

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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JOSE RODRIGUEZ,

Petitioner,

-against-

DAVID MILLER, Superintendent, Eastern
Correctional Facility,

Respondent.
-----X

MEMORANDUM & ORDER

Case No. 00-CV-3832 (FB)

Appearances:

For the Petitioner:

KATHERYNE M. MARTONE, ESQ.
The Legal Aid Society
Criminal Appeals Bureau
166 Montague Street
Brooklyn, New York 11201

For the Respondent:

CHARLES J. HYNES, ESQ.
District Attorney, Kings County
By: LEONARD JOBLOVE, ESQ.
SHOLOM J. TWERSKY, ESQ.
VICTOR BARRALL, ESQ.
Assistant District Attorneys
Renaissance Plaza, 350 Jay Street
Brooklyn, New York 11201

BLOCK, District Judge:

Jose Rodriguez (“Rodriguez”) seeks a writ of *habeas corpus* pursuant to 28 U.S.C. § 2254, claiming that the state trial court’s decision to allow his family members to remain in the courtroom on the condition that they sat behind a screen deprived him of his Sixth Amendment right to public trial pursuant to *Waller v. Georgia*, 467 U.S. 39 (1984). The Court initially denied his petition, see *Rodriguez v. Miller*, 2001 WL 1301732 (E.D.N.Y. Oct. 22, 2001), but the Second Circuit vacated and remanded for reconsideration in light of its decision in *Yung v. Walker*, 341 F.3d 104 (2d Cir. 2003). See *Rodriguez v. Miller*, 82 Fed. Appx. 715 (2d Cir. 2003). For the reasons set forth below, Rodriguez’s petition is again denied.

BACKGROUND

A. This Court's Prior Decision

In its October 22, 2001 Memorandum and Order, the Court recounted the pertinent facts as follows:

Petitioner's conviction arose out of a 'buy and bust' drug transaction. At petitioner's state court trial, the prosecution moved to close the courtroom to all spectators, including the petitioner's family, during the testimony of the undercover officer who had purchased drugs from the petitioner. The trial court conducted a *Hinton* hearing on the issue outside the jury's presence. See *People v. Hinton*, 31 N.Y.2d 71 (1972) (state court inquiry into factors justifying courtroom closure).

Undercover Officer 1068 was the sole witness at the hearing. The officer testified as follows: He had worked as an undercover police officer for approximately two and a half years. Tr. [at] 562.¹ During that time he had been involved in both "buy and bust" operations and long-term operations. *Id.* at 563. He was involved in active, long-term narcotics investigations in the Bushwick area of Brooklyn and had 'definite' plans to return to that area following his testimony. *Id.* at 563-64. He had open cases pending in the Kings County Supreme Court and had fears about his identity being revealed in court. *Id.* He had been threatened numerous times in the Bushwick area. *Id.* at 563. Specifically, "numerous subjects' of his had said 'that if they (were) to find (him), they would kill (him).'" *Id.* at 564. He had some "lost subjects," *i.e.*, buy and bust subjects who had evaded arrest in his open cases. *Id.* at 564-65.

The officer further testified that he would have fears for his safety if his identity were revealed to the defendant's family. *Id.* at 565. He explained that "if any of the defendant's family, relatives or friends see me, they'll be able to know I am a police officer and spread the word around." *Id.* On cross-examination by defense counsel, however, the officer admitted

¹ "Tr." refers to the transcript of the trial, which included the *Hinton* hearing.

that the defendant had never threatened him, that he did not know the defendant's family, and that he had no reason to believe that the defendant's family was dangerous, involved in drug dealing or knew any drug dealers. *Id.* at 566-67.

