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Due Process

standard at the administrative hearing had they inquired, the court refused to find section 31-53(a) unpermissibly vague.[424]

Finally, the court addressed plaintiffs' due process challenge to section 31-53(a). The court stated that due process protection afforded by the Fourteenth Amendment provides a party in an administrative proceeding "the opportunity to be heard with timely and adequate notice advising as to the reasons for the [proceeding], the opportunity to cross-examine witnesses and to call witnesses on its behalf, and the opportunity to present arguments and evidence."[425] Due to the fact that plaintiffs did not claim they failed to receive notice of the proceeding, or were deprived of an opportunity to present their case and challenge the DEP's case, the court found no basis to support a due process challenge.[426]

People v. C.M.[427]
(decided April 29, 1994)

In *People v. C.M.*,[428] the Supreme Court, New York County addressed what it found to be an issue of first impression in New York;[429] whether a defendant may waive his federal constitutional[430] or state statutory[431] right to a public trial,

424. *New Amber*, 619 N.Y.S.2d at 501.

425. *Id.* at 500 (citing Goldberg v. Kelly, 397 U.S. 254, 267 (1970)).

426. *New Amber*, 619 N.Y.S.2d at 500.

427. 161 Misc. 2d 574, 614 N.Y.S.2d 491 (Sup. Ct. New York County 1994).

428. *Id.*

429. *Id.* at 575, 614 N.Y.S.2d at 492.

430. *Id.* U.S. CONST. amend. VI. The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial . . . ." *Id.*

431. N.Y. CIV. RIGHTS LAW § 12 (McKinney 1992). This section provides in pertinent part: "In all criminal prosecutions, the accused has a right to a . . . public trial . . . ." *Id.* The right is also protected under New York Judiciary Law § 4 (McKinney 1992). This section provides in pertinent part:

> The sittings of every court within this state shall be public, and every citizen may freely attend . . . except that in . . . cases for divorce, seduction, abortion, rape, assault with intent to commit rape,

during his testimony, as of right.[432] The court held that the defendant's right to waive a public trial was not absolute and, therefore, did not give him a constitutional or statutory right to exclude the entire public during his testimony.[433] However, closure of the courtroom was ordered to protect the defendant's life and identity as a police informant.[434]

During trial, the defendant made a motion to close the courtroom during his testimony.[435] His defense at trial was that he possessed and sold drugs as a police informant.[436] The defendant argued that the public would gain knowledge of his identity as an informant if the trial were open to the public; thus, public knowledge of his identity as an agent for the police would put his life at risk as well as render him ineffective as an informant.[437] The court denied the motion to exclude the public based solely on the defendant's waiver of his right to a public trial.[438] However, it granted his request for a hearing to determine whether there were competing interests overriding those served by a public trial.[439] In light of the fact that disclosure of the defendant's identity as a police informant would jeopardize his life, the court upheld the motion.[440]

As mentioned, the issue of whether a defendant has the right to a private trial as a correlation of the defendant's right to a public trial was indicated to be one of first impression in New York.[441] In the typical closure case, it is the defendant who claims that his

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> sodomy . . . the court may, in its discretion, exclude [those not directly interested], excepting jurors, witnesses, and officers of the court.

Id.

432. *C.M.*, 161 Misc. 2d at 575, 614 N.Y.S.2d at 492.
433. *Id.*
434. *Id.* at 580, 614 N.Y.S.2d at 495.
435. *Id.* at 574-75, 614 N.Y.S.2d at 492.
436. *Id.* at 575, 614 N.Y.S.2d at 492.
437. *Id.*
438. *Id.*
439. *Id.* at 580, 614 N.Y.S.2d at 495.
440. *Id.*
441. *Id.* at 575, 614 N.Y.S.2d at 492.

or her public trial right has been violated.[442] Although there have been several instances when a criminal defendant has sought to exclude specific entities (e.g. the press) from a trial, here the defendant sought to exclude the public entirely.[443]

