No. 22-_____

IN THE

Supreme Court of the United States

DON FITZGERALD HANCOCK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner was convicted of second degree murder based largely on the testimony of the sole witness to the killing, who placed Petitioner at the scene of the crime. While testifying at trial, the government's witness wore a niqab, a religious garment that covers the entire body and face except for the wearer's eyes. Petitioner's counsel did not object that the witness's garb violated the Confrontation Clause, and the trial court allowed the testimony. Both the trial court and the D.C. Court of Appeals subsequently denied Petitioner's arguments that his Sixth Amendment rights were violated, in part based on "religious concerns" related to the witness's supposed First Amendment right to wear a religious garment while testifying. The questions presented are:

1. Whether, in a murder trial where a defendant's liberty interests at stake, allowing the only testifying witness present at the scene of the killing to testify in a niqab impermissibly hindered Petitioner's Sixth Amendment right to confront and cross-examine the witnesses against him at trial, and thus constituted plain error.

2. Whether Petitioner did not receive effective assistance of counsel at his criminal trial, when, given the readily apparent violation of Petitioner's Sixth Amendment confrontation rights, trial counsel failed to object to the testimony, both in advance and at the time it was presented.

PARTIES TO THE PROCEEDINGS

Petitioner Don Fitzgerald Hancock was the defendant-appellant below. Respondent the United States was the plaintiff-appellee below. Reynaud Cook was also an appellant below.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Don Fitzgerald Hancock is an individual person; he is not a corporate entity or publicly traded company.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Don Fitzgerald Hancock ("Petitioner") respectfully submits this petition for a writ of certiorari to review the judgment of the District of Columbia Court of Appeals in this case.

OPINIONS AND ORDERS BELOW

The D.C. Court of Appeals' opinion is unreported. Pet. App. 1a-14a. The order denying the petition for rehearing and rehearing en banc is unreported. *Id.* at. 45a-46a. The opinion of the District of Columbia Superior Court denying Petitioner's Motion under D.C. Code § 23-110 is unreported. *Id.* at 15a-44a.

STATEMENT OF JURISDICTION

The D.C. Superior Court had jurisdiction pursuant to 22 D.C. Code, §§ 2101, 4502, as well as D.C. Code § 23-110. The D.C. Court of Appeals had jurisdiction over Petitioner's appeals pursuant to D.C. Code § 11-721. The D.C. Court of Appeals filed its opinion on December 15, 2022. It denied Petitioner's timely petition for rehearing en banc on February 6, 2023. This court has jurisdiction to review the D.C. Court of Appeals' judgment on a writ of certiorari under 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the U.S. Constitution states, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to

be confronted with the witnesses against him; . . . and to have the Assistance of Counsel for his defence."

D.C. Code § 23-110 provides, in relevant part:

> D.C. Code § 23-110 Remedies on motion attacking sentence.
>
> (a) A prisoner in custody under sentence of the Superior Court claiming the right to be released upon the ground that (1) the sentence was imposed in violation of the Constitution of the United States or the laws of the District of Columbia, (2) the court was without jurisdiction to impose the sentence, (3) the sentence was in excess of the maximum authorized by law, (4) the sentence is otherwise subject to collateral attack, may move the court to vacate, set aside, or correct the sentence.
>
> (b)(1) A motion for such relief may be made at any time.
>
> …
>
> (c) Unless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the prosecuting authority, grant a prompt hearing thereon, determine the issues, and make findings of fact and conclusions of law with respect thereto. If the court finds that (1) the judgment was rendered without jurisdiction, (2) the sentence imposed was not authorized by law or is otherwise open to collateral attack, (3) there

> has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner, resentence him, grant a new trial, or correct the sentence, as may appear appropriate.
>
> …
>
> (f) An appeal may be taken to the District of Columbia Court of Appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

PRELIMINARY STATEMENT

This case squarely presents to this Court for resolution two constitutional issues of exceptional importance. First, Petitioner did not receive a constitutionally adequate criminal trial (where his liberty interests were at stake) because he was denied his Sixth Amendment right to confront witnesses testifying against him—in this case, the *only* witness to testify firsthand regarding the killing. The trial court committed plain error by permitting the witness to testify in a niqab, which impermissibly hindered Petitioner's ability to cross-examine her and the jury's ability to assess her credibility. In denying Petitioner's appeal on this issue, the Court of Appeals endorsed the use of a novel – and dangerous – "religious concerns" factor, whereby a criminal defendant's constitutional rights can be "balanced" against the purported First Amendment rights of a witness at trial to dress as they please, even when

such dress almost completely obstructs the witness's face and prevents proper confrontation under the Sixth Amendment.

Second, Petitioner's Sixth Amendment rights were violated because he did not receive effective assistance of counsel. Petitioner's trial counsel failed to raise the Confrontation Clause issue—which should have been abundantly obvious—at trial. In denying Petitioner's appeal on this issue, the Court of Appeals' reasoning was based on the same flawed determination that there was no Confrontation Clause violation, as well as a problematic reading of the objective standard of reasonableness for ineffective assistance of counsel cases.

These rulings will recur and cause further harm within the U.S. criminal justice system. They will have severely adverse consequences to criminal defendants whose liberty interests are at stake by effectively eviscerating the right to confrontation under the Constitution, by signaling that right can be "balanced" away by a non-defendant's religious rights. Neither the First nor the Sixth Amendments endorse or warrant such a dangerous precedent. Mr. Hancock has exhausted his appeals in the District of Columbia courts on these issues. For all of these reasons, as well as those discussed below, review and clarification from this Court are urgently needed.

STATEMENT OF THE CASE

1. This Petition and the appeals below arise from the criminal trial of Petitioner and Reynaud Cook. On a one-count indictment, Petitioner was charged with First Degree Murder While Armed

(Premeditated), in violation of 22 D.C. Code, §§ 2101, 4502, for the July 17, 2007 killing of Nacarto Gladden in northeast Washington, DC. Cook was also charged with the same crime, and Petitioner and Cook were joined as defendants and tried together. After Petitioner and Cook both pled not guilty, a nine-day trial was held before the D.C. Superior Court in July 2017.

2.a. At trial, the government's theory of the case was that Cook shot Gladden, with Petitioner participating in the killing, but the government would not rule out the possibility that Petitioner in fact shot Gladden. To support its case against Petitioner, the government largely relied on the testimony of Alisha Everhart, who was at the scene just moments before the killing transpired and whose testimony placed Petitioner there at the time of the killing. The government also presented evidence of statements made by Everhart shortly after the incident supposedly implicating Petitioner for the killing. There was, however, no clear testimony linking Petitioner to a murder weapon, and Everhart testified that she saw Cook walking to the scene carrying a gun. No murder weapon was placed into evidence, and it was never established at trial who shot Gladden.

b. Notably, Everhart – the sole testifying witness who was present at the scene of the crime, testified during the second, third, and fourth days of trial while wearing a niqab, a traditional form of religious dress that covers the entire face and body, and leaves only the eyes of the wearer visible. During its opening statement, the government sprung the

fact of Everhart's planned trial dress for the first time, making the jury aware that:

> In 2011 or so, Ms. Everhart pulled herself together. She got her life together. She got sober. She had a child. She became religious. She converted to Islam. She became very active in the Islamic community. And, in fact, ladies and gentlemen, she is such a devout individual that you will see, when she testifies here today, she's actually going to be in a headdress and face covering for religious reasons.

Pet. App. at 52a. Trial counsel did not object at that time to Everhart testifying while wearing a "headdress and face covering."

c. The prosecutor addressed Everhart's apparent religious beliefs on the first day of her testimony, noting that she had converted to Islam and was wearing a niqab in court for her testimony.

> Q And you said you converted to Islam. When did you do that?
> A August of 2009.
> …
> Q Now, Ms. Everhart, you are testifying today wearing a head covering as well as a face covering?
> A Yes, ma'am.
> Q And do you normally wear a face covering and a head covering in public?
> A Yes, ma'am. Well, *sometimes I do* and, you know, this is how I cover.
> Q And you say that --
> A It's called a Niqab.

> Q Can you spell that for the reporter.
> A N-I-Q-A-B.
> Q And how long have you been covering you?
> A Since I had converted over. For the past eight years.

Pet. App. at 55a (emphasis added). Everhart also testified that she is a musician and "an upcoming singer and rapper." *Id.* at 54a. There were no objections as to Everhart testifying in a niqab, and the trial court made no effort to prohibit Everhart from testifying in this manner or to otherwise conduct any inquiry into the propriety of the testimony.

d. On July 26, 2017, the jury found Petitioner guilty of second degree murder while armed. Pet. App. at 47a. Cook was also found guilty of second degree murder while armed. On July 9, 2018, the court sentenced Petitioner to 20 years imprisonment. *Id*. Cook was also sentenced to 20 years the same day. Both Petitioner and Cook appealed to the D.C. Court of Appeals.

3.a. While the appeal was pending, Petitioner and Cook filed separate post-trial motions pursuant to D.C. Code § 23-110. In his motion, Petitioner argued that (1) his trial counsel's performance was deficient because counsel failed to object to the wearing of the niqab by Everhart during her trial testimony, in violation of Petitioner's Confrontation Clause rights; and (2) counsel's failure to object prejudiced Petitioner, in that the inability to confront Everhart led to Petitioner's conviction.

b. After oral argument, the trial court issued its ruling on December 29, 2020, denying Petitioner's

and Cook's motions. Pet. App. at 15a-44a. The trial court held that it was not a violation of Petitioner's Confrontation Clause rights for Everhart to testify while wearing a niqab, because, the trial court reasoned, (1) the "face-to-face" element of the Confrontation Clause was satisfied, (2) in any event, Everhart's ability to testify while wearing a niqab furthered an important public policy and the reliability of her testimony was otherwise reassured; and (3) based on those findings, Petitioner's counsel was not ineffective for failing to object because such an objection would have been meritless. Pet. App. at 43a.