After the hearing, defense counsel informed the court that it "(had) to made certain findings in order to close the courtroom." *Id.* at 572. In response, the court stated that "what the (officer) said seems to fit the parameters, within the principles set forth in the cases. He's going back into the neighborhood, expects to go back to the neighborhood, he's still working in the neighborhood, lost subjects, fear(s) for personal safety. It's well-founded, it would seem." *Id.*

The court then inquired as to which family members would be attending the undercover officer's testimony. Defendant's counsel stated that the defendant's mother might attend. The prosecution opposed the mother's attendance, explaining that "if she tells somebody and this undercover will be testifying back and forth on several days in this building and be in the area, she can point him out to somebody. There is a danger." *Id.* at 576. At that point, the court adjourned until the following day, stating "we'll concern ourselves with (the issue) once more if and when there is a desire on the part of the defendant's mother to attend." *Id.* at 576-77.

The next day, defendant's mother and brother arrived at the courtroom to attend the trial. The court then issued its ruling. It first noted that the evidence at the hearing was "sufficient to warrant" the closure of the courtroom. *Id.* at 581. "The open question" for the court was "whether there should be an exception made for the . . . relatives to be present and set up a screen so that the jury is in a position to observe the witness, but not the people in the spectator's section." *Id.* at 582. At that point the following colloquy ensued between the court and defense counsel:

MR GOLDSTEIN: Judge, if that is the court's ruling, I'm going to ask my client's mother and brother to remain outside the courtroom. I fear that setting up the screen creates a substantial amount of prejudice to my client because the only thing the jury can conclude is that the

screen is being set up so that the spectators can't see the witness and that means the witness is in danger. I think my client's mother and brother should be permitted entry without any screens.

THE COURT: Yes, Mr. Goldstein, certainly any requested, appropriated and reasonable curative instructions [will] be given, should that, such a request, be made by the defense.

MR. GOLDSTEIN: Judge, my opinion is that no instructions would be sufficient. And if that's the Court's ruling, I'm going to ask my client's mother and brother to remain outside.

THE COURT: All right. Do you want to do that now?

MR. GOLDSTEIN: Yes.

* * *

THE COURT: To make sure that the record is clear concerning the ruling made a moment ago, the use of the screen plus the curative instruction would seem to the court would be sufficient to protect the defendant's legitimate rights. I . . . think given the state of the of the press and other media events in the metropolitan area in recent months that very few are under the impression that being an undercover police officer is a course of conduct that is as safe as staying in bed after retirement in Florida. Further, in light of the argument made by the Assistant District Attorney, the Court's impression (is) that a substantial cogent case can be made for the proposition that even on the basis of the testimony given and the state of the record and the fact that the undercover police officer will be moving in the neighborhood from the courthouse, at least a couple of days, presumably, the risks of recognition and identification while in transit would also be substantial. The defense has an exception.

Id. at 582-84. Thereafter, the trial resumed with the testimony

of the officer, during which the courtroom was completely closed.

Defendant appealed his conviction to the Appellate Division, Second Department, which affirmed explaining:

There is no merit to the defendant's contention that he was denied his right to a public trial because his family was, in essence, precluded from attending the trial as a result of the trial court's decision to use a screen to block their view of the testimony of the undercover officer Moreover, the court ordered an alternative to closure with regard to the defendant's family, allowing them to remain in the courtroom during the officer's testimony provided that a screen was placed so as to block their view of the undercover officer. Accordingly, the defendant was not deprived of his right to a public trial.

People v. Rodriguez, 685 N.Y.S.2d 252 (2d Dep't. 1999) [internal citations omitted].

Leave to appeal to the Court of Appeals was denied. [See] *People v. Rodriguez*, 93 N.Y.2d 978.

Rodriguez, 2001 WL 1301732, at *1-3.