Without the aid of direct precedent on the issue,[444] the *C.M.* court's reasoning began with an assessment of the right to a public trial. It acknowledged that the right to a public trial is well settled in both state and federal jurisprudence.[445] The court then

442. *See, e.g.*, Gannett Co. v. DePasquale, 43 N.Y.2d 370, 372 N.E.2d 544, 401 N.Y.S.2d 756, *aff'd*, 443 U.S. 368 (1977). This case involved a motion by Gannett Co., a large media conglomerate, claiming exclusion of the press violated the First Amendment. *Id.* at 374, 372 N.E.2d at 546, 401 N.Y.S.2d at 758. Stressing the unique nature of this motion, the court stated "[i]t is typically the defendant . . . who reminds us on appeal from cases of compelled disclosure that the right to a public trial is a constitutional guarantee which 'the accused shall enjoy.'" *Id.* at 376, 372 N.E.2d at 547, 401 N.Y.S.2d at 759 (citing U.S. CONST. amend. VI. and N.Y. CIV. RIGHTS LAW § 12 (McKinney 1992)). Thus, the *Gannett* court pointed out that the right to a public trial was primarily that of the accused. *Id.* at 376, 372 N.E.2d at 547, 401 N.Y.S.2d at 759. After all, the court reasoned, it is the defendant's liberty interest which is at stake. *Id.*

443. *C.M.*, 161 Misc. 2d at 575, 614 N.Y.S.2d at 492.

444. *Id.* It would appear that any ambiguity arising from this issue would be a result of interpreting state law. In Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (plurality opinion), the Court was asked for the first time to decide "whether a criminal trial itself may be closed to the public upon the unopposed request of a defendant, without any demonstration that the closure is required to protect the defendant's superior right to a fair trial, or that some other overriding consideration requires disclosure." *Id.* at 563-64. The Court held that the right of the public and the press to attend criminal trials is implicit in the guarantees of the First Amendment. However, this was only a plurality decision. *Id.* at 580. The lead opinion of Burger, C.J., joined by White, J., & Stevens, J., observed that "the Bill of Rights was enacted against the long history of trials being presumptively open." *Id.* at 575. As a matter of federal constitutional interpretation, *Richmond Newspapers* would seem right on point. Interestingly enough, the *C.M.* court states there are no precedents on this issue without ever citing *Richmond Newspapers*. *C.M.*, 161 Misc. 2d at 575, 614 N.Y.S.2d at 492. Thus, the ambiguity would appear to be a result of the court's expansive reading of the defendant's rights under state law.

445. *C.M.*, 161 Misc. 2d at 575, 614 N.Y.S.2d at 492. Here the court cites to the Sixth Amendment of the United States Constitution which provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to

cited *Gannett Co. v. DePasquale*,[446] stating the well established rule that "the right to an open trial is presumed."[447] This presumption of an open trial, according to *Gannett*, serves various constitutional interests.[448] For example, although

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a . . . public trial." U.S. CONST. amend. VI. The court also referred to relevant New York statutory law. *See* N.Y. CIV. RIGHTS LAW § 12 (McKinney 1992); *see also* N.Y. JUD. LAW § 4 (McKinney 1992).

446. 43 N.Y.2d 370, 372 N.E.2d 544, 401 N.Y.S.2d 756, *aff'd*, 443 U.S. 363 (1977). In *Gannett*, a highly publicized murder trial, the trial court ordered closure of the courtroom during evidentiary proceedings. *Id.* at 374, 372 N.E.2d at 546, 401 N.Y.S.2d at 758. Gannett claimed that exclusion of the press violated First Amendment guarantees. *Id.* The New York Court of Appeals concluded that the defendant's right to a fair trial unfettered by undue prejudice and the promotion of the orderly administration of justice outweighed the First Amendment interest advanced by Gannett. *Id.* at 381, 372 N.E.2d at 551, 401 N.Y.S.2d at 763.