4.a The D.C. Court of Appeals affirmed the verdicts as well as the trial court's decision on the § 23-110 motions on December 15, 2022. Pet. App. at 1a-14a. In addressing the related rulings on the Confrontation Clause and ineffective assistance of counsel issues, the Court of Appeals held, *inter alia*, that the trial court did not commit plain error by holding there was no Confrontation Clause violation, and that trial counsel's performance did not fall below an objective standard of reasonableness by not raising the issue at trial. Pet. App. at 3a-6a. However, in so ruling, the Court of Appeals committed some of the same errors that the trial court did, or ignored them entirely. Namely, it did not substantively address the trial court's balancing away of Mr. Hancock's Confrontation Clause rights in order to vindicate Ms. Everhart's "religious freedom"; it did not adequately engage with the relevant case law supporting a finding of a Confrontation Clause violation in circumstances similar to those at issue here; and based on its own truncated analysis, found that trial counsel's failure to raise the issue did not fall below

an objective standard of reasonableness. The Court of Appeals denied rehearing and rehearing en banc on February 6, 2023.

REASONS FOR GRANTING THE PETITION

The Petition should be granted because it squarely presents two constitutional issues of exceptional importance. First, Petitioner did not receive a constitutionally adequate criminal trial (where his liberty interests were at stake) because he was improperly denied his Sixth Amendment right to confront witnesses testifying against him. The trial court committed plain error by permitting the sole witness to the killing to testify in a niqab, which impermissibly hindered Petitioner's ability to cross-examine her and for the jury to assess her credibility. In denying Petitioner's appeal on this issue, the Court of Appeals failed to substantively address the trial court's use of a novel – and dangerous – "religious freedom" test, whereby a criminal defendant's constitutional rights can be "balanced" against the purported First Amendment rights of a witness at trial. There is no basis for such a "balancing" test in the law or this Court's precedent.

Second, review is necessary to address the exceptionally important question of whether Petitioner's Sixth Amendment rights were violated because he did not receive effective assistance of counsel. Petitioner's trial counsel failed to raise the Confrontation Clause issue—which should have been abundantly obvious—at trial. In denying Petitioner's appeal on this issue, the Court of Appeals' reasoning was that there was no settled law on the issue of whether Ms. Everhart's testimony constituted a

Confrontation Clause violation, but that limited reading ignores the fundamental right to confrontation in the first instance. For these reasons, the Petition should be granted.

I. The D.C. Court of Appeals' Decision Presents Two Constitutional Issues of Exceptional Importance.

The D.C. Court of Appeals' decision presents two constitutional issues of exceptional importance – *i.e.*, whether Petitioner's confrontation and effective assistance of counsel rights under the Sixth Amendment were violated. The Court of Appeals' affirmance of the trial court's decisions was flawed, in that it held that Petitioner could not meet the plain error standard as to the Confrontation Clause violation, and that trial counsel's performance did not fall below an objective standard of reasonableness. Both errors warrant this Court's intervention.

A. The Court of Appeals Wrongly Held that Petitioner Did Not Satisfy the Plain Error Standard as to the Confrontation Clause Violation.

The Court of Appeals' judgment was flawed in that it held that Petitioner did not satisfy the plain error standard as to the Confrontation Clause violation. Four elements must be satisfied for a showing of plain error: (1) there was an error, (2) the error was "clear" or "obvious", *i.e.*, "so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it, despite the defendant's failure to object[]", (3) the error affected the defendant's substantial rights, *i.e.*, there was a

reasonable probability that it had a prejudicial effect on the outcome of the trial; and (4) the error seriously affected the fairness, integrity or public reputation of the judicial proceeding. *Comford v. United States*, 947 A.2d 1181, 1189–90 (D.C. 2008).

Permitting Everhart to testify in a niqab was plain error. As a preliminary matter, under the Confrontation Clause, the accused must have "an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *California v. Green*, 399 U.S. 149, 157-58 (1970) (quoting *Mattox v. United States*, 156 U.S. 237, 242-243 (1895)). "[A] witness's face [is] the most expressive part of the body and something that is traditionally regarded as one of the most important factors in assessing credibility." *Romero v. State*, 173 S.W.3d 502, 506 (Tex. Crim. App. 2005). Facial expression, along with tone, demeanor, and emphasis, "make the words uttered ... convincing or not." *Howard v. Moore*, 131 F.3d 399, 408 (4th Cir. 1997) (*en banc*). Further, as this Court has held, "a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." *Maryland v. Craig*, 497 U.S. 836, 850 (1990).

Here, the niqab worn by Everhart prevented the jury from adequately assessing Everhart's testimony and denied Petitioner's constitutional right to face-to-

face confrontation. Testifying in a niqab or other similar face-shielding garments poses serious concerns for a defendant's Sixth Amendment rights. *United States v. Alimehmeti*, 284 F. Supp. 3d 477 (S.D.N.Y. 2018). This is particularly important because Everhart was by far the government's most important witness at trial, as she was the only testifying witness who was present at the scene of Gladden's killing. Without Everhart's testimony, there was no viable case against Petitioner. Yet despite the importance of Everhart to the government's case, the trial court permitted her to testify wearing a restrictive garment that completely shielded her facial expressions from counsel and the jury – even though Everhart herself admitted that she only wore the niqab "sometimes" and further stated that she was an "upcoming singer and rapper." Pet. App. at 54a-55a.

The Court of Appeals ruled that the fact that the trial court did not stop Everhart from testifying while wearing the niqab was not plain error. Although it correctly noted that "there is no precedent in this court or the Supreme Court indicating that appellants' rights were violated when Everhart testified wearing a niqab[,]" it also premised its ruling on a finding that "Appellants point only to cases that are both factually distinct and not binding on this court." Pet. App. at 4a. As an initial matter, it is undisputed that this Court has held that criminal defendants have a right to confront their accusers, *Green*, 399 U.S. at 157-58, and that right may be satisfied "absent a physical, face-to-face confrontation at trial *only* where denial of such confrontation is necessary to further an important public policy *and only* where the reliability of the testimony is

otherwise assured." *Craig*, 497 U.S. at 850 (emphasis added). These principles are clearly "settled law."

Additionally, the Court of Appeals' analysis of the factually similar cases cited by Petitioner overlooked several key points. First, the Court of Appeals marginalized the Southern District of New York's ruling in *Alimehmeti* as "inapposite" without further explanation. Pet. App. at 4a-5a n.1. To the contrary, *Alimehmeti* is readily applicable to the circumstances here. In that case, the court was presented with the question of whether undercover officers should be permitted to wear a disguise while testifying against a defendant charged with terrorism crimes. One of the alternatives discussed to preserve the officers' anonymity was to have them testify in a niqab. The court rejected this approach, noting that:

> Trial testimony by disguised witnesses might compromise [the defendant's] ability directly to confront his most central accusers at trial insofar as any disguise impedes [the defendant's] (or the jury's) ability to assess the witnesses' comportment on the stand. This arrangement is in tension with the Constitution's guarantee to a criminal defendant of the right "to be confronted with the witnesses against him," U.S. Const. amend. VI, and "a face-to-face meeting with witnesses appearing before the trier of fact[.]"

Alimehmeti, 284 F. Supp. 3d at 489 (quoting *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988)). Notably, the language in *Alimehmeti* is quite clear that allowing a witness to testify in a niqab "is in tension with the Constitution's guarantee" of the right to confrontation

of witnesses, because testimony in such circumstances prevents the defendant (and the jury) from observing the witness's "comportment" or demeanor in response to cross-examination. That principle should also apply here. *Id.*

Second, the Court of Appeals stated, again without further explanation, that the decision in *People v. Ketchens*, No. B282486, 2019 WL 2404393, at *8 (Cal Ct. App. 2d Dist. June 7, 2019), "militates against appellants' argument[.]" Pet. App. at 4a-5a n.1. To the contrary, the central principle set forth in *Ketchens* – *i.e.*, that "the defendant is deprived of a face-to-face encounter with a witness who testifies in court wearing a ski mask or a disguise that conceals almost all of [the witness's] face from view" and that "[a]llowing the witness to use such a disguise would effectively remove the 'face from 'face-to-face confrontation" (*Id.* at *8) – militates in Petitioner's favor. Although the court in *Ketchens* found there was no Confrontation Clause violation, that ruling was based on different factual circumstances; in that case, the ski mask in question covered the witness's entire face, but for her right eye, which was visible slightly, a portion of her nose, and a little bit of her left eye, whereas here, only Everhart's eyes were barely visible.

Third, the Court of Appeals found that the decision in *Romero v. Texas*, 173 S.W.3d 502 (Tex. Crim. App. 2005), "does not account for the religious concerns presented in this case." Pet. App. at 4a-5a n.1. *Romero* found a Confrontation Clause violation when the witness wore "dark sunglasses, a baseball cap pulled down over his forehead, and a long-sleeved jacket with its collar turned up and fastened so as to

obscure [his] mouth, jaw, and the lower half of his nose. The net effect and apparent purpose of [his] 'disguise' was to hide almost all of his face from view." 173 S.W.3d at 503. Those circumstances are very similar to those under which Everhart testified here.

More importantly, in setting *Romero* aside, the Court of Appeals did not explain why the supposed "religious concerns presented in this case" (Pet. App. at 5a n.1) should trump Petitioner's rights or serve as an adequate public policy exception to obviate the requirements under this Court's precedent and the Confrontation Clause. Indeed, there is no prevailing authority that even suggests that "religious concerns" constitute a sufficient public policy interest capable of balancing away Sixth Amendment confrontation rights that implicate liberty interests. Balancing Petitioner's liberty interests and his constitutional rights on the altar of "religious freedom" – especially when such religious freedom is practiced only occasionally and conveniently – is unacceptable under the Confrontation Clause. The liberty interests at stake are simply too great to allow any witness – much less a witness upon whose testimony a lengthy prison sentence depends – to testify without allowing counsel and the jury to assess facial expressions, and consequently, credibility while answering crucial questions regarding the events surrounding a crime. And there was every reason to doubt the sincerity of Everhart's religious belief and her decision to testify wearing a niqab, because she freely admitted that she only wore it "sometimes" and that she participated in secular activities such as singing and rapping that are inconsistent with wearing a niqab. Pet. App. at 54a-55a. Those circumstances were sufficient to render as

plain error the trial court's decision to allow Everhart to testify while wearing the niqab.