Although AEDPA clearly governs this case, the Court commented that “even under pre-AEDPA review, the state court’s decision would likely be upheld as a correct application of *Waller*.” *Id.* at *5. The Court determined that “even if [the state court’s decision was] incorrect, it certainly cannot be concluded that the decision was unreasonable under the post-AEDPA review.” *Id.*

B. Second Circuit Remand

By summary order, the Second Circuit vacated and remanded, “largely

because the district court did not have the benefit of our recent decision in *Yung v. Walker*, 341 F.3d 104 (2d Cir. 2003).” *Rodriguez*, 82 Fed. Appx. at 716. The circuit court noted:

Both the state and the district courts assumed that the use of the screen was an alternative to closure rather than a partial closure. Neither considered whether it was necessary to close the courtroom to Rodriguez’s relatives before considering whether the screen constituted a reasonable alternative to closure. Finally neither court considered the possible prejudice to Rodriguez from the use of a screen when assessing whether its use was a reasonable alternative to closure.

Rodriguez, 82 Fed. Appx. at 716. Citing *Yung*, the circuit court explained:

Waller’s second mandate – that the closure be no broader than required to protect the overriding interest at stake – necessarily applies to both the duration of the closure and to the portion of the public to be excluded. Thus *Waller* prevents a court from denying a family member’s request to be exempted from a courtroom closure order unless the court is convinced that the exclusion of that particular relative is necessary to protect the overriding interest at stake. Indeed it would be an unreasonable interpretation of *Waller* for a court to deny such a request if the exclusion of that particular relative under the specific circumstances at issue, is not necessary to promote the overriding interest.

Id. Thus, the circuit court directed the Court to address the following issues on remand:

(1) whether it was necessary to exclude Rodriguez’s family members in order to ensure the safety and efficacy of the undercover officer; (2) whether the use of a screen is properly characterized as a partial closure or an alternative to closure within a *Waller* analysis; (3) whether assuming the use of the screen is an alternative to closure, it is a reasonable alternative within the meaning of *Waller* given its potential prejudicial effect; and (4) whether assuming the use of the screen is a partial closure, the state court reasonably applied *Waller* by mandating the use of the screen.

Id. The circuit court commented that it “express[ed] no views on the merits of any of these questions.” *Id.*

STANDARD OF REVIEW

Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), when a federal claim has been “adjudicated on the merits” by a state court, the state court’s judgment is entitled to substantial deference. *See* 28 U.S.C. § 2254(d). “[A] state court adjudicates a state prisoner’s federal claim on the merits when it (1) disposes of the claim on the merits, and (2) reduces its disposition to judgment.” *Sellan v. Kuhlman*, 261 F.3d 303, 312 (2d Cir. 2001) (citations and quotations omitted). For claims “adjudicated on the merits,” *habeas* relief may not be granted unless the state court decision 1) was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,” or 2) was “based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d).

A state court decision is “contrary to” clearly established federal law “if the state court applies a rule that contradicts the governing law set forth” in Supreme Court precedent or “if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives” at a different conclusion. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). A state court decision involves an “unreasonable application” of clearly established federal law if it unreasonably applies Supreme Court precedent to the particular facts of a case. *See id.* at 409. This inquiry requires a court to “ask whether the state court’s application of clearly established federal law was objectively unreasonable,” not whether the application was erroneous or incorrect. *Id.* In that respect, the standard to be applied “falls somewhere between merely

erroneous and unreasonable to all reasonable jurists.” *Wade v. Mantello*, 333 F.3d 51, 57 (2d Cir. 2003) (quoting *Jones v. Stinson*, 229 F.3d 112, 119 (2d Cir. 2000)). However, the “increment [of incorrectness beyond error] need not be great; otherwise, habeas relief would be limited to state court decisions so far off the mark as to suggest judicial incompetence.” *Eze v. Senkowski*, 321 F.3d 110, 125 (2d Cir. 2003) (quoting *Francis S. v. Stone*, 221 F.3d 100, 111 (2d Cir. 2000)).

DISCUSSION

The Supreme Court in *Waller* announced the standard for courtroom closure:

[1] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, [2] the closure must be no broader than necessary to protect that interest, [3] the trial court must consider reasonable alternatives to closing the proceeding, and [4] it must make findings adequate to support the closure.

