18 - - - so the - - - in - - - from your perspective,
19 there's no overriding interest demonstrated?

20 MS. STEPHENS-DAVIDOWITZ: Well, there was -
21 - - there was - - -

22 CHIEF JUDGE LIPPMAN: It was just gen - - -
23 generality; is that the - - -

24 MS. STEPHENS-DAVIDOWITZ: Correct, Your
25 Honor. There was no reason why the concerns of the

1 undercover officers were at all more - - -

2 CHIEF JUDGE LIPPMAN: Counselor, one
3 second. Do you want - - -

4 MS. STEPHENS-DAVIDOWITZ: One minute,
5 please.

6 CHIEF JUDGE LIPPMAN: One minute. Go
7 ahead.

8 MS. STEPHENS-DAVIDOWITZ: There was - - -
9 there was no indication that the concerns of these
10 officers were - - - and their - - - about their
11 safety or effectiveness were any more threatened by
12 testifying in Mr. Johnson's case than testifying in
13 any case.

14 CHIEF JUDGE LIPPMAN: So was it the - - -
15 it wasn't particularized to this officer?

16 MS. STEPHENS-DAVIDOWITZ: Correct, Your
17 Honor, which this court has mandated. This court has
18 said time and time again that the routine closure of
19 the courtroom during the testimony of active
20 undercover officers flies in the face of the - - - of
21 the precedents of this court as well as the United
22 States Supreme Court. If - - - if this court were to
23 affirm closure in this case, it would affirm that
24 rule that it has condemned.

25 CHIEF JUDGE LIPPMAN: And the fact that the

1 family is allowed to attend doesn't - - - doesn't
2 change any of that?

3 MS. STEPHENS-DAVIDOWITZ: No, Your Honors.
4 And in fact, Mr. Johnson didn't have any family
5 members, which shows the arbitrariness of such a
6 rule. It's a right to a public trial; it's not the
7 right for a defendant to - - - who happens to have
8 family members, to have people in the courtroom.
9 This court has to do everything that it can to
10 guarantee that the public is admitted to the
11 courtroom.

12 CHIEF JUDGE LIPPMAN: So in your case, do
13 we reach the agency issue or do we have to?

14 MS. STEPHENS-DAVIDOWITZ: You could reverse
15 on the courtroom closure issue.

16 CHIEF JUDGE LIPPMAN: And what about the
17 agency issue?

18 MS. STEPHENS-DAVIDOWITZ: Your Honor, you
19 could also reverse on agency. In this case - - -

20 CHIEF JUDGE LIPPMAN: Well, that's why;
21 there's one factor omitted in your case, right?

22 MS. STEPHENS-DAVIDOWITZ: That's correct,
23 Your Honor. The - - -

24 CHIEF JUDGE LIPPMAN: Why was that enough
25 to - - - to make a harmful error?

1 MS. STEPHENS-DAVIDOWITZ: Well, Your Honor,
2 that was an - - - this was a closed case. There were
3 certainly - - - there were a lot of factors showing
4 that the defendant was acting as an agent of the
5 undercover officer, and when - - - and the court may
6 - - - gave counsel every reason to believe that he
7 was - - - that it was going to charge this factor of
8 the agency defense, the fact that the defendant did
9 not have any indication of prior drug sales. And
10 then it even - - - it even overruled the
11 prosecution's objection when defense counsel argued
12 that that was a relevant factor during summation, and
13 yet the charge - - - the court didn't charge it,
14 indicating to the jury that it wasn't an important
15 consideration for them.

16 JUDGE SMITH: And you - - - the facts are
17 that Johnson approaches the undercover, says what you
18 looking for? The undercover says, I want crack, and
19 Johnson says, follow me. You really think you have a
20 strong agency case? Are you even entitled to an
21 agency charge on those facts?

22 MS. STEPHENS-DAVIDOWITZ: Yes, Your Honor.
23 In this case, the defendant took a circuitous route,
24 you know, indicating that he wasn't working for a
25 particular person. He was helping this undercover.

1 The undercover - - - the undercover said I just tried
2 to sell it - - - get - - - buy from a female, and the
3 officer said, oh, don't trust females, showing a
4 relationship that was being formed.

5 You know, these are factual determinations,
6 complicated factual determinations, and one that
7 should - - - should be left to the jury. And when
8 the jury is not instructed about an important factor
9 of the - - - you know, of the agency charge, a factor
10 that this court in People v. Lam Lek Chong said was
11 important, that did disturb - - - that did affect the
12 jury's ability to - - -

13 JUDGE SMITH: You're really - - - on your
14 theory there would have to be an agency charge in
15 just about every buy-and-bust case, wouldn't there?

16 MS. STEPHENS-DAVIDOWITZ: Not necessarily,
17 Your Honor. Obviously, that's a determination for
18 the judge to make. But in this case, when there was
19 - - - there were numerous factors pointing towards
20 agency which is why the judge granted the defense
21 counsel's motion. Defense counsel argued agency from
22 the beginning - - - from opening statement until
23 closing statement, and - - - and then the court
24 didn't instruct the jury on this - - - on this
25 relevant factor, which - - - which was an abuse of

1 discretion as a matter of law.

2 But Your Honors, we - - - we also just - -
3 - back to the courtroom closure point, I think that
4 the testimony in this case could not have been more
5 generic, more rote, exactly the type of testimony
6 that this court has repeatedly condemned. And - - -
7 and if - - - if this - - - if this testimony is
8 permitted to close a courtroom, it would essentially
9 close all drug trials in New York City, which - - -
10 which would - - - which would abridge a defendant's
11 right to a public trial.