447. *C.M.*, 161 Misc. 2d at 575, 614 N.Y.S.2d at 492 (citing *Gannett*, 43 N.Y.2d at 376, 372 N.E.2d at 547, 401 N.Y.S.2d at 759).

448. *Gannett*, 43 N.Y.2d at 377, 372 N.E.2d at 547, 401 N.Y.S.2d at 759. Although *Gannett* points out that the primary interest served by a public trial is to assure a criminal defendant a fair proceeding as public trials check judicial abuse, the *Gannett* court stated, "this priority need not detract from the public's general interest in the assurance of fair as well as effective enforcement of its laws." *Id.* Thus, *Gannett* states, "each of us shares a stake in an adversary system which consistently dispenses our law impartially." *Id.* (citing U.S. CONST. amend. V, U.S. CONST. amend. XIV and N.Y. CONST. art. I, §§ 2, 6). If it is not altogether clear what constitutional or statutory principle establishes the presumption of an open trial, still a trial open to the public would appear to be a necessary concomitant of the democratic process. The Supreme Court has never clearly defined the origin of the presumption of an open trial. *See, e.g.*, *Richmond Newspapers*, 448 U.S. at 575-80 (finding the presumption of an open trial resting at least in part in the First and Fourteenth Amendments). New York has been equally unclear as to where the right to an open trial originated. *See, e.g.*, People v. Jelke, 308 N.Y.2d 56, 61, 123 N.E.2d 769, 771, 125 N.Y.S.2d 244, 246 (1954) (stating, "[o]f uncertain origin, but nevertheless firmly rooted in the common law, the right to a public trial has long been regarded as a fundamental privilege of the defendant in a criminal prosecution"). The preceding cases do make clear, however, that the right to a public trial protects interests exclusive of the defendant's right to a public trial embodied in the Sixth Amendment. New York statutory law makes this point. For example, New York Civil Rights Law § 12 stresses that "the accused" shall enjoy the right to a public trial. *See* N.Y. CIV. RIGHTS LAW § 12 (McKinney 1992). New York Judiciary Law

Gannett recognized that the primary interest served by a public trial is preservation of the defendant's right to a fair proceeding free from judicial abuse, it pointed out that the general public also has an interest in fair trials and effective enforcement of the law.[449] Thus, by citing *Gannett* to state the right to an open trial is presumed, the *C.M.* court effectively stated that other values are being served which are not rooted in the Sixth Amendment. Along this line of reasoning, concluding that the defendant's right to a public trial did not convey an absolute right to compel a private one, the New York Supreme Court established constitutional interests in a public trial exclusive of the constitutional rights of the accused.[450]

In its analysis, the court laid out two primary interests preserved by the right to a public trial. First, the court cited to *People v. Clemons*,[451] which reasoned that a paramount interest served by a public trial is to protect the defendant's right to a fair trial.[452] In this regard, the *Clemons* court stated that "knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on the possible abuse of judicial power."[453] The other policy the *C.M.* court asserted to be advanced by the public trial was one of judicial integrity.[454] Here, the court referred to *People v.*

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section 4, on the other hand, states that "every citizen may freely attend" trials. *See* N.Y. JUD. LAW § 4 (McKinney 1992).

449. *Gannett*, 43 N.Y.2d at 377, 372 N.E.2d at 547, 401 N.Y.S.2d at 759.

450. *See supra* note 448 and accompanying text (indicating the presumption of an open trial serves due process and First Amendment interests of the general public as well as protecting the accused's Sixth Amendment right to a public trial).

451. 78 N.Y.2d 48, 574 N.E.2d 1039, 571 N.Y.S.2d 433 (1991). In *Clemons*, the defendant was charged with various offenses involving an alleged rape. *Id.* at 50, 574 N.E.2d at 1040, 571 N.Y.S.2d at 434. The trial court asked the prosecution if they requested closure and the prosecution replied that they did. *Id.* Without articulating any reason, the trial judge closed the courtroom. *Id.* The New York Court of Appeals held that although the right to a public trial is not absolute, it was a fundamental privilege, and could not be denied without sufficiently articulated competing interests. *Id.*

452. *Id.* at 51, 574 N.E.2d at 1040, 571 N.Y.S.2d at 434.