Waller, 467 U.S. at 48. The Supreme Court did not consider the standard to apply when family members request an exemption from the courtroom-closure order.

However, prior to its decision in *Waller*, the Supreme Court commented in *dicta* that “an accused is at the very least entitled to have his friends, relatives and counsel present [at trial], no matter what offense he may be charged.” *In re Oliver*, 333 U.S. 257, 271-72 (1948). In light of this *dicta*, the Second Circuit, in *Vidal v. Williams*, 31 F.3d 67, 69 (2d Cir. 1994), required at a minimum, “evidence that the [relative] w[as] inclined to harm or . . . likely to encounter the undercover officer[,]” before closing the courtroom to family members. *Yung*, 341 F.3d at 110 (citing *Vidal*, 31 F.3d at 69).

In *Yung*, however, the Second Circuit ruled that under post-AEDPA review

the more stringent *Vidal* standard was not applicable because it was not clearly established Supreme Court law. *See id.* at 110. Nonetheless, because “*Waller’s* second mandate . . . necessarily applies to both the duration of the closure and to the portion of the public to be excluded[,]” it construed *Waller* as “prevent[ing] a court from denying a family member’s request to be exempted from a courtroom closure order unless the court is convinced that the exclusion of that particular relative is necessary to protect the overriding interest at stake.” *Id.* at 110-11. Thus, “if the exclusion of [a] particular relative, under the specific circumstances at issue, is not necessary to promote the overriding interest,” a denial of the family member’s request to be present would be an unreasonable application of *Waller*. *Id.* at 111. In *Sevencan v. Herbert*, 342 F.3d 69 (2003), the Second Circuit applied the standard set forth in *Yung*, holding that it was not an unreasonable application of *Waller* to exclude the defendant’s wife because she lived in the neighborhood where the undercover officer intended to conduct further undercover work and was susceptible to requests from her husband’s associates to divulge the officer’s identity. *See id.* at 76-77.

1. Whether Exclusion of Rodriguez’s Family Members was Necessary?

The government argues that closure was necessary because, as the officer testified, “if any of the immediate subject’s family, relatives or friends see [the officer], they’ll be able to . . . go back and spread the word around.” Tr. at 565. Although the officer conceded that he had never been threatened by the defendant or his family, nor had any reason to believe the defendant’s family was involved in drug dealing, he stated that Rodriguez’s relatives might disclose his identity as an undercover police officer to

“people in the neighborhood that the defendant knows.” *Id.* at 570.

The government contends that implicit in the officer’s testimony was that both Rodriguez’s mother and brother both lived in or near the Bushwick neighborhood; however, no such finding was made by the trial court. The government has now submitted documentary evidence that Rodriguez’s mother and brother lived in close geographic proximity to the area where the undercover officer operated and would be returning. Specifically, a Criminal Justice Agency Interview Report states that at the time of his arrest, Rodriguez lived with his mother at 146 Knickerbocker Avenue in Bushwick. *See* Supplemental Aff., On Remand From Second Circuit, in Opp’n to Pet. for Writ of Habeas Corpus of Victor Barrall (“Barrall Supplemental Aff.”), Ex. 2. Other records of the Department of Correctional Services submitted to the Court on remand establish that Rodriguez’s brother lived at 1866 Madison Street and/or 1875 Madison Street in Ridgewood, Queens, a neighborhood adjacent to Bushwick. *See* Barrall Supplemental Aff., Ex. 3. Street maps of the area show that Rodriguez’s mother lived approximately twelve blocks from where Rodriguez and the officer conducted a transaction and that Rodriguez’s brother lived within three blocks of another location where a transaction between the officer and Rodriguez occurred. *See* Barrall Supplemental Aff., Ex. 4.