12 CHIEF JUDGE LIPPMAN: Okay, counselor.

13 MS. STEPHENS-DAVIDOWITZ: Thank you.

14 CHIEF JUDGE LIPPMAN: Thank you.

15 Okay. Counselor Crowley, you're going to
16 talk about Echevarria, right?

17 MR. CROWLEY: Well, actually this court had
18 instructed us to coordinate our presentations - - -

19 CHIEF JUDGE LIPPMAN: Sure.

20 MR. CROWLEY: - - - to avoid undue
21 repetition.

22 CHIEF JUDGE LIPPMAN: You want to - - -
23 what's - - - what issue are you dealing with?

24 MR. CROWLEY: I'd like to talk about
25 preservation for my three minutes, and Mr. Marinelli

1 would like to talk about the evidence in support of
2 closure, and Mr. Stromes, the court's efforts to
3 narrowly tailor the closures.

4 CHIEF JUDGE LIPPMAN: Sure. Go ahead.

5 MR. CROWLEY: And I can talk about any
6 agency questions.

7 JUDGE PIGOTT: In your experience, has - -
8 - has there ever been a court that has said, we're
9 going to let the undercovers testify in open court?

10 MR. CROWLEY: In my personal experience?

11 JUDGE PIGOTT: Yeah. Have you ever ruled
12 in favor of a defendant in these - - - in these
13 hearings?

14 MR. CROWLEY: My experience is two years at
15 the DA's office, so no, not in any experience. There
16 is, I believe, in Ayala, one of the cases the court
17 notes that it had previously denied an application -
18 - - or maybe Pearson - - - in that it wasn't routine
19 closure.

20 But as to preservation, if I can make the
21 point, these defendants contended, because they
22 simply opposed closure, they preserved every specific
23 claim they now raise on appeal. And effectively,
24 they're asking this court to depart from the well-
25 established specific objection rule. The problem

1 with that is is that it would turn the Hinton
2 hearings into a game and would actually harm this - -
3 -

4 JUDGE SMITH: Are you talking about the - -
5 - the closure or nonclosure, or are you talking about
6 the consideration of alternatives point?

7 MR. CROWLEY: I'm talking about everything,
8 so both - - -

9 JUDGE SMITH: So you - - - but - - - how -
10 - - in light of Presley, how can you say they need to
11 - - - they need to propose specific alternatives to
12 preserve them?

13 MR. CROWLEY: Well, there's a few reasons.
14 First of all, this court and the Second Circuit have
15 both noted that Presley is not a pres - - - or it
16 doesn't talk about New York preservation rules, and
17 this court in People v. Alvarez and People v. George
18 said it a few months ago, and the Second Circuit said
19 it in Downs v. Lape. The more fundamental - - -

20 JUDGE SMITH: Well - - - well - - - but it
21 - - - but Presley does seem to say that you've got to
22 consider propo - - - alternatives even not proposed
23 by the defendant, right?

24 MR. CROWLEY: Certainly. And we're talking
25 about what courts have to do when defendants are

1 quiet. And nobody on this side believes - - -

2 JUDGE SMITH: Well, are you saying the
3 defendant has to stand up and say, Judge, you got to
4 consider alternatives?

5 MR. CROWLEY: I'm saying the defendant has
6 to get up and say, Judge, I think you're failing.
7 And that's true - - - every time a judge makes an
8 error - - -

9 CHIEF JUDGE LIPPMAN: Is that contrary to
10 the whole spirit of what Presley is trying to do?

11 MR. CROWLEY: No. It's exactly the
12 opposite, Your Honor, and here's why.

13 CHIEF JUDGE LIPPMAN: How is it exactly the
14 opposite?

15 MR. CROWLEY: Because Presley is trying to
16 eliminate the closures that are unjustified and
17 overbroad, right. And so it tells judges go ahead,
18 don't rely on anybody to tell you what to do, try and
19 achieve that outcome.

20 CHIEF JUDGE LIPPMAN: So you have to say,
21 Judge, you're failing in your duties? That's the
22 preservation requirement?

23 MR. CROWLEY: So if you don't, imagine a
24 judge that has tried - - -

25 CHIEF JUDGE LIPPMAN: Is that the answer?

1 Yes, you have to say that you're failing in your
2 duty?

3 MR. CROWLEY: To preserve it to complain on
4 appeal - - -

5 CHIEF JUDGE LIPPMAN: Yeah.

6 MR. CROWLEY: - - - the answer is yes.

7 JUDGE PIGOTT: Well, that's the whole point
8 of a Hinton hearing, isn't it? I mean, you're - - -
9 it seems to me your argument is putting a burden on
10 the defense where you put on the UCs, they - - - the
11 judge does whatever he does, and you rest. And they
12 say well, wait a minute, wait a minute, wait a
13 minute; in order to - - - in order to be fair here
14 and, of course, hurt my client, I want to raise the
15 fact that you didn't - - - you didn't propose
16 alternatives, Judge. So then he reopens the hearing
17 and then says, well, my alternatives are these and
18 I'm rejecting them all. And they're actually hurting
19 their clients. I mean, isn't - - - isn't the point
20 that you have the burden of proof; to meet the burden
21 is to close the courtroom. It's - - - there's no
22 obligation on their part, is there?

23 MR. CROWLEY: There's no - - - that's
24 correct.

25 JUDGE PIGOTT: Okay.

1 MR. CROWLEY: But here's the thing; it's
2 not hurting their clients if what their clients want
3 is an open trial, because we're talking about a
4 process designed to protect their rights by
5 determining whether a closure is necessary, and if
6 so, what it should look like.

7 When they have a general objection rule,
8 they have every incentive to remain quiet and hope
9 for the error because it's a magic bullet on appeal.
10 There's no harmless - - - there's no harmless error
11 standard. And so what their choice is is they see
12 the judge is failing to consider alternatives even
13 though everybody knows - - -

14 JUDGE PIGOTT: But you don't do that. You
15 don't, you know, stand up and say, wait a minute, you
16 know, they're failing to preserve an issue here,
17 Judge, I'd like to - - - I'd like to ask the
18 defendant if in objecting to this he is trying to
19 preserve an error for appeal.