B. The Court of Appeals Erred by Finding that Trial Counsel's Performance Did Not Fall Below an Objective Standard of Reasonableness.

The Court of Appeals also erred by finding that trial counsel's failure to raise the Confrontation Clause issue did not fall below an objective standard of reasonableness. To establish ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that this deficient performance prejudiced the defendant such that it denied the defendant a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Fatumabahirtu v. United States*, 148 A.3d 260, 263–64 (D.C. 2016) (quoting *Vaughn v. United States*, 93 A.3d 1237, 1271 (D.C. 2014). To show deficient performance of trial counsel, a defendant must show that counsel's representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 668; *Cosio v. United States,* 927 A.2d 1106, 1123 (D.C. 2007) (en banc) (citation omitted). Failure by counsel to object at trial is a valid basis for an ineffective assistance of counsel claim. *Chatmon v. United States*, 801 A.2d 92, 95 (D.C. 2002).

In its ruling, the Court of Appeals held that "[b]ecause there are no cases in this court or the Supreme Court that address a similar situation—a witness testifying while wearing a religious covering—any objection would have been based on unsettled law rather than on existing precedent." Pet. App. at 5a-6a. The Court of Appeals further stated

that "[f]ailure to object based on unsettled law is not an error, let alone an error bringing representation 'below an objective standard of reasonableness.'" *Id.* at 6a (citation and internal quotation marks omitted). But as noted above, the principles informing Confrontation Clause rights are well-settled by this Court, and other courts have found a Confrontation Clause violation in similar circumstances. *See supra* at 11-15.

In any event, the particular circumstances here exacerbated the Confrontation Clause violation, because trial counsel was given multiple opportunities to object and failed to do so. The prosecutor even previewed at the outset of the trial that Everhart would be testifying in the niqab. The need for an objection should have been obvious to Petitioner's trial counsel, *and particularly given Everhart's importance to the government's case*. Moreover, there was every reason to doubt the sincerity of Everhart's religious belief and her decision to testify wearing a niqab, as she freely admitted that she only wore it "sometimes" and that she participated in secular activities such as singing and rapping that are inconsistent with wearing a niqab. Pet. App. at 54a-55a. Yet Petitioner's counsel still failed to object. Like the trial court below, the Court of Appeals' analysis of the issue erred by not accounting for those factors, thus warranting this Court's intervention.

CONCLUSION

For the foregoing reasons, Petitioner Don Fitzgerald Hancock's petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 8, 2023

APPENDIX

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APPENDIX A

DISTRICT OF COLUMBIA
COURT OF APPEALS

Nos. 18-CF-738, 18-CF-758, 21-CO-4 & 21-CO-46

REYNAUD COOK & DON FITZGERALD HANCOCK,

Appellants,

v.

UNITED STATES,

Appellee.

Appeals from the Superior Court
of the District of Columbia
(2013-CF1-9030 & 2013-CF1-15041)
(Hon. Judith Bartnoff & Hon. Craig Iscoe,
Trial Judges)

(Argued May 5, 2022
Decided December 15, 2022)

MEMORANDUM OPINION AND JUDGMENT

Before BECKWITH, EASTERLY, and ALIKHAN, *Associate Judges*.

PER CURIAM: Following a jury trial, appellants Reynaud Cook and Don Hancock were convicted of second-degree murder. In these consolidated appeals, both appellants argue that the trial court erred by allowing a witness to testify while wearing a niqab, and that counsel's failure to object to the witness's

wearing the niqab constituted ineffective assistance of counsel. Hancock separately challenges (1) the trial court's denial of his motions to sever his trial from Cook's; (2) the admission of statements from three witnesses' grand jury testimony; and (3) the trial court's use of an aiding and abetting jury instruction. Cook separately challenges the sufficiency of the evidence to support his conviction. We affirm.

I. Factual Background and Procedural History

The evidence at trial showed the following. In July 2007, Nacarto Gladden and his friend Alisha Everhart drove to Eastern Avenue to purchase PCP from Hancock. When they arrived, Hancock was standing outside with Cook. Everhart asked Hancock for the PCP, and he responded that they would need to walk to a different block to get it. Everhart first walked to Quarles Street with Hancock to retrieve the drugs, but then returned to where Cook and Gladden were waiting while Hancock retrieved his stash. After he obtained the PCP, Hancock went back to join Everhart, Gladden, and Cook. Hancock handed the drugs to Gladden through the passenger-side window of Everhart's car.

Hancock then asked Everhart for a ride to his car so that he could drive Cook somewhere and to avoid the police discovering that he was in possession of PCP. He told her that his car was behind the building where they were parked. Everhart agreed, Hancock got into the car with her and Gladden, and Everhart drove around the block to drop Hancock off at his car. When the trio arrived at Hancock's car, both Hancock and Gladden got out. Hancock then grabbed Gladden and the two began fighting. Everhart testified that she heard Gladden ask Hancock, "why you got a gun?" and that she got out of the car to break up the fight. Cook

then approached Everhart, holding his finger up to his mouth to indicate that she should be quiet. Everhart also testified that Cook was holding a black gun with a pearl handle. Everhart then ran from the scene. She testified that she heard three shots being fired as she was running away.

Police discovered Gladden at the scene. He was deceased and had multiple gunshot wounds. Around Gladden's body were three .9-millimeter cartridge casings, a stocking cap containing Hancock's DNA, and a cigarette bearing both his and Hancock's DNA.

Cook and Hancock were charged with first-degree murder while armed. The jury found both guilty of second-degree murder. This appeal followed.

II. Discussion

A. Everhart's Testifying in a Niqab

At trial, Everhart testified while wearing a niqab, a religious covering that obscures the wearer's face and body and shows only the wearer's eyes. Everhart explained that she wears the niqab as part of her Muslim faith. Neither Cook's nor Hancock's trial counsel objected to Everhart's wearing the niqab while testifying. After the trial, both appellants filed motions to vacate their sentences pursuant to D.C. Code § 23-110, asserting that their counsels' failure to object to Everhart's wearing the niqab amounted to ineffective assistance of counsel. The trial court denied the motions. On appeal, both appellants argue that (1) the trial court erred by allowing Everhart to testify while wearing a niqab because it violated their rights under the Confrontation Clause; and (2) the trial court erroneously denied their post-conviction motions alleging ineffective assistance of counsel due to their trial

counsels' failure to object to Everhart's testifying while wearing a niqab.

Because appellants did not object to Everhart's wearing a niqab while testifying at trial, we review only for plain error. *Williams v. United States*, 130 A.3d 343, 347 (D.C. 2016). To demonstrate plain error, the "appellant first must show (1) error, (2) that is plain, and (3) that affected [the] appellant's substantial rights. Even if all three of these conditions are met, this court will not reverse unless (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Lowery v. United States*, 3 A.3d 1169, 1173 (D.C. 2010) (internal quotation marks omitted)).

Appellants have not satisfied their burden under plain error review. As both appellants acknowledge, there is no precedent in this court or the Supreme Court indicating that appellants' rights were violated when Everhart testified wearing a niqab. Appellants point only to cases that are both factually distinct and not binding on this court.[1] Thus, we cannot say that

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[1] For example, appellants rely on *United States v. Alimehmeti*, 284 F. Supp. 3d 477 (S.D.N.Y. 2018), where a district court judge found that partially closing the courtroom to protect an undercover informant's identity was a better alternative than allowing him to testify while wearing a disguise, *id.* at 489; *People v. Ketchens*, No. B282486, 2019 WL 2404393 (Cal. Ct. App. June 7, 2019), an unpublished California case where the court found no Confrontation Clause issue with a Muslim witness testifying while wearing a headscarf that exposed only her eyes and nose, and declined to decide whether a scarf covering the witness's "entire face" would violate the Confrontation Clause because any potential error would be harmless beyond a reasonable doubt, *id.* at *9; and *Romero v. Texas*, 173 S.W.3d 502 (Tex. Crim. App. 2005), where a Texas appellate court held that there was a Confrontation Clause issue when an adult witness, who feared retaliation by the

the trial court judge plainly erred by failing to determine sua sponte that Everhart could not wear a niqab while testifying. *See Rose v. United States*, 49 A.3d 1252, 1256-58 (D.C. 2012) (finding no plain error "where there [wa]s no clear case law in our jurisdiction").

To prevail on an ineffective assistance of counsel claim, appellants must show both that their trial counsel's representation was deficient and that the deficient performance prejudiced their defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish deficient performance, we consider whether "counsel's 'representation fell below an objective standard of reasonableness.'" *Bost v. United States*, 178 A.3d 1156, 1210 (D.C. 2018) (quoting *Otts v. United States*, 952 A.2d 156, 164 (D.C. 2008) (en banc)). If counsel's performance was deficient, the defendant must then show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Clark v. United States*, 136 A.3d 334, 341 (D.C. 2016) (quoting *Strickland*, 466 U.S. at 694).

While a counsel's failure to object at trial can be a valid basis for an ineffective assistance claim, *Chatmon v. United States*, 801 A.2d 92, 95 (D.C. 2002), we discern no ineffectiveness in counsels' decision not to object to Everhart's niqab. Because there are no cases in this court or the Supreme Court that address a similar situation—a witness testifying while wearing a religious covering—any objection would have been based on unsettled law rather than on existing

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defendant, testified in a disguise that obscured his face, despite the fact that the defendant already had the witness's name and home address, *id.* at 505-07. The first case is inapposite, the second militates against appellants' argument, and the third does not account for the religious concerns presented in this case.

precedent. Failure to object based on unsettled law is not an error, let alone an error bringing representation "below an objective standard of reasonableness." *Bost*, 178 A.3d at 1211; *cf. Otts*, 952 A.2d at 165 (rejecting the argument that "trial counsel's failure to anticipate [a subsequent decision of this court] . . . fell below prevailing professional norms, or was enough to overcome the presumption that counsel rendered reasonable professional assistance" (internal quotation marks omitted)). Accordingly, we do not find that either trial counsel's failure to make an objection based on an unsettled area of law constitutes deficient performance under *Strickland*.[2]

B. Severance

Hancock argues that the trial court abused its discretion by denying his severance motions because his defense was irreconcilable with Cook's and the jury inferred his guilt from this irreconcilability.