Rodriguez objects to the court’s consideration of this evidence; however, he did not request a hearing to challenge its substance. Although this evidence was not before the trial court, it is entirely appropriate for this Court to consider it. As the Second Circuit has instructed:

where either [petitioner had made only a perfunctory

objection at trial to the courtroom closure or the law changed after trial, creating a greater necessity for a fully-developed record] or any similar reason exists, it is particularly appropriate for a habeas court to gather additional evidence – rather than granting the defendant the windfall of a new trial – where the alleged constitutional violation does not affect the fairness of the outcome at trial, as in courtroom closure cases.

Sevencan, 342 F.3d at 77 (citing *Nieblas v. Smith*, 204 F.3d 29, 32 (2d Cir. 1999)). *See also Gonzalez v. Quniones*, 211 F.3d 735, 738 (2d Cir. 2000) (“[A] federal court considering a habeas petition premised on a closure of the courtroom is not limited to the factual record developed at trial, but may, in its discretion, hold a reconstruction hearing in order to gather more information as [to] whether the closure was proper under the circumstances of the case.”). The Court is warranted in considering this additional evidence because, although Rodriguez requested that his relatives be exempted from the closure order, his objection was only perfunctory. *See* Tr. at 575 (informing the trial court only that there was a case “that states there is no real reason to exclude [Rodriguez’s] family from the courtroom”).

As in *Sevencan*, Rodriguez’s mother and brother both lived in close proximity to the area in which the officer was returning to resume his undercover duties and where the transactions with Rodriguez had taken place, creating a likelihood that either of them would encounter the officer in the course of their daily activities. *Compare Sevencan*, 342 F.3d at 77 (sufficient geographic particularity where officer testified he intended to return to bars located in a large shopping area in the defendant’s wife’s neighborhood), *with Vidal*, 31 F.3d at 69 (refusing to find an encounter likely where relatives “lived in the Bronx” and the officer’s unit “operated throughout the Bronx” since the Bronx “covers 41

square miles”).

Moreover, it is fair to glean from the trial record that the officer would be traveling to and from the courthouse to testify over a number of days, which heightened the risk to his safety because Rodriguez’s mother or brother could point him out to others around the courthouse. Furthermore, the officer testified that he specifically feared Rodriguez’s family’s ability to disclose his identity to “people in the neighborhood that the defendant knows.” Tr. at 569. *Cf. English v. Artuz*, 164 F.3d 105, 109 (2d Cir. 1998) (findings not adequate to warrant closure where, *inter alia*, officer testified that “he was not afraid of testifying before [the defendant’s] family”).

Based on the officer’s testimony and the new information presented subsequent to the remand, the Court determines that the exclusion of Rodriguez’s mother and brother was necessary “to promote the overriding interest” in the officer’s safety and effectiveness. It makes this determination *de novo* because the Second Circuit has yet to determine whether AEDPA deference can apply to determinations rendered by a federal habeas court that considers evidence that was not before the trial court. The Court notes that the two circuits that have considered the issue have held that AEDPA deference applies. *See Matheney v. Anderson*, 377 F.3d 740, 747 (7th Cir. 2004) (“[O]ur case law is clear in holding that § 2254(d) is applicable even though the district judge held an evidentiary hearing.” (quotation omitted)); *Valdez v. Cockrell*, 274 F.3d 941, 954 (5th Cir.2001) (same).

B. Alternative to Closure Versus Partial Closure

No court has considered the refined issue of whether the use of a screen constitutes an alternative to closure or a partial closure within the *Waller* analysis, making