20 MR. CROWLEY: Yeah, we're talking about a
21 small - - -

22 JUDGE PIGOTT: No, but my point is this;
23 the People never do that, and in fact, they always
24 argue preservation as you are appropriately here.
25 But you - - - you want to say they had the burden of

1 saving you in carrying your burden of proving that
2 the courtroom should - - - should be closed on UCs,
3 and I'm trying to find the difference there. You
4 know, you're saying, okay, if we - - - if we made a
5 mistake here and the judge made a mistake in closing
6 this courtroom, they had an obligation to tell the
7 judge that he was making a mistake?

8 MR. CROWLEY: Yes - - -

9 JUDGE PIGOTT: Okay.

10 MR. CROWLEY: - - -if they want to
11 complain about it on appeal, as they have to in a
12 trial order of dismissal, when a judge makes a jury
13 instruction charge, any other charge. And the reason
14 is because, you know, we're talking about a very
15 small set of cases when the ju - - - most of the time
16 the judge will get it right, the People will get it
17 right.

18 But when the judge has made a mistake and
19 the People, who have every incentive to protect their
20 conviction, will miss it, too, why in that case do we
21 want to encourage silence by saying to a defendant,
22 your choice is between a few hours of closed
23 courtroom testimony which you'll suffer through or
24 three years in jail, ten years in jail? It
25 encourages gamesmanship, and that can't be the

1 outcome we want.

2 The spirit of Presley is - - - and I see
3 that my red light is on. If I can speak about
4 agency, but I'm happy to yield my time. Thank you.

5 CHIEF JUDGE LIPPMAN: Counselor, you're
6 going to talk about what?

7 MR. MARINELLI: Good afternoon, Your Honor.
8 The showing necessary to close the courtroom and - -
9 -

10 CHIEF JUDGE LIPPMAN: What - - - what about
11 it? What's the test?

12 MR. MARINELLI: Well - - -

13 CHIEF JUDGE LIPPMAN: What's the showing?

14 MR. MARINELLI: - - - sorry - - - that
15 there's no dispute that protecting the safety and
16 effectiveness of undercover police officers can
17 constitute a compelling and overriding interest;
18 defendants make no challenge to this court's
19 standards for - - -

20 CHIEF JUDGE LIPPMAN: What about when they
21 - - -

22 MR. MARINELLI: - - - holding that interest
23 on a particular case.

24 CHIEF JUDGE LIPPMAN: - - - where there's -
25 - - where it's just very vague and they're going

1 through kind of generalities about being threatened
2 or - - - with no real specificity as to returning to
3 the area they just talk in general platitudes? How
4 do - - - where do we draw the line as to when it's
5 too vague and when it's sufficient?

6 MR. MARINELLI: Well, Your Honor has always
7 looked to a constellation of the facts, and I think -
8 - -

9 CHIEF JUDGE LIPPMAN: So where - - - if you
10 had to describe what you have to demonstrate to show
11 overriding interest, what is it?

12 MR. MARINELLI: Well, I think there's a - -
13 - in Moss and Johnson where the defendants
14 challenges, the decisions were very consistent with
15 this court's precedent in nearly two dozen cases, and
16 they did not simply say - - - they - - -

17 CHIEF JUDGE LIPPMAN: In Johnson you think
18 it was specific enough?

19 MR. MARINELLI: Absolutely, Your Honor. In
20 Johnson - - -

21 CHIEF JUDGE LIPPMAN: How so? How
22 specific?

23 MR. MARINELLI: You see 4 - - - 14
24 testified that he was returning to the vicinity of
25 sale or had returned fifty times in just the seven

1 months between the defendant's arrest and trial.

2 JUDGE SMITH: Well, what about the point
3 that "vicinity" could mean - - - could mean anything?

4 MR. MARINELLI: The - - - well, that's not
5 preserved, Your Honor, because everyone in that
6 courtroom understood "vicinity" to mean habits,
7 normal meeting of near to or close by.

8 JUDGE PIGOTT: Do you know - - - have - - -
9 do you know of any judge that said, you know, I'm - -
10 - I'm leaving the courtroom open under an undercover?

11 MR. MARINELLI: We do not ask for it in
12 every case. We do not always get what we ask for.
13 Now, if you look to the appellate record the way the
14 defendants do, it's actually much more nuanced
15 reality, and that's - - - even though, as we point
16 out in our brief, the People can't appeal these
17 orders, so necessarily - - -

18 JUDGE PIGOTT: Yeah.

19 MR. MARINELLI: - - - the appellate record
20 always deals with grants but - - -

21 JUDGE PIGOTT: Are undercover agents, the
22 one - - - are they always undercover?

23 MR. MARINELLI: No, Your Honor, sometime -
24 - -

25 JUDGE PIGOTT: So let's assume they're

1 testifying down the hall at a - - - at a robbery
2 case, isn't somebody going to see them in the
3 courtroom?

4 MR. MARINELLI: I'm sorry. I misunderstood
5 you. I think undercover narcotics officers work
6 undercover narcotics consistently.

7 JUDGE PIGOTT: They do nothing else?

8 JUDGE SMITH: You mean you're not
9 undercover just Monday, Wednesday, and Friday?

10 MR. MARINELLI: No, I don't believe so,
11 Your Honor. So to sort of get back as - - - just a
12 little bit about the appellate record, in an - - - in
13 Pearson when the judge answers the defendant's
14 complaint, he says, I just denied the last Hinton
15 application that was made to me; it's not automatic.
16 In Peterson, the application was denied as to - - -

17 CHIEF JUDGE LIPPMAN: But haven't we gotten
18 to the point where - - - where - - - I think I see
19 what Judge Piggott is driving at, that it is kind of
20 automatic and you don't really - - - in many cases,
21 there's kind of a just standard stock things that
22 people say have no relationship to the particular
23 situation?

24 MR. MARINELLI: No, Your Honor.

25 CHIEF JUDGE LIPPMAN: You don't think that

1 that's the common - - - you know, what happens
2 generally today?

3 MR. MARINELLI: Absolutely not, Your Honor.
4 The topics explored at these hearings, the same
5 topics are often explored precisely because, again,
6 there are many cases from this court about what the
7 relevant - - - what relevant considerations can be.