453. *Id.* (quoting *In re Oliver*, 333 U.S. 257, 270 (1948)).

454. *C.M.*, 161 Misc. 2d at 575, 614 N.Y.S.2d at 492.

Jones,[455] where it was determined that public trials promote testimonial trustworthiness.[456] For example, the *C.M.* court pointed out that making trials open to the public increases a witness' apprehension that untruthful testimony will be detected.[457] By noting this latter policy rooted in preserving judicial integrity, the court effectively stated that there are interests served by a public trial that are not rooted in the defendant's Sixth Amendment right. This supports the court's conclusion that the defendant's right to a public trial does not absolutely convey the right to compel a private one.

After discussing the interests giving rise to the presumption of an open trial, the court directly confronted the issue of whether the defendant could receive a private trial, as a matter of law, by waiving his right to a public trial. The court looked to federal law, citing *Singer v. U.S.*,[458] which reasoned by analogy that no correlative right to a private trial derived from the public trial right,[459] holding that the right to a jury trial did not convey the right to be tried by a judge alone.[460] The *C.M.* court approved of the implication that *Singer* derived from the Third Circuit case, *U.S. v. Kobli*,[461] which found that a defendant may waive the right to a public trial under certain circumstances.[462] In light of

455. 82 A.D.2d 674, 442 N.Y.S.2d 999 (2d Dep't 1981).

456. *Id.* at 677, 442 N.Y.S.2d at 1001. *See* People v. Jelke, 308 N.Y.2d 56, 62, 123 N.E.2d 769, 771, 125 N.Y.S.2d 244, 246 (1954). The *Jelke* court stated that publicity of trials preserves fairness to the defendant by deterring judicial abuse and has also "been deemed to play an important role in assuring testimonial trustworthiness, by inducing the fear of exposure of testimony falsely given, as well as in bringing notice of the proceedings to the attention of possible witnesses who may not be known to the parties." *Id.* at 62-63, 123 N.E.2d at 772, 125 N.Y.S.2d at 246 (citations omitted).

457. *C.M.*, 161 Misc. 2d at 575, 614 N.Y.S.2d at 492.

458. 380 U.S. 24 (1964). In *Singer*, the defendant in a federal criminal fraud case claimed that he had an absolute right to be tried by a judge alone. *Id.* at 25-26. The Court rejected the claim that the Sixth Amendment jury trial right provided a correlative right to be tried by a judge. *Id.* at 26.

459. *Id.* at 34-35.

460. *Id.* at 34.

461. 172 F.2d 919 (3d Cir. 1949).

462. *Id.* at 920 n.2. In a case of notoriety, Kobli was charged with transporting her niece across state lines to place her into prostitution in

this synthesis of *Singer* and *Kobli*, the *C.M.* court held that "as with other constitutional rights, the defendant's right to waive a public trial is not 'absolute or inflexible'" and, therefore, he had no correlative right to a private trial as an implication of his public trial right.[463]

Despite its ruling on this motion, the *C.M.* court granted the defendant's alternative request for a hearing to determine whether there were sufficiently articulated interests justifying closure.[464] In order to balance the competing interests, the court relied on the four-prong test set out in *Waller v. Georgia.*[465] Under

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violation of the Mann Act. *Id.* Because young girls were expected to be at the trial which would concern lewd issues, the judge ordered the courtroom closed. *Id.* Although the defendant's counsel objected and requested a public trial, the counsel for the other three co-defendants did not object to the closure. *Id.* The Third Circuit found that the three co-defendants had waived their right to a public trial. *Id.*

463. *C.M.*, 161 Misc. 2d at 576, 614 N.Y.S.2d at 493. In reaching its conclusion that the right to waive a public trial is not "absolute or inflexible," the *C.M.* court quoted Judge Cooke's dissent from *Gannett*. *Id.* Judge Cooke stated, "[i]t is no answer to suggest the right to a public trial is waiveable at the option of the accused. As the right to a public trial knows no correlative right to a private one, such a waiver cannot automatically close the court." 43 N.Y.2d at 387-88, 372 N.E.2d at 555, 401 N.Y.S.2d at 767 (Cooke, J., dissenting) (citing *Singer*, 380 U.S. at 34-35).