it an issue of first impression. However, without deciding this discrete issue, the Second Circuit has referenced on a number of occasions the option of using a screen in the context of the third *Waller* prong – whether the trial court considered reasonable alternatives. See *Okonkwo v. Lacy*, 104 F.3d 21, 26 (2d Cir. 1997) (suggesting “possible *alternatives* to closure during the undercover officer’s testimony: a strategically placed board to conceal the witness from public view; a disguise of the witness; and a direction that the defendant specify the individuals he desires to be present in the courtroom, with the state to show cause why any such person should be barred.” (emphasis added)); *Pearson v. James*, 105 F.3d 828, 830 (2d Cir. 1997) (evaluating trial court’s closure order and noting that “[s]ome *alternatives*, such as placing a screen between the undercover officer and the spectators . . . appear to have been worth considering” (emphasis added)); *Ayala v. Speckard*, 131 F.3d 62, 71-72 (2d Cir. 1997) (*en banc*) (listing “placing a screen between the witness and the spectators” as an *alternative* to closure (emphasis added)); *Vidal*, 31 F.3d at 69 (observing that trial court did not consider “less restrictive *alternatives* such as screening devices to conceal the witness’s identity” (emphasis added)). See also *Tocco v. Senkowski*, 2002 WL 31465803, at *2 (S.D.N.Y. Nov. 4, 2002) (describing the agent’s testimony behind a screen as a “less exclusive procedure” compared to excluding the public from the courtroom); *McCarthy v. Portundo*, 2001 WL 826702, at *9 (E.D.N.Y. May 25, 2001) (discussing as an alternative to closure, having a blackboard placed in front of the witness to block the view of family members, who were exempt from courtroom closure order); *United States v. Lucas*, 932 F.2d 1210, 1217 (8th Cir. 1991) (upholding use of screen after district court “considered the use of a disguise, the use of a screen, and full closure of the courtroom as means of

concealing [undercover officer's] identity”).

By contrast, the Court's independent research revealed that the Second Circuit has used the term partial closure in several reported cases: in each, partial closure refers to closure of the courtroom to a limited group of spectators or for a limited period of time, not to the use of a screen or other mechanism to shield a witness's identity. *See, e.g., ABC, Inc. v. Stewart*, 360 F.3d 90, 105 (2d Cir. 2004) (“partial closure” when portions of *voir dire* closed to the public); *English v. Artuz*, 164 F.3d 105, 109 (2d Cir. 1998) (“partial closure” when courtroom is closed only to defendant's family); *Woods v. Kuhlmann*, 977 F.2d 74, 76 (2d Cir. 1992) (“partial closure” when “only members of the defendant's family were excluded and then only for the duration of one witness'[s] testimony.”). *See also Judd v. Haley*, 250 F.3d 1308, 1315 (11th Cir. 2001) (defining partial closures as “situations in which public retains some (though not complete) access to a particular proceeding”).

Unlike a partial closure, the use of a screen permits spectators to remain in the courtroom and listen contemporaneously to the witness's testimony. Accordingly, using a screen to shield a witness's identity is most properly characterized as an alternative to closure, not a partial closure.

C. Reasonableness of Using A Screen

The test for evaluating whether an alternative is reasonable is another issue of first impression. The government suggests that the test should encompass whether the proposed alternative 1) deprived the defendant of a due process right, apart from the right to a public trial, and 2) substantially compromised any of the values underlying the right to a public trial. Rodriguez suggests that an alternative is reasonable only if it eliminates

the danger of disclosing the witness's identity. Neither party, however, has located a case directly on point.

In *Tocco*, a district court upheld the use of a screen when challenged on *habeas* review. *See Tocco*, 2002 WL 31465803, at *2. Although not in the context of evaluating whether it was a reasonable alternative, the court simply noted that the trial court “carefully balanced the need to protect the identity of the undercover officer and petitioner’s right to a public trial.” *Id.* *See also Lucas*, 932 F.2d at 1217 (concluding that there was “no abuse of discretion in [district court’s] conclusion that a screen should be used during [officer’s] testimony”).

In the Court’s view, the “reasonableness” test under the Fourth Amendment, requiring the balancing of the countervailing interests at stake, provides the proper guidance. *Cf. New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (“The determination of the standard of *reasonableness* governing any specific class of searches requires balancing the need to search against the invasion which the search entails.” (emphasis added) (citations and quotations omitted)); *Sampson v. City of Schenectady*, 160 F. Supp. 2d 336, 345 (N.D.N.Y. 2001) (“In order to determine whether an officer’s use of force meets the Fourth Amendment’s *reasonable* standard, a court must carefully balance the ‘the nature and quality of the intrusion against the countervailing government interest at stake.’” (emphasis added) (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989))).