8 JUDGE PIGOTT: But I didn't understand,
9 like, they say we'll let the family in, which is very
10 nice - - -

11 MR. MARINELLI: Right.

12 JUDGE PIGOTT: - - - but why should the
13 family know who an undercover is? They may be
14 dealing drugs out the back door when the - - - when
15 the defendant's out the front. I - - - I don't get
16 the logic of saying, you know, if you've got - - - if
17 you got your whole family here, they can come in and
18 they're going to see the undercover and they can tell
19 the whole neighborhood if they want but - - -

20 MR. MARINELLI: Well, I think - - -

21 JUDGE PIGOTT: - - - but for some reason,
22 we're - - - we - - - we say that other people can't.

23 MR. MARINELLI: The - - - I think Justice
24 Fitzgerald's performance in Moss is very good on this
25 point because what he says, the defendant's mother is

1 from the Bronx, so there's not the concern that she
2 would be exposing the undercover to people in the
3 neighborhood. He says, you know, other family
4 members can come in, but if it's somebody from the
5 neighborhood that there - - - there's a concern that
6 they might actually expose the undercover to drug
7 dealers in the area, that he was going to take on a
8 case-by-case basis.

9 JUDGE PIGOTT: But what is - - -

10 JUDGE RIVERA: So is it your position it's
11 too burdensome to actually do that with everyone
12 walking in?

13 MR. MARINELLI: The - - -

14 JUDGE RIVERA: Because there are a lot of
15 people from the Bronx.

16 MR. MARINELLI: The - - - I believe it's a
17 - - - that Justice Fitzgerald in Moss, you know,
18 properly exercised his discretion where he explained
19 in that case to say, look, you know, I have a lot of
20 people coming back; I don't have a calendar day. In
21 Ramos, this court even recognized that having a
22 screening procedure could be unduly disruptive, even
23 said that either the court or the defendant might
24 find this to not be a reasonable explanation. And
25 here you have a judge who actually may - - - has on

1 the record reasons why it wouldn't be. Just to - - -

2 CHIEF JUDGE LIPPMAN: What about - - - what
3 about Johnson? Where's the specifics there?

4 MR. MARINELLI: And UC 14 testified he'd
5 been returned to the vicinity of the sale fifty times
6 in just the seven months between the defendant's
7 arrest and trial, that UC 206 had been there two
8 weeks before, and that, along with the - - - and
9 there are many factors they also testified to between
10 the threats received and then cases of lost subjects.

11 CHIEF JUDGE LIPPMAN: And "vicinity" is
12 sufficient, in your mind, just to say "vicinity"?

13 MR. MARINELLI: The - - - it was sufficient
14 in everyone's mind in that proceeding. And I note in
15 Moss, you know, all the defendant's attorney said - -
16 - he didn't say this - - - returning to the area
17 isn't specific; he just said, look, that's not his
18 main - - - precinct, he's not going there often. So
19 everybody understood it to be close by that actual
20 intersection. And in addition to the actual buys,
21 there are also pending cases, lost subjects from the
22 area as well that did meet the specificity that
23 you've pointed out: Ramos, Pearson, Ayala.

24 Thank you.

25 CHIEF JUDGE LIPPMAN: All right. So you

1 don't - - - the bottom line is you don't feel any of
2 this is really boilerplate; you think they're being
3 as specific as they can be?

4 MR. MARINELLI: I think, absolutely; if you
5 look at the inquiries the courts make here, they're
6 making the specific inquiries that this court has
7 told the trial judges to make.

8 CHIEF JUDGE LIPPMAN: Okay. Thanks,
9 counselor.

10 MR. MARINELLI: Thank you.

11 CHIEF JUDGE LIPPMAN: Counselor, what's
12 your subject matter?

13 MR. STROMES: Good afternoon, Your Honor.
14 It's David Stromes for the People on the showing of
15 the overriding interests in the alternative to
16 closures. I think the - - -

17 CHIEF JUDGE LIPPMAN: What about the - - -
18 what's the rule, counselor, in your mind, on
19 alternatives to closure?

20 MR. STROMES: The rule is that a court must
21 consider them.

22 CHIEF JUDGE LIPPMAN: And what does that
23 mean?

24 MR. STROMES: That means that, as this
25 court - - -

1 CHIEF JUDGE LIPPMAN: Is it enough to say
2 I've considered alternatives or I've considered a
3 particular alternative and the answer is no?

4 MR. STROMES: In fact, Your Honor, neither
5 of those things are necessary. This court makes - -
6 -

7 CHIEF JUDGE LIPPMAN: What's necessary? Go
8 ahead.

9 MR. STROMES: What's necessary is that the
10 court demonstrate a consideration of alternative - -
11 - an - - - of alternatives by limiting the scope of
12 the closure in some way. This court noted in Ramos,
13 once there is a limited closure, right, once we don't
14 have complete closure of the entire proceeding such
15 that the closure is not facially overbroad, the trial
16 court doesn't have to spout - - -

17 CHIEF JUDGE LIPPMAN: You mean allowing the
18 family in is enough?

19 MR. STROMES: Letting the family in is
20 certainly one alternative to closure.

21 CHIEF JUDGE LIPPMAN: That applies to prong
22 3?

23 MR. STROMES: Absolutely, because - - - and
24 the reason it does is because, really, prongs 2 and 3
25 are two sides of the same - - - same coin; they're

1 interrelated. This court said exactly that in Ramos.

2 JUDGE SMITH: Well, suppose a case in which
3 not a word is said about any alternatives to closure
4 and there's also nothing in the record to indicate
5 that there was any, that - - - let's suppose a case
6 in which, you know, a common sense person looking at
7 it would say they've got to close this courtroom,
8 there's nothing else they can do; does the judge
9 still have to - - - have to mention some alternative
10 to closure and then say I reject it?