At trial, the court instructed the jury that Cook's theory of the case proposed that Everhart had fabricated the allegation that Cook was present at the scene at all. The court further instructed that Hancock's defense was that the government had failed to meet its burden of proof and that he was not involved in Gladden's murder. Hancock's counsel moved for severance on several occasions, each time alleging that Cook's defense strategy was actually to place the blame on Hancock.

We review the trial court's decision to deny severance for abuse of discretion. *See Tillman v. United*

[2] While we find no error on the facts of this case, we do not take a position on the general question whether there can ever be a Confrontation Clause violation in cases where a witness testifies wearing a niqab.

States, 519 A.2d 166, 169 (D.C. 1986). To show a need for severance on the grounds of irreconcilable defenses, a defendant must establish a "'clear and substantial contradiction between the respective defenses,' causing inherent irreconcilability between them, and that the irreconcilability creates a danger or risk that the jury will draw an improper conclusion from the existence of the conflicting defenses alone that both defendants are guilty." *Garris v. United States*, 559 A.2d 323, 329 (D.C. 1989) (quoting *Tillman*, 519 A.2d at 170). If there is an irreconcilability, we then "determine whether there [is] enough independent evidence of appellant's guilt—beyond that required for the government to survive a motion for judgment of acquittal—so that the court reasonably could find, with substantial certainty, that the conflict in defenses alone would not sway the jury to find appellant guilty." *Tillman*, 519 A.2d at 171 (emphasis omitted) (quoting *Ready v. United States*, 445 A.2d 982, 987 (D.C. 1982)).

We will assume without deciding that Cook's and Hancock's defenses are irreconcilable, and we conclude that this conflict alone would not lead the jury to unjustifiably infer Hancock's guilt. The evidence against Hancock was substantial. Everhart testified that she heard Gladden say, "Don, why you got a gun?" Several witnesses testified that, after the shooting, Everhart told other people that Hancock had shot Gladden, or that the two had been fighting and then she heard shots. And Hancock's DNA was found on a stocking cap and a cigarette on the ground near where Gladden was shot. This evidence is plainly sufficient to establish Hancock's guilt beyond that required to survive a

motion for judgment of acquittal, and thus we discern no abuse of discretion.[3]

C. Use of Certain Grand Jury Testimony

Hancock next argues that the trial judge erred by allowing the government to use grand jury testimony from Everhart and two other witnesses that Everhart had talked to after the shooting—Nikki Rogers and Ebony Thomas—without trying to properly refresh their memories or laying a proper foundation for impeachment. He also contends that admission of the grand jury testimony as substantive evidence violated his Sixth Amendment right to confront the witnesses against him because Everhart and Rogers were not sufficiently available for cross-examination. The specifics of the challenged colloquies are as follows.

Everhart. The government sought to elicit testimony from Everhart that Hancock had wanted a ride to his car to prevent the police from discovering that he was in possession of PCP. Everhart instead testified that Hancock had wanted a ride to his car so that he could drive Cook somewhere. The prosecutor then presented

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[3] We have noted that the sufficient-independent-evidence test may have been displaced by *Zafiro v. United States*, 506 U.S. 534 (1993), in which the Supreme Court held that a court should grant severance "only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence," *id.* at 539; *see Hargraves v. United States*, 62 A.3d 107, 116 n.29 (D.C. 2013) (noting that the sufficient-independent-evidence test may be "questionable in light of *Zafiro*"); *Jenkins v. United States*, 113 A.3d 535, 542-43 (D.C. 2015) (similar). We need not resolve the issue in this case because we do not find an abuse of discretion under either test. In light of both the physical evidence and testimony presented at trial, any irreconcilability in the defenses would not have prevented the jury from making a reliable judgment as to Hancock's guilt or innocence.

Everhart with her grand jury testimony, which she confirmed was hers, and read aloud her statement that Hancock had wanted a ride because he "ain't trying to be walking around with this stash on me because the police out there." Hancock agreed that she had made that statement and adopted it, testifying that Hancock had given her both reasons.

Rogers. The government sought to elicit testimony about a conversation that Rogers, who is Everhart's sister-in-law, had with Everhart about how Hancock and Gladden had been in a fight and how Hancock had a gun. Rogers testified that Everhart had told her that Hancock and Gladden had "got[ten] into some kind of altercation." When the prosecutor asked Rogers if Everhart had said anything about a weapon, Rogers said that she had not. She then asked Rogers about her grand jury testimony, and read aloud her statement that Everhart had "heard someone say he has got a gun when she was running away." When the prosecutor asked Rogers if this was in fact what she remembered happening, she agreed.

Thomas. The government sought to elicit testimony from Thomas, who is Gladden's brother's girlfriend, about a conversation she had with Everhart after the shooting. The prosecutor asked Thomas if Everhart had told her "how [Hancock] had gotten into the picture." Thomas replied "[n]o." The prosecutor then asked if Thomas remembered testifying before the grand jury, and when she responded "[y]es," the prosecutor read aloud the statement from her grand jury testimony that "[Everhart] said they went to get the [PCP] dipper from the guy, [Hancock]," to which Thomas responded "[r]ight."

Hancock's counsel did not object to any of the testimony that Hancock challenges on appeal;

accordingly, we review for plain error. *See Hunter v. United States*, 606 A.2d 139, 144 (D.C. 1992) ("Objections must be made with reasonable specificity; the judge must be fairly apprised as to the question on which he is being asked to rule."). We similarly review his Sixth Amendment argument for plain error because he did not make this objection at trial. *Bryant v. United States*, , 696 (D.C. 2016).

On the evidentiary claim, we need not engage in an extended assessment of the above colloquies because, even if we assume that admission of these three grand jury statements was error, Hancock has not shown that the error affected his "substantial rights." *Lowery*, 3 A.3d at 1173; *see Duvall v. United States*, 975 A.2d 839, 847 n.9 (D.C. 2009) ("[T]he *appellant* bears the burden . . . to show that the alleged error affected his substantial rights."). As explained, the evidence against Hancock was substantial, *see supra* p. 5, including testimony from Everhart, Rogers, and Thomas unrelated to the challenged grand jury testimony, and Hancock's DNA at the scene. Against that evidence, the challenged grand jury statements were neither particularly illuminating nor incriminating. Everhart's grand jury statement that Hancock wanted a ride to avoid being discovered with drugs has little bearing on his guilt or innocence; the same is true of Thomas's grand jury statement that Everhart had told her that she and Gladden had gone to buy PCP from Hancock. Thomas's and Rogers's grand jury statements were also cumulative of Hancock's testimony—after all, they were merely repeating what Everhart had told them, and she had already testified to the events in question. To be sure, Thomas's and Rogers's testimony enhanced Everhart's credibility by showing that Everhart had described the shooting shortly after it occurred, but that would be the case without the two

snippets of their grand jury testimony. There is thus no reason to believe that the outcome of the trial would have been different in the absence of this limited grand jury testimony.

On Mr. Hancock's Confrontation Clause claim, we discern no error, let alone plain error. The Sixth Amendment guarantees a criminal defendant "the right . . . to be confronted with the witnesses against him." U.S. Const. amend. XI. This right prohibits the "admission of testimonial statements of a witness who d[oes] not appear at trial unless he [i]s unavailable to testify, and the defendant had . . . a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). But "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." *Id.* at 59 n.9. As long as a defendant has the "full and fair opportunity" to cross-examine the witness, the right is not violated simply because a witness provides testimony that is "marred by forgetfulness, confusion, or evasion." *United States v. Owens*, 484 U.S. 554, 558 (1988) (quoting *Delaware v. Fensterer*, 474 U.S. 15, 21-22 (1985) (per curiam)). This court applied this reasoning in *Diggs v. United States*, 28 A.3d 585 (D.C. 2011), holding that there was no Confrontation Clause violation when a witness could not remember certain details about an event and was then impeached with his grand jury testimony in which he had testified about the event at length, because the defense still had the opportunity to cross-examine him, *id.* at 593-94.

Hancock argues that Everhart and Rogers were "not constitutionally 'present' for cross-examination, and [that] their total lack of recall made it impossible for Hancock's counsel to fully cross-examine them." But

even if both witnesses had failed to recall the entirety of their relevant grand jury testimony, they were physically present at trial, and the defense had the "full and fair" opportunity to cross-examine them. Consistent with *Diggs*, we find no violation of Hancock's Sixth Amendment rights from the use and admission of the grand jury statements.

D. Aiding and Abetting Instruction

Hancock next argues that the trial court abused its discretion by instructing the jury that he could be found guilty of aiding and abetting, even though the government's theory did not identify which defendant was the principal. Our court's precedent forecloses this argument. While it is true that, "at a minimum, . . . there must be evidence to support that someone else acted as a principal, as '[o]ne cannot aid and abet himself,'" *Tyree v. United States*, 942 A.2d 629, 636 (D.C. 2008) (second alteration in original) (quoting *Brooks v. United States*, 599 A.2d 1094, 1099 (D.C. 1991)), we have held that the trial court may provide an aiding and abetting instruction "when more than one gunman participates in a shooting but the evidence is unclear which gunman is responsible for firing the bullets," *Leonard v. United States*, 602 A.2d 1112, 1114 (D.C. 1992) (citing *Gillis v. United States*, 586 A.2d 726, 728 (D.C. 1991) (per curiam)). The government is permitted to proceed on both a principal and an aider and abettor theory "where the evidence is disputed as to who . . . was the principal, so long as there is evidence that the defendant participated—in one capacity or the other—in the events that led to [the] commission of the crime." *Tyree*, 942 A.2d at 637.

In this case, the government theorized that either Cook was the principal who shot Gladden with Hancock's assistance, or Hancock shot Gladden

himself with Cook's aid. Hancock argues that under the government's theory, "either defendant could have been the principal, thus raising the specter that Hancock was convicted as both the principal and the aider/abettor." But with the aiding and abetting instruction, Hancock would not have been convicted as *both* the principal and the aider/abettor. Rather, the aiding and abetting instruction permitted the jury to convict Hancock for *either* role. Our precedents allow for this.