In all courtroom closure cases, there are principally two countervailing interests: the government’s interest in inhibiting the disclosure of sensitive information and the defendant’s rights to a fair and public trial. *See Waller*, 467 U.S. at 45 (“[T]he right

to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information"); *Gannett Co. v. DePasquale*, 443 U.S. 368, 401 (1979) (Powell, J., concurring) ("[Those] who object to closure have the responsibility of showing to the court's satisfaction that alternative procedures are available that would eliminate the dangers shown by the defendant and the State.").

Balancing these interests presumes that the use of a screen is not *per se* unreasonable, which would require a determination, akin to a facial constitutional challenge, that "no set of circumstances exists" under which its use would not deprive a defendant of a fair trial. *See Reno v. Flores*, 507 U.S. 292, 301 (1993) ("To prevail . . . in a facial challenge, respondents must establish that no set of circumstances exists under which the [regulation] would be valid." (citation omitted)). The Second Circuit has not specifically addressed the issue, simply acknowledging the obvious: that the use of a screen could be prejudicial to a defendant because a jury could conclude that it negatively reflects upon the defendant. *See Pearson v. James*, 105 F.3d 828, 830 (2d Cir. 1997) (use of a screen to block the witness from the spectators "might [itself] be disadvantageous to a defendant"); *Ayala*, 131 F.3d at 71-72 (suggesting that "placing a screen between the witness and the courtroom spectators . . . [may] imply[] to the jury that the family or friends of the defendant in attendance are likely to be dangerous").

In the Court's opinion, it cannot be said that there may not be some circumstances where the use of a screen could be deployed without depriving a defendant of a fair trial. One would have to know specific facts, such as the size and nature of the

screen, and whether it could be placed in the courtroom in question in a location and manner that would not be likely to cause prejudice.

On the record before the Court, it simply cannot be determined what type of screen would have been utilized, or where it would have been placed. It was incumbent upon the defendant to make such inquiries, so that a proper record could be created to address the reasonableness issue. In the present state of the record, all that can be gleaned is that the family presumably would not have submitted to sitting behind a screen under any circumstances. *See, e.g., Overton v. Newton*, 295 F.3d 270, 279 (2002) (denying *habeas* petition in *Batson* challenge where record was not fully established by defendant). As such, the reasonableness issue cannot be answered, other than to reject the notion of a *per se* rule, and to articulate the standard to be employed in any future as-applied challenge.

D. Partial Closure and *Waller* Analysis

Even assuming *arguendo* that the use of the screen constitutes a partial closure, and not an alternative to closure, the trial court's decision to use a screen to shield the officer's identity comports with *Waller*. The Court's affirmative answer to the Second Circuit's first question – determining that it was necessary to exclude Rodriguez's mother and brother from the courtroom to protect the government's interest – satisfies the first two prongs of *Waller*. Under the third prong, the trial court never considered whether there could be any alternative to the use of a screen; however, defendant never proposed an alternative, and the trial court could not be faulted for not considering other possibilities. *See Ayala*, 131 F.3d at 72 (“No additional alternatives were suggested by any party, and the

trial judges had no obligation to consider additional alternatives *sua sponte.*”). As for the fourth prong, adequate findings have now been made to support the closure.

CONCLUSION

Rodriguez’s petition is denied. However, a certificate of appealability is granted as to the issues of whether the use of a screen is a partial or alternative to closure, and, if it is an alternative to closure, whether there are no circumstances under which it could be reasonable. *See* 28 U.S.C. § 2253.

SO ORDERED.

FREDERIC BLOCK
United States District Judge

Brooklyn, New York
November 24, 2004