11 MR. STROMES: If the judge closes the
12 entire proceeding to the entire public and says
13 nothing - - -

14 JUDGE SMITH: Or the entire voir dire, as
15 in Presley, to the entire public.

16 MR. STROMES: As in Presley - - - Presley
17 is a great example because Presley - - - there was a
18 total closure.

19 JUDGE SMITH: I was suggesting to your
20 adversary, in Presley the alternative was staring the
21 judge in the face. It's as clear as those empty
22 chairs are right now to me. But when - - -

23 MR. STROMES: That's right.

24 JUDGE SMITH: When there's no equally
25 obvious alternative, does Presley still apply?

1 MR. STROMES: Yes, Your Honor, Presley
2 would still apply because when you have a complete
3 closure that's not limited in any respects, the judge
4 has a sua sponte duty to demonstrate that the closure
5 is no broader than necessary, and in that case, I
6 think the judge might have to note why.

7 CHIEF JUDGE LIPPMAN: Well, how does he
8 demonstrated it - - - he or she demonstrate it?

9 MR. STROMES: In all three of these cases,
10 the judge demonstrated that they were constraining
11 the closure by limiting it only to the duration of
12 the undercover officer's testimony and by
13 specifically saying if family members want to come
14 in, we're going to have a separate discussion about
15 that so that family members are allowed in.

16 CHIEF JUDGE LIPPMAN: Anything that - - -
17 that - - - that makes it less than total and complete
18 closure is enough as the rule as you sug - - - you
19 are suggesting?

20 MR. STROMES: Anything that makes it less
21 than total and complete closure is an alternative to
22 closure and - - -

23 JUDGE SMITH: Well, why - - - why is
24 limiting it to the duration of the undercover's
25 testimony any different from limiting it to the

1 duration of the juror - - - juror selection?

2 MR. STROMES: I'm sorry. Why is it any
3 different than - - -

4 JUDGE SMITH: Yes. Yeah, I mean, as I
5 understand it in Presley, it was limited to the juror
6 - - - jury selection, right?

7 MR. STROMES: Correct.

8 JUDGE SMITH: Why - - - why was that not
9 just as good as limiting it to the duration of the
10 undercover officer's testimony?

11 MR. STROMES: When the Supreme Court talks
12 about these rules and really set them forth in both
13 Press-Enterprise cases and in Waller, they talked
14 about an entire proceeding as one isolated
15 proceeding. In Waller, it was a suppression hearing.
16 And even though a suppression hearing is part of a
17 larger trial, what was found to be error was closure
18 of the entire proceeding, i.e., the suppression - - -
19 the suppression hearing. I would submit that voir
20 dire operates the same way. It - - - it's a very
21 distinct piece of a trial; it has nothing to do with
22 the evidence being presented. So when the entire
23 voir dire is closed, you've closed down an entire
24 proceeding.

25 In these cases, you're only talking about

1 two witnesses out of however many witnesses there, in
2 fact, were. So that alternative to complete closure
3 was considered and, in fact, was implemented.

4 Now, what Ramos says is at that point, once
5 the judge limits the closure and the closure is not
6 facially overbroad, the judge does not have to spout
7 into the record everything else he or she can think
8 of that might be a different alternative and rejects
9 them all when the defendant doesn't ask for any.

10 Your Honor, Judge Smith, as you were saying
11 before, that would create ritualistic words, magic
12 words that judges have to say, catechisms, at least
13 toward - - -

14 JUDGE SMITH: But if - - - if the
15 defendants prevail on the Presley issue here, does
16 that mean that a lot of drug convictions are going to
17 be in trouble?

18 MR. STROMES: I don't know if a lot of - -
19 - I - - - I don't have - - - I don't have numbers and
20 certainly there's nothing in the record as to how
21 many would be in trouble. Certainly, courts going
22 forward, I guess - - -

23 JUDGE SMITH: Is there anything unusual
24 about these three particular cases here?

25 MR. STROMES: Unusual?

1 JUDGE SMITH: Yeah.

2 MR. STROMES: I - - - I don't think there's
3 anything unusual about these cases. I think - - -

4 JUDGE SMITH: I mean, I - - - from your
5 experience, would you say there got to be a lot of
6 similarly - - - people similarly situated to Mr. Moss
7 and Mr. Echevarria and Mr. Johnson?

8 MR. STROMES: I would certainly think so,
9 because when a judge makes a limited closure - - -
10 judges have read Ramos; judges understand the rule.
11 When a judge makes a limited closure, the judge
12 doesn't expect to have to pontificate aloud about
13 every other alternative he can think of and say why
14 it's not reasonable. The judge knows that the
15 appellate courts will view it as him having - - -

16 CHIEF JUDGE LIPPMAN: Are you saying - - -

17 MR. STROMES: - - - considering implicitly
18 and rejected - - -

19 CHIEF JUDGE LIPPMAN: - - - in the average
20 - - - in the average case, judges knowing about the
21 case law in this area do not indicate something on
22 the record about alternatives?

23 MR. STROMES: I think judges indicate a lot
24 in the record about alternatives because consistently
25 judges limit the scope - - -

1 CHIEF JUDGE LIPPMAN: But doesn't it - - -
2 doesn't it cut the other way from the argument you're
3 making when you're saying we shouldn't require them
4 to say anything. If they know the law, I - - -
5 overwhelmingly, I think they do say something when
6 you look at the records.

7 MR. STROMES: That's right, because - - -
8 because judges - - -

9 CHIEF JUDGE LIPPMAN: But why aren't these
10 the flip side of - - - when you're not doing it, why
11 isn't that the unusual case? The point is - - - I'm
12 making is Judge Smith is asking you that - - - what's
13 the effect of what you're advocating in terms of the
14 average number of these cases that often come up and
15 - - - and I'm not sure what your answer is. Is your
16 answer that, well, it - - - it's rare that there's
17 nothing on the record, so really it's not going to
18 have that great effect or is your answer that judges
19 don't say anything invariably and they shouldn't be
20 required to?