E. Sufficiency of the Evidence

Finally, Cook argues that there was insufficient evidence to support his conviction as either the principal offender or as an aider and abettor. We review sufficiency claims de novo. *Robinson v. United States*, 263 A.3d 139, 141 (D.C. 2021). "Considering the facts in the light most favorable to the verdict, we must deem the evidence sufficient if 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Id.* (quoting *Miller v. United States*, 209 A.3d 75, 77 (D.C. 2019)). It is only if "the government has produced no evidence from which a reasonable mind might fairly infer guilt beyond a reasonable doubt" that we reverse. *Clark v. United States*, 147 A.3d 318, 326 (D.C. 2016).

Cook claims that the government presented insufficient evidence that he was present at the scene or, alternatively, that if he was present, he was involved in the shooting. The essence of his argument is that the government's sole eyewitness was Everhart, and that she was not a reliable witness. We have held on several occasions that we do not "substitute [our] judgment for that of the fact-finder when it comes to assessing the credibility of a witness . . . based on factors that can only be ascertained after observing

the witness testify." *David v. United States*, 957 A.2d 4, 8 (D.C. 2008) (alteration in original) (quoting *Robinson v. United States*, 928 A.2d 717, 727 (D.C. 2007)); *see Bouknight v. United States*, 867 A.2d 245, 251 (D.C. 2005) ("The determination of credibility is for the finder of fact, and is entitled to substantial deference."). We defer to the jury's determination as to whether Everhart was a credible witness and how her testimony factored into its verdict. We cannot say that the evidence was insufficient for the jury to find, beyond a reasonable doubt, that Cook was culpable.

III. Conclusion

For the foregoing reasons, the judgment of the Superior Court is

Affirmed.

ENTERED BY DIRECTION OF THE COURT:

/s/ Julio A. Castillo
JULIO A. CASTILLO
Clerk of the Court

Copies emailed to:

Honorable Judith Bartnoff
Honorable Craig Iscoe
Director, Criminal Division

Copies e-served to:

Sean R. Day, Esquire
Paul D. Schmitt, Esquire
Chrisellen R. Kolb, Esquire
Assistant United States Attorney

APPENDIX B

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
Criminal Division

Case No. 2013 CF1 009030

UNITED STATES OF AMERICA

v.

REYNAUD COOK

Case No. 2013 CF1 15041

UNITED STATES OF AMERICA

v.

DON HANCOCK

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON DEFENDANTS' § 23-110 MOTION

These matters are before the Court on the following filings: Defendant Reynaud Cook's "Motion to Vacate Conviction Pursuant to D.C. Code § 23-110 And For Other Relief" filed on April 16, 2020; Defendant Don Hancock's "Motion to Vacate, Set Aside, or Correct Sentence Pursuant to D.C. Code § 23-110, And For Other Relief" filed on June 12, 2020; the United States' "Opposition to Defendants' § 23-110 Motions" filed on August 7, 2020; Defendant Cook's "Reply in Support of Motion to Vacate Conviction Pursuant to D.C. Code

§ 23-110 And For Other Relief" filed on August 10, 2020; and Defendant Hancock's "Reply in Support of Motion to Vacate Conviction Pursuant to D.C. Code § 23-110 And For Other Relief" filed on August 14, 2020.[1]

The Court held its first remote hearing to address these filings on November 10, 2020. The following individuals were present for the hearing: AUSA Grace Richards, Attorney Sean Day (Counsel for Reynaud Cook), Attorney Charles Wayne (Counsel for Don Hancock), and Attorney Paul Schmitt (Counsel for Don Hancock). At this hearing, the parties agreed that the Court could set a remote hearing date to allow for oral argument on the various filings listed above. The Court also presented new legal questions for the parties to consider and set a briefing schedule to permit voluntary filings addressing these questions. The Court received the following filings after the hearing: Defendant Cook's "Supplemental Memorandum to 23-110 Motion" filed on November 24, 2020, and Defendant Hancock's "Supplemental Brief In Support of Motion to Vacate, Set Aside, or Correct Sentence Pursuant to D.C. Code § 23-110, And For Other Relief" filed on November 25, 2020.[2] The government did not

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[1] Judge Bartnoff presided over the Defendants' trial. The undersigned judge now handles all of Judge Bartnoff's criminal matters.

[2] The Court noted at the November 10, 2020 hearing that a logical extension of Defendants' argument, that the right to confront a witness required that the fact finder be able to see the entire face of that witness, could be that a blind juror would never be able to serve on a jury in a criminal trial. As Defendants concede, the Superior Court cannot categorically exclude blind jurors. *Galloway v. Superior Court of D.C.*, 816 F. Supp. 12 (D.D.C. 1993). The Court is not persuaded by Defendant Cook's argument that *Galloway* does not apply because "all twelve jurors

file any supplement. The Court held oral argument on all of the filings on December 16, 2020.[3] The following individuals were present for this hearing: AUSA Grace Richards; Mr. Day[4]; and Defendant Hancock and his[4] counsel, Mr. Wayne and Mr. Schmitt. For the reasons detailed in this Order, based on the entire record and

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were blinded to Ms. Everhart's face" (Cook Supplemental Memorandum at 3) and the implicit contention that, in a case not dependent on photographs or charts that cannot be accessed non-visually, there could not be a jury comprised of 12 sightless jurors. The Court does not, however, need to resolve the "blind juror" question in order to rule in the matter before it.

[3] At both the November 10, 2020 and December 16, 2020 hearings, all parties stated clearly that they were not requesting the Court hold an evidentiary hearing before addressing the issues raised in the 23-110 motions filed by Defendants Cook and Hancock. Both Defendants and the government agreed that all facts necessary for the Court to resolve the constitutional questions raised in the motions were undisputed and therefore there was no need for an evidentiary hearing. The Court agrees that there are no undisputed facts and finds that Defendants reasonably, as well as knowingly and voluntarily, waived their right to request an evidentiary hearing. All parties agreed that: (1) Alisha Everhart testified at trial while wearing a niqab; (2) neither of Defendants' trial counsel objected to her wearing a niqab during her testimony; and (3) both counsel were permitted to cross-examine Ms. Everhart.

[4] Although USP Victorville, the Federal Correctional Institution where Mr. Cook was being held, had set up an audio conferencing room from which Mr. Cook could participate in the hearing, an FCI official informed the Court and parties that Mr. Cook declined to leave his cell to participate in the hearing. Defense Counsel Day informed the Court that Mr. Cook had told him that he did not want to attend the hearing and did not object to the hearing taking place in Mr. Cook's absence. The Court then excused Mr. Cook's presence.

arguments from the parties, the Defendants' motions are DENIED.[5]

I. FACTUAL BACKGROUND[6]

On July 17, 2007, Alisha Everhart was driving in the Deanwood neighborhood of the District of Columbia when she saw her friend, Nacarto Gladden (the decedent), walking on the street. Ms. Everhart stopped her vehicle, the two discussed the possibility of getting high, and then Mr. Gladden entered Ms. Everhart's vehicle. Ms. Everhart called Defendant Don Hancock to arrange to buy PCP from him. Ms. Everhart and Mr. Gladden met Mr. Hancock for the purchase and completed the transaction. After Mr. Hancock sold the PCP, he asked for a ride to his car that was parked nearby on Quarles Street. Ms. Everhart agreed and the three then drove to the location of Mr. Hancock's car. Gov. Opp. at 1 – 2.

After arriving at that location, Mr. Hancock and Mr. Gladden both exited Ms. Everhart's vehicle and began to fight. Ms. Everhart heard Mr. Gladden say "Don, why you got a gun?" and then she fled for her safety. Gov. Opp. at 3. As she fled, Ms. Everhart saw Defendant Reynaud Cook enter the area carrying a "black revolver with a pearl handle." Gov. Opp. at 3.

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[5] As discussed in this Order, Defendant Cook and Defendant Hancock argue the same claim. The Court refers to them collectively as the "Defendants" and separates them only where necessary to avoid confusion or highlight an argument made in only one of the Defendants' filings.

[6] The Court relies on the government representation of facts because the government briefing includes greater detail about the underlying crime and the evidence presented at trial. The Defendants are not challenging the facts of the case and, as stated above, the parties agree on the most pertinent fact, that Ms. Everhart wore a niqab while testifying.

She asked Mr. Cook what was going on and he placed his fingers over his mouth and said "shhh." Gov. Opp. at 3. Ms. Everhart continued to flee and heard three gunshots as she left. Ms. Everhart spoke to the police about the shooting first on July 17, 2007, and then again a few weeks later. It was during this second meeting that she informed the police that both Mr. Hancock and Mr. Cook were responsible for the murder of Mr. Gladden.

The Defendants were charged by indictment with First-Degree Murder on February 29, 2014. Ms. Everhart testified at the Defendants' trial, and the manner in which she testified is the basis for the 23-110 motions before the Court. Ms. Everhart testified while wearing a niqab, which is a religious garment worn traditionally by Muslim women. The garment covers the head and face of the person wearing it, but does expose the individual's eyes clearly.

Neither the Defendants nor the Court were unaware that Ms. Everhart would testify while wearing a niqab. The government stated in its opening statement that Ms. Everhart was "actually going to be in a headdress and face covering for religious reasons." Gov. Opp. at 6. Neither Defendant objected to her wearing a niqab.[7]

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[7] For the purposes of the 23-110 motions, all parties agree that neither Mr. Cook's nor Mr. Hancock's trial counsel objected to Ms. Everhart wearing a niqab while testifying. Early in the 23-110 process, on October 21, 2019, Mr. Cook's trial counsel, Daniel Quillin, stated to Mr. Day in an e-mail that the "issue [regarding a witness wearing a niqab] was raised during trial and rejected." Cook 23-110 Motion, Affidavit of Sean R. Day at 1. During a call on November 12, 2019, Mr. Quillin stated that believed he objected "because it's a Sixth Amendment issue." Cook 23-110 Motion, Affidavit of Sean R. Day at 1. Mr. Cook represents in his 23-110 motion that "[t]here is no indication in the record that either trial counsel [for him or Mr. Hancock] objected." Cook 23-

The trial judge did not *sua sponte* rule that the Defendants' constitutional right to confront the witnesses against them would be violated if a witness wore a niqab.