464. *C.M.*, 161 Misc. 2d at 578, 614 N.Y.S.2d at 494.

465. 467 U.S. 39 (1984). In *Waller*, court-authorized wiretapping of telephones by Georgia police provided probable cause that a large lottery operation existed and the police searched various places, including the defendants' homes. *Id.* at 41. Subsequently, the defendants were indicted for violating state gambling statutes. *Id.* At a suppression hearing, the state moved to close the proceeding to the public. *Id.* Georgia alleged that publicizing the information obtained from the wiretap would render this evidence inadmissible as it involved privacy interests of those not indicted. *Id.* The trial court sustained the motion upon finding that insofar as the wiretap evidence related to alleged offenders not then on trial, the evidence would be tainted and, therefore, inadmissible at trial. *Id.* at 42. Over defendants' objections, the court excluded all persons from the courtroom during the suppression hearing except witnesses, court personnel, the parties and their lawyers. *Id.* The hearing lasted for seven days, though less than two and one-half hours were devoted to playing the tapes made from the intercepted phone conversations. *Id.* On review, the Court held that closure of the entire hearing was unjustified because it was overly broad and not based on adequately articulated findings.

Waller, the defendant carries the burden of showing first, an overriding interest that will be prejudiced; second, that the requested closure is no broader than necessary; third, the court must make adequate findings to support the closure; and fourth, the court must consider other reasonable alternatives.[466]

Applying *Waller*, the New York Supreme Court in *C.M.* upheld the closure motion.[467] In support of his motion, the defendant argued that without exclusion of the public during his testimony, he could not fully present himself without placing his life in jeopardy.[468] First, the court determined that this was a sufficient overriding interest.[469] Second, the .court found (in compliance with *Waller*'s third prong) that the defendant had been involved in fights and placed in protective custody in prison.[470] The court reasoned that the defendant was placed into a situation where testifying would put his life in danger and refusing to testify would compromise his fair trial right.[471] Thus, the overriding interest asserted by the defendant, and found sufficient by the court relates to the due process right to be heard, which would be thoroughly chilled if the court adhered to the

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Id. at 48-49. Moreover, the Court concluded that adequate alternatives were not considered. *Id.*

466. *C.M.*, 161 Misc. 2d at 577, 614 N.Y.S.2d at 493-94 (citing *Waller*, 467 U.S. at 48).

467. *Id.* at 580-81, 614 N.Y.S.2d at 495-96.

468. *Id.* at 577, 614 N.Y.S.2d at 494. *See* People v. Hinton, 31 N.Y.2d 71, 75, 286 N.E.2d 265, 267, 334 N.Y.S.2d 885, 889 (1972), *cert. denied*, 410 U.S. 911 (1973) (stating that exclusion of the public is often ordered "to shield the identity of a witness from the public and preserve not only [an informant's] future usefulness, but also [the informant's] life").

469. *C.M.*, 161 Misc. 2d at 579, 614 N.Y.S.2d at 495.