21 MR. STROMES: I - - - I think it's more - -
22 - more along the lines of the second. What judges do
23 say is - - - is we - - - judges never start from the
24 position that we're closing the entire trial to the
25 entire public. That's not the reality. Judges are

1 always looking - - -

2 CHIEF JUDGE LIPPMAN: Yeah, but I guess the

3 - - -

4 MR. STROMES: - - - to narrow the scope of

5 the closure - - -

6 CHIEF JUDGE LIPPMAN: But I guess the

7 distinction is - - -

8 MR. STROMES: - - - and consider

9 alternatives.

10 CHIEF JUDGE LIPPMAN: - - - that what is

11 really narrowing the scope when you say that it only

12 exists to the end of the undercover's testimony, is

13 that narrowing the scope or in this family issue,

14 that go to prong 2 or prong 3 so - - -

15 MR. STROMES: They - - - they both consider

16 alternatives. This court said it in Ramos; this

17 court said it again in Jones. In Ramos, this court

18 said, "the obligation to consider alternatives was

19 inherent in the court's duty that the closure be

20 narrowly tailored." In Jones, the court was talking

21 about a screaming - - - screening procedure and noted

22 some courts have called the screening procedure an

23 alternative string cite; other courts have called a

24 limitation of the scope string cite. Whatever we

25 call it, the result's the same. This court

1 recognized that prongs 2 and 3 go hand in hand.

2 Prong 2 says what you have to do, limit the scope - -

3 -

4 CHIEF JUDGE LIPPMAN: You're saying prongs

5 - - -

6 MR. STROMES: - - - prong 3 says how.

7 CHIEF JUDGE LIPPMAN: - - - 2 and 3 are

8 basically - - - they're one and the same?

9 MR. STROMES: Two sides of the same coin.

10 Prong 3 tells you how to implement prong 2.

11 CHIEF JUDGE LIPPMAN: Okay, counselor.

12 JUDGE SMITH: Sorry. Can I ask one more -

13 - -

14 CHIEF JUDGE LIPPMAN: Judge Smith.

15 JUDGE SMITH: - - - one overtime question?

16 The Second Circuit decision in Ayala, is that still

17 good law?

18 MR. STROMES: Absolutely. Ayala - - -

19 Ayala basically says the same thing Ramos says.

20 You're starting from the position where you already

21 have a limited closure.

22 JUDGE SMITH: And Justice - - - I think

23 it's Scalia's judgment, one of the - - - whoever

24 dissented in Presley seemed to think that Ayala had

25 just been overruled.

1 MR. STROMES: I don't think the dissent
2 thought that Ayala had been overruled. I think what
3 the dissent in Ayala mentioned - - - what the dissent
4 in, excuse me, Presley mentioned was that Ayala had -
5 - - Ayala and other federal courts had been, you
6 know, struggling with these issues, and by deciding
7 Presley summarily without briefing or argument almost
8 made light of the - - - of the difficult exercise the
9 circuit judges went through. But all Ayala said was
10 what Ramos said. And Ayala actually specifically
11 said, we're saying exactly what the New York Court of
12 Appeals said in Ramos, which is that once you have a
13 limited closure already that's not facially
14 overbroad, judges don't have to pontificate aloud and
15 think of everything they can and say so; it's okay to
16 do it implicitly.

17 CHIEF JUDGE LIPPMAN: Okay, counselor.
18 Thank you.

19 MR. STROMES: Thank you.

20 CHIEF JUDGE LIPPMAN: Counselors, rebuttal.

21 MR. DEAN: All Presley requires is that the
22 court consider alternatives.

23 JUDGE SMITH: Do you think Ayala has been
24 overruled?

25 MR. DEAN: Yes.

1 JUDGE READ: You think Ramos - - -

2 MR. DEAN: Not only that - - -

3 JUDGE READ: You think Ramos has been
4 overruled.

5 MR. DEAN: Ramos has definitely been
6 overruled.

7 JUDGE SMITH: And you - - - you think just
8 - - - Judge Parker's dissent in Ayala is now the law
9 essentially?

10 MR. DEAN: I'm not saying that. I'm saying
11 that Ramos is - - -

12 JUDGE SMITH: Well, not that it's the law
13 but that it is - - -

14 MR. DEAN: - - - Ramos is no longer good
15 law.

16 JUDGE SMITH: And would you say that Judge
17 Parker's dissent is essential - - - says essentially
18 the same thing Presley says?

19 MR. DEAN: I'm - - - I'm not - - - I don't
20 have to say that at all. All I'm saying is that
21 People v. Ramos is definitely no longer good law.

22 CHIEF JUDGE LIPPMAN: So what's the rule?

23 MR. DEAN: The rule is that the court has
24 to, even sua sponte, consider alternatives. There's
25 a whole bunch of juris - - -

1 CHIEF JUDGE LIPPMAN: And allowing the
2 family in is not enough?

3 MR. DEAN: That has nothing to do with
4 alternatives.

5 CHIEF JUDGE LIPPMAN: It goes to prong 2?

6 MR. DEAN: That goes to breadth of closure.

7 CHIEF JUDGE LIPPMAN: What about limiting
8 the duration to the end of the - - -

9 MR. DEAN: Breadth of closure. And if
10 those - - - if what I was saying was not true, there
11 would be no reason for the Supreme Court to have
12 ruled the way they did in Presley v. Georgia where
13 the court considered whether the uncle should stay
14 in.

15 CHIEF JUDGE LIPPMAN: What about the last
16 question you were talking about? Is there a great
17 impact by reaffirming that, or what's your view, you
18 know, on the - - -

19 MR. DEAN: Well, there - - - well, there
20 would be no floodgates, certainly post - - -

21 CHIEF JUDGE LIPPMAN: In most cases, to
22 your knowledge, does the judge say something about
23 alternatives?

24 MR. DEAN: In most cases, the judge says
25 something about alternatives and they say something

1 like, it's a very busy courtroom so posting an
2 officer at the door is not going to work in this
3 case, or they say something like, it ain't a busy
4 courtroom, there aren't a lot of spectators, posting
5 an officer at the door will be sufficient. You don't
6 see those cases.