Ms. Everhart's testimony was quite significant because she was the "single eyewitness" who was present in the alley where Mr. Gladden was killed and she may have been high at the time of the killing. Hancock 23-110 Motion at 1 – 3. Mr. Hancock "presented the expert testimony of forensic psychiatrist Dr. Neil Blumberg regarding the effects of PCP use" (Gov. Opp. at 6) but could address only the general effects of the drug and not how it affected Ms. Everhart. Police recovered three 9-milimeter cartridge cases from the scene and determined that two of these three were fired from the same weapon. Gov. Opp. at 5. Three bullets were recovered from Mr. Gladden's body and two of these were determined to be fired from the same firearm. Gov. Opp. at 5. All three of these bullets were "consistent with having been fired from a .38 Special or .357 Magnum revolver." Gov. Opp. at 5. A stocking cap and cigarette bearing Mr. Hancock's DNA were found on the scene as well. Gov. Opp. at 5. Fingerprints "taken from the vehicle and various objects" did not match Mr. Cook and Mr. Cook's "DNA did not match any DNA taken either." Cook 23-110 Motion at 14. Although other civilian and MPD witnesses testified, Ms. Everhart was the most important witness to the government's case.

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110 Motion at 5. Mr. Hancock states in his motion that "[t]here are no discernible objections in the record [from his trial counsel, Steven Kiersh] as to Everhart testifying in a niqab." Hancock 23-110 Motion at 2.

During its direct examination of Ms. Everhart, the Court asked if she "normally [wore] a face covering and a head covering in public?" Ms. Everhart replied, "Yes, ma'am. Well, sometimes I do and, you know, this is how I cover." She stated that she had been covering in this manner for the "past eight years," since she converted to Islam. Gov. Opp. at 7. Neither trial counsel cross-examined Ms. Everhart about how often she wore a niqab, why she decided to wear a niqab at trial, why she sometimes did not wear a niqab, or other issues regarding Ms. Everhart's wearing of a niqab. Defendants' counsel for the 23-110 proceeding agree, however, that trial counsel's failure to ask such questions is not the basis for Defendants' 23-110 claim. Instead, the claim that trial counsel was ineffective is based solely on trial counsel's failure to object to Ms. Everhart testifying while wearing a niqab. Perhaps to bolster their arguments that their clients' confrontation rights were violated, Mr. Cook and Mr. Hancock's 23-110 counsel note that the jury requested transcripts of Ms. Everhart's testimony and the police report from her interview on August 9, 2017, though neither could be provided. Cook 23-110 Motion at 15; Hancock 23-110 Motion at 5.

The jury returned a verdict acquitting Defendants of First-Degree Murder but convicting them of the lesser included offense of Second-Degree Murder While Armed. On July 9, 2018, Judge Bartnoff sentenced each Defendant to 20 years of imprisonment. Both Defendants have filed a direct appeal, which is pending.

II. ANALYSIS: THE CONFRONTATION CLAUSE WAS NOT VIOLATED AND THEREFORE THE DEFENDANTS DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL

Pursuant to D.C. Code § 23-110(a) a "prisoner in custody under sentence of the Superior Court claiming the right to be released upon the ground that. . .the sentence was imposed in violation of the Constitution of the United States . . . may move the court to vacate, set aside, or correct the sentence." Defendants raise ineffective assistance of counsel claims under D.C. Code § 23-110. *Cosio v. United*, 927 A.2d 1106, 1122 (D.C. 2007). An ineffective assistance of counsel claim is governed by a two-prong test set out in *Strickland v. Washington*, 466 U.S. 668 (1984).

First, "the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed [to] the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. To satisfy this prong, a defendant must demonstrate that "counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688; *see also Watson v. United States*, 536 A.2d 1056, 1065 (D.C. 1987) ("[T]he appropriate standard is regarded as reasonably effective assistance under prevailing professional norms. To put it another way, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances.") (internal quotations and citations omitted). Judicial scrutiny is highly deferential and there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689.

The second prong of the *Strickland* test requires a defendant to "show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id*. at 687. A defendant must satisfy both prongs and the Court does not need to "address both components of the inquiry if the defendant makes an insufficient showing on one." *Id.* at 668.

A trial counsel's failure to file a "meritless motion does not constitute ineffective assistance of counsel." *Washington v. United States*, 689 A.2d 568, 572-73 (D.C. 1997); *see also Steward v. United States*, 927 A.2d 1081, 1087 n.5 (D.C. 2007) (quoting *Washington* and stating that "[c]ounsel cannot be found unconstitutionally deficient for failing to bring a meritless motion.") Indeed, counsel is under "no professional obligation to file a motion that may have no merit." *Zanders v. United States*, 678 A.2d 556, 569 (D.C. 1996). A defendant cannot show "[p]rejudice...where the motion, if filed, would not have been successful." *Sanchez-Rengifo v. United States*, 815 A.2d 351, 362 (D.C. 2002).

In this case, Defendants argue that their respective trial counsel should have objected to Ms. Everhart wearing her niqab while testifying because her testimony while wearing that religious garment violated their Confrontation Clause rights.[8] Defendants argue that trial counsel's failure to object constitutes deficient performance under *Strickland* and such deficient

[8] Consistent with the Supreme Court's stylization in *Maryland v. Craig*, 497 U.S. 836 (1990), this Court capitalizes the phrase "Confrontation Clause." but not "confrontation right" or similar terms.

performance prejudiced the Defendants. The government contends that had trial counsel objected, such objection would have been meritless because the Defendants' Confrontation Clause rights were not, in fact, violated. Therefore, the government argues, if the underlying objection would have been meritless, then the trial counsel's performance was not ineffective under *Strickland*.

To resolve the Defendants' motions, the Court must determine if the Confrontation Clause rights of the Defendants were violated. While there is no guidance directly on point from the Supreme Court or District of Columbia Court of Appeals on a situation where the face of a witness, but not their eyes, is covered by religious garb, there are analogous cases that guide this Court's analysis. In *Maryland v. Craig*, 497 U.S. 836 (1990), the Supreme Court held that it was not a violation of the Confrontation Clause for a child-victim of sexual assault to testify against the defendant in a separate room using a one-way closed-circuit television loop. The Court outlined that certain "elements of confrontation -- physical presence, oath, cross-examination, and observation of demeanor by the trier of fact -- serves the purposes of the Confrontation Clause by ensuring that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings." *Craig*, 497 U.S. at 846. The Court also clarified that "[a]lthough face-to-face confrontation forms the core of the values furthered by the Confrontation Clause. . .we have nevertheless recognized that it is not the *sine qua non* of the confrontation right." *Craig*, 497 U.S. at 847 (citations and quotations omitted). The *Craig* Court further held that where the physical presence element is not met, "a defendant's right to confront accusatory witnesses

may be satisfied. . .only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." *Craig*, 497 U.S. at 850.

No party disputes that Ms. Everhart testified under oath and that she was subject to cross-examination. Ms. Everhart was physically present in the same room as the Defendants and the jury while she testified. The core of the Defendants' claim is that the niqab obstructed observation of the witness by counsel and the jury in order to assess her credibility and therefore made it impossible for the Defendants to confront her. Cook 23-110 Motion at 21 ("Because Ms. Everhart testified with her face fully covered but for a slit for her eyes, Mr. Cook, his attorney, and the jury were denied a critical tool for assessing Ms. Everhart's credibility and determining whether a facial expression revealed doubt, forgetfulness, confusion, or deceit."); Hancock 23-110 Motion at 7 ("The niqab prevented the jury from adequately assessing Everhart's testimony and denied Hancock's constitutional right to face-to-face confrontation."). Defendants' argument rests squarely on the premise that Ms. Everhart's wearing of the niqab obstructed their view of her, and the jury's view of her, while she was testifying in such a way that they no longer had a meaningful ability to confront her.

The Court has reviewed, and is persuaded by, multiple cases in which the reviewing court did not find a Confrontation Clause violation when a witness had some feature of her or his face covered and other features exposed. In *Commonwealth v. Smarr*, 2019 Pa. Super. LEXIS 2593, 16 (Pa. July 3, 2019) a witness, consistent with her Islamic beliefs, testified while wearing a scarf that covered her mouth and nose

but left her eyes visible. Applying *Craig*, the found that "[n]o precedent has established that a witness's clothing or accessories renders a physical, in-court confrontation other than face-to-face, particularly where the clothing does not obstruct the witness's eyes, and we decline to do so under the facts of this case." *Id*. For the witness in *Smarr* and Ms. Everhart alike, the jury and defendant could view "her posture, her gestures, and her body language; hear her tone of voice, her cadence, and her hesitation; and observe any nervousness, frustration, or hostility." *Id*. at 19.

The importance of eyesight to the Confrontation Clause has never been singled out as a necessary element, but it is certainly an important consideration. *See Coy v. Iowa*, 487 U.S. 1012, 1016-19 (1988) ("We have never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact. . . .[t]he phrase still persists, [l]ook me in the eye and say that.") (internal quotations omitted). Several courts, however, have permitted testimony where the witness' eyes may not be fully visible. In *Morales v. Artuz*, 281 F.3d 55 (2nd Cir. 2002), a witness refused to take her sunglasses off while testifying and the court permitted her to testify while wearing them. The court found that the sunglasses:

> [O]bscured view of the witness's eyes, however, [it] resulted in only a minimal impairment of the jurors' opportunity to assess her credibility. Even if we accept the idea, grounded perhaps more on tradition than on empirical data, that demeanor is a useful basis for assessing credibility, the jurors had an entirely unimpaired opportunity to assess the delivery of [the witness'] testimony, notice any evident

> nervousness, and observe her body language. Most important, they had a full opportunity to combine these fully observable aspects of demeanor with their consideration of the substance of her testimony, assessing her opportunity to observe, the consistency of her account, any hostile motive, and all the other traditional bases for evaluating testimony.

Morales, 281 F.3d at 61-62. Similar to the witness in *Morales*, Ms. Everhart's delivery of her testimony, including if she sounded nervous or anxious, was still observable to the Defendants and the jury. Although the niqab covered Ms. Everhart's mouth and nose, her overall body language, such as whether she fidgeted her hands, changed her body posture, turned her head, or looked up or down, were still visible.