470. *Id.*

471. *Id.* at 579-80, 614 N.Y.S.2d at 495. The *C.M.* court stated that this dilemma had "constitutional ramifications." *Id.* The court found that the defendant faced a risk to his life that would effectively limit his right to testify and, therefore, present a defense. *Id.* The court reasoned that the constitutional due process right to be heard would be compromised if the trial remained open. *Id.* Thus, the court concluded, "[h]ere the defendant shares 'the public's interest in avoiding any developments that would threaten to truncate a defendant's right to a fair trial.'" *Id.* (quoting *Gannett*, 43 N.Y.2d at 380, 372 N.E.2d at 549, 401 N.Y.S.2d at 771).

presumption of an open trial.[472] Third, because closure was only requested during defendants testimony, it was found to be no broader than was necessary.[473] Finally, no reasonable alternatives were advanced or found by the court to be available.[474]

As mentioned, the issue of whether the right to a public trial can be waived and provide the defendant the right to compel a private trial was one of first impression for New York.[475] In reaching its decision, the *C.M.* court applied *Singer* and *Kobli*. A synthesis of these cases established that there was no correlative right to a private trial as an implication of the right to a public trial under the Sixth Amendment. In doing so, the court refrained from expanding the right to a public trial under New York State law. Thus, both the New York and federal right to a public trial do not convey the right to obtain a private trial simply by waiver. Both jurisdictions presume the trial to be open to the public.

Both New York and federal law are consistent in holding that although there is no absolute right to a private trial, competing interests may rebut the public trial presumption and warrant courtroom closure. In this regard, New York follows the federal test set out in *Waller*.[476] Thus, New York does not confer any

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472. *C.M.*, 161 Misc. 2d at 579, 614 N.Y.S.2d at 495.

473. *Id.* at 580, 614 N.Y.S.2d at 495. *Cf. Waller*, 467 U.S. at 49-50 (excluding public for an entire seven day hearing overly broad where less than two and one-half hours were devoted to playing tapes which were the subject of the exclusion motion).

474. *C.M.*, 161 Misc. 2d at 580, 614 N.Y.S.2d at 495.

475. *Id.* at 575, 614 N.Y.S.2d at 492.

476. *See, e.g.*, People v. Kan, 78 N.Y.2d 54, 57, 574 N.E.2d 1042, 1044, 571 N.Y.S.2d 436, 438 (1991). In *Kan*, codefendants Kan, Ip, and an accomplice were charged with distribution and possession of heroin. 78 N.Y.2d at 56, 574 N.E.2d at 1044, 571 N.Y.S.2d at 437. The accomplice was enabled to plead guilty to a lesser charge in exchange for testimony inculpating Kan and Ip. *Id.* The trial court conducted a hearing to determine whether closure was warranted during the accomplice's testimony. *Id.* The accomplice argued that closure was warranted because he would be working with law enforcement as part of an ongoing criminal investigation and, therefore, revealing his identity would render him ineffective. *Id.* at 58, 574 N.E.2d at 1044, 571 N.Y.S.2d at 438. Moreover, the accomplice stated that it feared reprisal from Kan's "people," and also, others involved in the criminal

greater freedom under its laws to a defendant requesting a private trial. New York, currently following *Singer* and *Waller,* holds that a defendant seeking to rebut the public trial presumption must show first, an overriding interest that is likely to be prejudiced; second, that the closure requested is no broader than necessary; third, the court ordering closure must make adequate findings to support this action; and fourth, the court must assess any reasonable alternatives.[477]

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investigation. *Id.* The accomplice did not, however, express fear of Kan's family. *Id.* Over Kan's objection, the trial court ordered closure of the courtroom to all spectators, during the accomplice's testimony. *Id.* at 56, 574 N.E.2d at 1043, 571 N.Y.S.2d at 437. Citing *Waller*, the court of appeals held that exclusion of everyone from the trial during the accomplice's testimony was broader than constitutionally tolerable and thus, constituted a violation of Kan's right to a public trial. The exclusion of Kan's family in particular, was not justified by the record. *Id.* at 59, 574 N.E.2d at 1045, 571 N.Y.S.2d at 439.

477. *Waller*, 467 U.S. at 48. *See Kan*, 78 N.Y.2d at 57, 574 N.E.2d at 1044, 571 N.Y.S.2d at 438.

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