7 JUDGE READ: And what does - - - what does
8 the officer do, Mr. Dean? How do - - - how do you
9 screen something out when you post the officer at the
10 - - -

11 MR. STROMES: Well, they ask for - - -

12 JUDGE READ: What basis do they use?

13 MR. STROMES: Well, they ask for ID. And
14 by the way, they've asked me this question when I go
15 in to observe cases, as I sometimes do. The officer
16 - - -

17 JUDGE GRAFFEO: But are they looking - - -

18 MR. DEAN: - - - court officer comes up to
19 me and he says - - -

20 JUDGE READ: What are they looking - - -
21 wait. What are they looking for? I mean, so you've
22 got ID, so does that mean you automatically get in?

23 MR. DEAN: Well, the idea is that if you're
24 a drug dealer and your business there is to seek to
25 out undercover officers - - -

1 JUDGE READ: Okay.

2 MR. DEAN: - - - then you're not going to
3 want to enter a courtroom where a court officer is -
4 - -

5 JUDGE GRAFFEO: Are they looking for the
6 address - - -

7 MR. DEAN: - - - posted outside.

8 JUDGE GRAFFEO: - - - to see if someone
9 lives in - - -

10 MR. DEAN: I - - -

11 JUDGE GRAFFEO: - - - within a few blocks?

12 MR. DEAN: I'm not a member of the union,
13 so I don't really know the answer. But judges do use
14 this all the time.

15 JUDGE GRAFFEO: Well, I was wondering when
16 they ask you if they ask - - - if they look for an
17 address.

18 MR. DEAN: No. They say - - - they say I'm
19 here on behalf of the judiciary committee; I'm re - -
20 - I'm reviewing this candidate.

21 CHIEF JUDGE LIPPMAN: Yeah, but we're just
22 trying to get to - - -

23 JUDGE RIVERA: So - - - so - - - so if
24 someone was - - -

25 CHIEF JUDGE LIPPMAN: - - - practically how

1 it works.

2 JUDGE GRAFFEO: Yeah.

3 CHIEF JUDGE LIPPMAN: That's all we want to
4 know.

5 MR. DEAN: Oh, they post the court officer
6 outside the door - - -

7 CHIEF JUDGE LIPPMAN: If they show ID, they
8 let him in?

9 MR. DEAN: - - - and they exercise - - -
10 the officer exercises its discretion. If it's a
11 member of the defendant's team or a paralegal or - -
12 -

13 CHIEF JUDGE LIPPMAN: The officer might say
14 no or go into the judge or something?

15 MR. DEAN: Judges say, if there's a
16 question and somebody wants to come in, we'll - - -

17 CHIEF JUDGE LIPPMAN: Okay.

18 MR. DEAN: - - - bring up the matter at
19 that time. Yeah, they do say that.

20 JUDGE RIVERA: So let me understand it. So
21 now you've got to have an ID to walk into a
22 courtroom? So what - - -

23 MR. DEAN: You don't have to have an ID to
24 walk into the courtroom.

25 JUDGE RIVERA: Well, what's the point of

1 the ID?

2 MR. DEAN: The - - - that's something the
3 court officer might do or he just might ask you what
4 is your business. If you say I'm a spectator - - -

5 JUDGE RIVERA: Uh-huh.

6 MR. DEAN: - - - or I'm a lawyer and I'm
7 interested in the proceedings, they let you in. If
8 there's a question that arises, they bring it to the
9 - - -

10 JUDGE RIVERA: I just say I'm a spectator,
11 so it could be a drug dealer who's a spectator.

12 MR. DEAN: Well - - -

13 JUDGE RIVERA: I'm a drug dealer who's a
14 spectator.

15 MR. DEAN: I think that - - -

16 JUDGE RIVERA: No, right?

17 MR. DEAN: - - - in many cases it's
18 sufficient. The presence of the authority outside
19 the courtroom is enough to deter - - -

20 JUDGE RIVERA: A deterrent?

21 MR. DEAN: - - - people whose sole business
22 is - - - is to out the undercover - - -

23 JUDGE SMITH: On the other hand, you can
24 certainly imagine a judge thinking maybe that
25 wouldn't be enough.

1 MR. DEAN: It - - - I've never seen it come
2 to that point. If you're asking about what happens
3 in all these other cases, I've never seen a problem
4 arise where the judge says, okay, what we'll do - - -
5 you know, sometimes judges will rule against the
6 People in terms of total closure. They'll say, he's
7 made out, you know, an overriding interest but I'm
8 going to put an officer at the door to screen people
9 who want to come there - - -

10 JUDGE SMITH: I mean, isn't - - - isn't the
11 judge - - -

12 MR. DEAN: - - - because this is not a busy
13 courtroom.

14 JUDGE SMITH: Isn't the judge also allowed
15 to be concerned about conservation of resources?
16 Presumably, if you put enough court officers to
17 scrutinizing everybody, you'd never have to close any
18 courtroom.

19 MR. DEAN: It's always - - -

20 JUDGE SMITH: There's got to be some limit
21 some - - -

22 MR. DEAN: It's always just one officer.
23 And if it comes to that, that would be a valid
24 consideration. But the judge - - - all the judge has
25 to do is consider the alternatives, and as soon as

1 the judge considers the alternatives, now we're in
2 realm of discretion.

3 JUDGE SMITH: Yeah, but that - - - that - -
4 - that's what's - - -

5 MR. DEAN: All we have to do is consider -
6 - -

7 JUDGE SMITH: - - - that's what bothers me
8 about your rule. You - - - aren't we just saying to
9 the judges, come out with a list of alternatives to
10 reject?

11 MR. DEAN: Doesn't have to come out with a
12 list. Maybe - - - maybe one would do the trick
13 because all you have to do is consider alternatives.

14 JUDGE SMITH: Then he doesn't even have to
15 list; he could memorize one and use it all the time?

16 JUDGE READ: Yeah, because you're post - -
17 -

18 MR. DEAN: Your Honor, all I can say is
19 that I'm only saying what *Presley v. Georgia* says,
20 and to the extent that this court said otherwise in
21 *People v. Ramos*, that runs directly in conflict with
22 *Presley v. Georgia* - - -

23 JUDGE PIGOTT: Well, your colleagues make
24 the argument that this is a New York phenomenon in
25 any event, that no other state seems to have it.