Sunglasses were also at issue in *Commonwealth v. Lynch*, 439 Mass. 532 (Mass. 2003). In *Lynch*, there was a factual dispute whether a witness wore sunglasses while testifying and, if so, how dark the lenses were. Notwithstanding this dispute, the Court found that "had [the witness] worn dark glasses of some type, there is no basis on which to conclude that it created a substantial likelihood of a miscarriage of justice. 'Face to face' confrontation does not mean 'eye to eye'. . .and wearing dark glasses does not prevent exposure of a witness's face." *Lynch*, 439 Mass. at 542 (internal citations omitted). A similar outcome was reached in *People v. Miller*, 2014 Cal. App. LEXIS 937, 79 (Cal. Ct. of App. Feb. 7, 2014), where the trial court permitted a witness to testify in sunglasses and the reviewing appeals court found that there was no violation because the witness "testified in person, from inside the courtroom and in full view of the defendants except for the fact his eyes were obscured." Here, Ms.

Everhart's eyes were visible to the Defendants and the jury, which relative to *Morales, Lynch*, and *Miller*, fostered a more meaningful "face to face" connection than in those cases where the reviewing court did not find that the Confrontation Clause was violated. Unlike in *Coy*, Ms. Everhart was not blocked by a screen or partition; she was present in open court, with her eyes and upper body fully visible to the Defendants and the jury. *Coy*, 487 U.S. at 1022.

A niqab is undisputedly a religious garment that covers most of the face of the person wearing it, but analogous cases involving disguises, rather than religious articles that cover the face, also fail to support the Defendants' position that items that partially obscure the face of a witness violate the Confrontation Clause. In *Smith v. Graham*, 2012 U.S. Dist. LEXIS 89468, *1, *24 (S.D.N.Y. 2012), a prosecution witness was permitted to "wear a fake goatee, moustache, and wig while testifying. His eyes, however, were not covered." The reviewing court held that "[g]iven that Supreme Court precedent on this point both tempers the right to unimpeded visual confrontation and puts significant emphasis on the defendant and jury being able to view the eyes of the testifying witness and assess the witness's demeanor, there is no basis to conclude that the state courts' decision was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." *Id.* at *26-*27 (internal quotations omitted). As with the witness in *Smith*, Ms. Everhart's eyes were not covered and her demeanor was otherwise observable.

The cases cited above establish that a witness who testifies with some facial features obstructed, who otherwise is in the same room as the defendant and

jury and is in their full view, and whose eyes are visible and demeanor may be observed, does not violate a defendant's Confrontation Clause rights. Defendants' attempts to distinguish or rebut the cases discussed above are not persuasive. First, Defendants argue that *Smarr* is a "non-precedential opinion." Cook Reply at 1. Defendants are correct that, with the exception of the U.S. Supreme Court's opinion in *Craig* and *Coy*, and opinions from the District of Columbia Court of Appeals, none of the cases cited by Defendants or the government are controlling over the Superior Court of the District of Columbia. This Court looks to the cases for the rationale they provide, with which it agrees, but does not consider any of them to establish binding or controlling precedent.

The Court finds the *Smarr* opinion to provide a helpful analytical application of *Craig* to a situation where a witness is still physically present in the same room as the defendant but is wearing religious garb. It is inconsequential to this Court that the *Smarr* opinion is non-precedential, because it was never a controlling opinion in the District of Columbia. Next, Defendants highlight that the *Miller* Court stated that the witness who wore the sunglasses was "merely a bystander witness." *People v. Miller*, 2014 Cal. App. LEXIS 937, 79 (C.A. 2014). The *Miller* Court made that observation assuming *arguendo* that there had been a violation, however, and noted that the witness' minimal role meant that any such error would be "harmless." *Id.* at 82 ("Moreover, even had there been a confrontation clause violation, it would have been harmless. Unlike the situations in *Coy, Craig*, and *Murphy*, where the witnesses in question were the alleged victims, [the witness in *Miller*] was merely a bystander witness.") This does not change the overall holding of *Miller* that a witness wearing sunglasses

while testifying does not violate the Confrontation Clause.

Next, Defendants attempt to undermine the holding of *Graham* by comparing the fact that the witness' disguise of a wig and facial hair "merely put the witness on par with any bearded man with a head of hair; it did not conceal facial expressions." Cook Reply at 2. This may be true in a general sense, but several other similarities exist between the witness in *Graham* and Ms. Everhart: both had their eyes visible to the Defendant; both were physically present in the same room as the Defendant; and both had other indicators of their demeanor on display, including the tone of their voice and use of pauses while testifying. In addition, the term "any bearded man" ignores the wide variety of beards a man could have. It is not difficult to envision a witness with a long, bushy beard and mustache that obscures his mouth, cheeks, chin, and ears. Although the nose of the witness would be at least partially visible, while the nose of a witness wearing a niqab would not, the nose is not generally considered a facial feature on which credibility determinations are made.[9] Defendants have failed to cite any case in which a court has found that it would violate the Confrontation Clause if a witness did not first shave off or shorten his bushy beard.

Defendants attempt to undercut the persuasive value of *Lynch* by stating that the question if the witness worse sunglasses was factually in dispute. Cook Reply at 3; Hancock Reply at 3. It is true that the

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[9] The Court is not considering the fictional character Pinocchio, whose nose grew longer each time he told a lie. It is reasonable to assume, however, that significant immediate nose growth would be visible even if a witness were wearing a niqab.

Court in *Lynch* found that the defendant "has failed to establish that [the witness] wore sunglasses, dark enough to conceal his eyes, during his testimony" but the Court continued to state that "[e]ven if [the witness] had worn dark glasses of some type, there is no basis on which to conclude that it created a substantial likelihood of a miscarriage of justice." *Lynch,* 439 Mass. at 542. The broader point that Defendants overlook is that the *Lynch* Court was not concerned by the dispute over whether the witness had worn sunglasses because the Court concluded that, even if he had worn sunglasses, doing so would not have presented a Confrontation Clause issue.

Finally, Defendants attempt to distinguish *Morales* as a case where there was substantially more evidence of the defendant's guilt than there is in the case before this Court. Cook Reply at 3. Even if the prosecution in the *Morales* case presented more evidence than the prosecutor presented against Defendants here, the Court is persuaded that the rational of *Morales* does not hinge on that fact alone. Defendant Cook ignores the detailed analysis in *Morales*:

> The obscured view of the witness's eyes, however, resulted in only a minimal impairment of the jurors' opportunity to assess her credibility. Even if we accept the idea, grounded perhaps more on tradition than on empirical data, that demeanor is a useful basis for assessing credibility, the jurors had an entirely unimpaired opportunity to assess the delivery of Sanchez's testimony, notice any evident nervousness, and observe her body language. Most important, they had a full opportunity to combine these fully observable aspects of demeanor with their con-

> sideration of the substance of her testimony, assessing her opportunity to observe, the consistency of her account, any hostile motive, and all the other traditional bases for evaluating testimony. All that was lacking was the jury's ability to discern whatever might have been indicated by the movement of her eyes.

Morales, 281 F.3d at 61-62. In sum, the Court is persuaded by the analysis in many state and federal courts that a witness, with some part of their face covered, who is otherwise present in the same room as the defendant and the jury, may testify without violating the Confrontation Clause. The Defendants' attempts to undercut or distinguish the reasoning in these cases is not persuasive.

Defendants raise three additional cases which the Court addresses in turn.[10] First, Defendants cite to *United States v. Alimehmeti*, 284 F. Supp. 3d 477 (S.D.N.Y. 2018) for the proposition that a trial court would not allow undercover officers to testify in niqabs to protect their identity because it compromises the defendant's right to confront them. The *Alimehmeti* court did not categorically hold, however, that wearing a niqab always leads to a Confrontation Clause violation, but rather was weighing that possibility against other options to protect the undercover officers' identities:

> The partial closure [of the courtroom] on the terms outlined above is superior to the alternatives that either been proposed or identified.

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[10] These three cases are, for the reasons raised by Defendants, not binding on the Court. As with all cases that are not binding or have no precedential effect, this Court considers the rationale of the opinion.

> One alternative would be to have the UCs testify in disguise (such as using a niqab to cover the UC's head or light makeup to conceal a UC's features). One reporter who commented at the public hearing suggested testimony in disguise, although this option was opposed by both the Government and the defense. For several reasons, the Court rejects this approach, whatever form the UC's disguise might take. Trial testimony by disguised witnesses might compromise Alimehmeti's ability directly to confront his most central accusers at trial insofar as any disguise impedes Alimehmeti's (or the jury's) ability to assess the witnesses' comportment on the stand. This arrangement is in tension with the Constitution's guarantee to a criminal defendant of the right to be confronted with the witnesses against him. . .and a face-to-face meeting with witnesses appearing before the trier of fact.

Alimehmeti, 284 F. Supp. at 488-89 (internal quotations and citations omitted). The *Alimehmeti* Court held it would partially close the courtroom in lieu of disguising any of the witnesses and, therefore, did not proceed with applying *Craig*. This Court is not persuaded that the *Alimehmeti* Court's general remarks about the disguise of a witness undercuts the Court's conclusion that application of the *Craig* analysis establishes it does not violate a defendant's Confrontation Clause rights for a witness to testify while wearing a niqab.

Defendants also direct the Court's attention to *People v. Ketchens*, 2019 Cal. App. LEXIS 3920 (Cal. Ct. of App. June 7, 2019), for the proposition that a

witness who wears a ski mask or disguise that conceals almost all of their face violates the Confrontation Clause. Hancock Reply at 3, Footnote 1. In *Ketchens*, however, the witness wore a ski mask that "cover[ed] her entire face, but for her right eye, which was visible slightly, a portion of her nose, and a little bit of her left eye." *People v. Ketchens*, 2019 Cal. App. LEXIS 3920, 24 (internal quotations omitted). Here, both of Ms. Everhart's eyes were visible. As stated above, eye contact has never been identified as the core requirement of the Confrontation Clause, but eye visibility is important. *Coy*, 487 U.S. at 1022. Additionally, the *Ketchens* Court did not formally address whether this presented a Confrontation Clause issue: "We need not, however, decide whether the scarf triggered the defendants' confrontation clause rights, because even if it did, any error was harmless." *Id*.