1 MR. DEAN: This is overwhelmingly not only
2 a New York - - - a New York State phenomenon but a
3 New York County phenomenon where most of these
4 prosecutions take place - - -

5 CHIEF JUDGE LIPPMAN: Okay, counselor.

6 MR. DEAN: - - - because of the - - - the
7 Office of Special Narcotics operates out of New York
8 County.

9 JUDGE READ: One more question.

10 CHIEF JUDGE LIPPMAN: Yeah, Judge Read.

11 JUDGE READ: So this posting an officer at
12 the door is, in your experience, the most common
13 alternative measure?

14 MR. DEAN: Yes, absolutely. I've seen a
15 recent case since Presley where the judge says I'm
16 not going to consider a disguise because the officer
17 is obese and that wouldn't work. So judges do - - -

18 CHIEF JUDGE LIPPMAN: So in your - - - in
19 your experience, this is the state of the art that
20 you'd post someone by the door and end of - - - end
21 of story?

22 MR. DEAN: Yes.

23 CHIEF JUDGE LIPPMAN: Okay. Thanks. Let's
24 have the other two rebuttals.

25 Counselor.

1 MR. ROSS: Thank you, Your Honor.

2 Respondent can't cite a single case by name
3 where a prosecutor has sought closure during the
4 trial testimony of an undercover officer and that
5 closure has been denied. In fact, it can only
6 reference twenty-year-old dicta in Pearson that
7 refers offhand to some case where maybe - - -

8 JUDGE SMITH: Well, of course, when closure
9 is denied, they - - - no one appeals. So you don't -
10 - - you don't see such a case.

11 MR. ROSS: Well, you also don't have all of
12 the cases that settle - - - or that plead out. You
13 also don't have cases where there are acquittals.
14 But there - - - there's no question that courtroom
15 closure is the standard in New York County now. In
16 fact, I - - - I am unaware of any courtroom closure
17 being affirmed in the Third or Fourth Department
18 since 1998 so - - -

19 JUDGE PIGOTT: Well, you make the point - -
20 - I think it was your brief that said there are five
21 cases nationwide and 264 in - - - in New York County.

22 MR. ROSS: That's correct, Your Honor. And
23 in cases like this one, on the basis of nonspecific
24 generic testimony, like 2454s, New York's lower
25 courts are making something that is supposed to be

1 rare, routine.

2 And just one more point, respondent
3 declined to offer a test, and that's because there's
4 no test that this court has articulated that the
5 facts of Mr. Moss's case would satisfy. There's no
6 specific link, and there is certainly no return to
7 the area of the sale that would qualify under the
8 outermost boundary of what this court has talked
9 about in that context in Ayala.

10 Finally, as this court stated in Jones, the
11 defendant's Sixth Amendment rights must not be
12 lightly cast aside simply because the People claim
13 that an undercover officer's safety or effectiveness
14 is at risk. If that holding remains valid today,
15 this case must be reversed.

16 CHIEF JUDGE LIPPMAN: Okay. Thanks,
17 counselor.

18 MR. ROSS: Thank you.

19 CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

20 MR. STEPHENS-DAVIDOWITZ: Your Honors,
21 although reversal is appropriate on the issue of
22 alternatives, this court - - - what's important for
23 this court to realize is that we only get to
24 alternatives if there's a sufficient showing, which
25 is a very demanding test, as this court has called

1 it; Waller's first prong is demanding. And I think
2 that we're sort of - - - I hope that we're not losing
3 focus on the - - - how fundamental a defendant's
4 right to a public trial is and how concerning it is
5 that it's being routinely cast aside.

6 JUDGE PIGOTT: Well, it's fundamental, but
7 I mean, it - - - as has been made - - - I mean,
8 you're talking about one witness, maybe two.

9 MR. STEPHENS-DAVIDOWITZ: Your Honor, it's
10 the heart of the prosecution's case. It's - - -

11 JUDGE PIGOTT: It doesn't make any
12 difference. I mean - - - and it's not like it's not
13 - - - it's not like they're closing the courtroom to
14 everybody. I mean, the - - - the idea is that we
15 want to make sure that the judge and the prosecutors
16 and everybody aren't colluding, you know, and doing
17 nasty things that the public would like to know. And
18 all they're saying is we got one guy or gal and he
19 may be or may be not in danger, and we've looked at
20 that and we want to close it for that period.

21 MR. STEPHENS-DAVIDOWITZ: Well, Your Honor,
22 again, it is - - - it is the heart of the
23 prosecution's case. The - - - the undercover
24 officers are the people without - - - without whom
25 the defendant could not be prosecuted. These are key

1 witnesses; these are police officers. We're not even
2 allowing the press in.

3 I will quote - - - I will cite this court's
4 language in People v. Jelke; it's a 1954 case. "A
5 defend" - - - and this is about the friends and
6 family issue. "A defendant may not have any
7 relatives or friends available or willing to attend
8 the trial, and even if he has, such a handful is not,
9 by any means, sufficiently representative of the
10 public to provide any protection to an accused and
11 the contemporaneously" - - - "contemporaneous review
12 in the form of public opinion that a public trial is
13 designed to assure in a form" - - - "and afford."

14 When the - - - when the courtroom is closed
15 during nearly all drug trials in New York City, a
16 defendant's right to a public trial is being
17 violated, and we ask that you reverse.

18 CHIEF JUDGE LIPPMAN: Okay, counselor.

19 Thank you all. Appreciate it.

20 (Court is adjourned)

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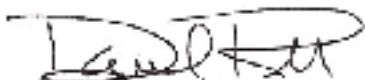
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C E R T I F I C A T I O N

I, David Rutt, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Alex Echevarria, No. 59, People v. Andrew Moss, No. 60, and People v. Martin Johnson, No. 61 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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Date: March 19, 2013