Finally, Defendants cite to *Romero v. State*, 173 S.W. 3d 502 (Tex. Ct. of Crim. App. 2005), as a comparable case to this matter. Hancock Reply at 3 ("The Texas case [of *Romero*] presents circumstances similar to Everhart's testimony in this case."); Cook 23-110 Motion at 19. In *Romero*, a witness who feared for his safety if he were to testify against the defendant testified while "wearing dark sunglasses, a baseball cap pulled down over his forehead, and a long-sleeved jacket with its collar turned up and fastened so as to obscure [his] mouth, jaw, and the lower half of his nose. The net effect and apparent purpose of [his] 'disguise' was to hide almost all of his face from view." *Romero*, 173 S.W. 3d at 503. The Court found that the disguise violated the defendant's right to confront the witness and stated that "the trier of fact was deprived of the ability to observe [the witness'] eyes and his facial expressions." *Romero,* 173 S.W. 3d at 505. While the witness in *Romero* and Ms. Everhart both had

parts of their faces covered, Ms. Everhart's eyes were completely visible and the eyes of the witness in *Romero* were not. *Romero* represents a combination of the points of contention in cases such as *Smarr*, *Morales*, and *Smith*, but the violation in *Romero* included a more significant denial of a face-to-face, eye-contact-driven experience than here or in any other case reviewed by this Court.

Even assuming *arguendo* that Ms. Everhart's wearing of the niqab while testifying frustrated the Defendants' right to a "face-to-face" confrontation, and this case is more analogous to *Romero,* it is still possible for the confrontation right to be satisfied "where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." *Maryland v. Craig*, 497 U.S. 836, 850. Here, the Court finds that even if there was a denial of the Confrontation Clause rights, allowing Ms. Everhart to testify in a niqab furthered the important public policy of protecting Ms. Everhart's rights under the Free Exercise Clause of the First Amendment of the U.S. Constitution.

The Court does not need to resolve Defendants' contention that Ms. Everhart practiced her faith only "occasionally" or that she "treated the niqab as just one outfit she sometimes wore." Hancock Reply at 5; Cook 23-110 Motion at 18. It is "not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989); *see also Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 716 (1981) ("Courts are not arbiters of scriptural interpretation."). Absent clear guidance from the

Supreme Court or the District of Columbia Court of Appeals to the contrary, the Court finds that respecting Ms. Everhart's Free Exercise Clause rights by permitting her to testify while wearing a niqab advances an important public policy. Still, counsel for both Defendants were free to cross-examine Ms. Everhart about her religious beliefs or why she chose to wear a niqab during her testimony.

Defendants cite to cases in which courts have determined that witnesses wearing masks to protect themselves against the spread of COVID-19 constitutes an important public policy. *See United States v. Crittenden*, 2020 WL 4917733 at *6 (M.D. Ga. Aug 21, 2020), *United States v. Clemons*, 2020 WL 6485087, at *2-3 (D. Md. Nov. 4, 2020), *and United States v. Jones*, 2020 WL 6081501, at *2 (D. Ariz. Oct. 15, 2020). Defendants appear to be suggesting that wearing a mask in response to COVID-19 is a legitimate public policy goal, but that permitting the free exercise of religion is not a legitimate public policy goal. Cook Supplemental Memorandum at 6 ("Additionally, this case lacks what is present in the pandemic cases: the limitation [on the right to confront] must be necessary to serve an important public policy. Here, the witness wore the niqab as the day's outfit."); Hancock Supplemental Memorandum at 2 ("[N]o such public policy is implicated here by Ms. Everhart's casual wearing of a niqab, must less an exigent public policy like the need to protect against a lethal global pandemic."). Defendants disregard Ms. Everhart's religious beliefs as "casual" and this Court cannot accept that description. The Court does not need to engage in a meaningless comparative analysis if protecting against the spread of COVID-19 is any more or less important than respecting Ms. Everhart's religious freedoms. The Court finds under *Craig*, if

there was an encroachment on the Defendants' confrontation rights, safeguarding Ms. Everhart's religious freedom serves as an important public policy under the first prong of the test.

The Court also finds that the reliability of Ms. Everhart's testimony was "otherwise assured" in satisfaction of the second part of the *Craig* analysis. Reliability was measured by the *Craig* Court to include the presence of "other elements of confrontation -- oath, cross-examination, and observation of the witness' demeanor – [which] adequately ensures that the testimony is both reliable and subject to rigorous adversarial testing." *Craig*, 497 U.S. at 851. Here, each of those elements are met: (1) Ms. Everhart testified under oath; (2) Ms. Everhart was subject to cross-examination; and (3) Ms. Everhart's demeanor was observable, to include her tone, patterns of speech, and eye movements. As with the witness in *Smarr*, the Defendants and the jury in this case could see Ms. Everhart's eyes and view her "posture, her gestures, and her body language; hear her tone of voice, her cadence, and her hesitation; and observe any nervousness, frustration, or hostility" all while Ms. Everhart was under oath and subject to cross-examination. *Commonwealth v. Smarr*, 2019 Pa. Super. LEXIS 2593, 19 (Pa. July 3, 2019). Critically, the jury in this case requested transcripts of her testimony and records from her police interview. The Court views these requests to signal that the jury was more concerned with the content of Ms. Everhart's testimony and not necessarily what she wore to court that day. The Court finds, therefore, that the reliability of Ms. Everhart's testimony was assured.

In summary, the Court finds that the Defendants' Confrontation Clause rights were not violated because

Ms. Everhart's testimony meets all of the elements as detailed in *Craig*. Assuming *arguendo* that the "face-to-face" meeting was frustrated by the niqab, permitting Ms. Everhart to testify while wearing the niqab was necessary to further an important public policy and the testimony itself was otherwise reliably assured. Therefore, this Court concludes that had either of the Defendants' trial counsel objected, the objection should have been overruled as meritless. As stated above, "[a] trial counsel's failure to file a "meritless motion does not constitute ineffective assistance of counsel." *Washington v. United States*, 689 A.2d 568, 572-73 (D.C. 1997). The Court finds that the Defendants' trial counsel were not ineffective for failing to raise a meritless objection and therefore their request for relief should be denied. Defendants have not demonstrated that their respective "counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688.

The Court now turns to a related issue regarding unsettled law. To satisfy the first prong of the *Strickland* test, Defendants must show that their "counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. This Court cannot find that either counsel's actions fell below the objection standard of reasonableness when counsel did not make an objection based on an unsettled area of the law. The trial counsel who represented Defendants here were in a similar situation to that of the trial counsel in *Otts v. United States*, 952 A.2d 156 (D.C. 2008). There, the defendant claimed that his trial counsel was ineffective for not objecting to the admission of chemist's reports without the author of the reports present to testify. The *Otts* court held that:

> While appellant's trial counsel could have attempted to construe DEA-7 chemist reports as testimonial and therefore coming within the ambit of *Crawford*, we cannot say that trial counsel's failure to anticipate our decision in *Thomas*, which came two years after appellant's 2004 jury trial, fell below 'prevailing professional norms,' or was enough to 'overcome the presumption that counsel rendered reasonable professional assistance.' *Kimmelman*, *supra*, 477 U.S. at 386 (citing *Strickland*, supra, 466 U.S. at 689); *accord State v. Gross*, 134 Md. App. 528, 760 A.2d 725, 757 (Md. Ct. Spec. App. 2000) (holding that 'the failure to anticipate a possible change in the local law of evidence or to push for such a change is not an instance of counsel's representation [falling] below an objective standard of reasonableness.')

Otts, 952 A.2d at 165 (D.C. 2008). As stated above, a trial counsel's failure to file a "meritless motion does not constitute ineffective assistance of counsel." *Washington v. United States*, 689 A.2d 568, 572-73 (D.C. 1997); *see also Steward v. United States*, 927 A.2d 1081, 1087 n.5 (D.C. 2007) (quoting *Washington* and stating that "[c]ounsel cannot be found unconstitutionally deficient for failing to bring a meritless motion."). The Court finds these decisions in line with the decisions of other state and federal courts that have held, in more specific terms, that attorneys do not act unreasonably for *Strickland* purposes where they do not guess at unsettled questions of law. *See, e.g., New v. United States*, 652 F.3d 949, 952 (8th Cir. 2011) ("[F]ailure to raise arguments that require the resolution of unsettled legal questions generally does not render a lawyer's services 'outside the wide range

of professionally competent assistance' sufficient to satisfy the Sixth Amendment."); *Kornahrens v. Evatt*, 66 F.3d 1350, 1360 (4th Cir. 1995) ("[T]he case law is clear that an attorney's assistance is not rendered ineffective because he failed to anticipate a new rule of law."); *Walker v. Jones*, 10 F.3d 1569, 1573 (11th Cir. 1994) ("[B]ecause Alabama courts had rejected similar claims [that the defendant sought to raise] and the Supreme Court had not yet decided *Cage* [which settled the issue the defendant sought to raise], trial counsel had no basis for objecting to the trial court's instruction on reasonable doubt. Trial counsel's failure to object to the instruction was, therefore, reasonable."); *Bloomer v. United States*, 162 F.3d 187, 193 (2nd Cir. 1998) ("Although an attorney is not usually faulted for lacking the foresight to realize that a higher court will subsequently identify a defect in jury instructions similar to those used at his client's trial. . .an attorney nonetheless may be held responsible for failing to make such an objection when precedent supported a 'reasonable probability' that a higher court would rule in defendant's favor."); *State v. Breitzman*, 2017 WI 100, 49 (Wis. 2017) ("At the outset, we note that, for trial counsel's performance to have been deficient, Breitzman would need to demonstrate that counsel failed to raise an issue of settled law."); *State v. Reigelsperger*, 2017 UT App 101, 92 (Utah 2017) ("The law does not require counsel to seek resolution of every unsettled legal question that might bear on the proceeding. . .or to make every novel argument new counsel may later derive and assert for the first time on appeal.")

The Court is guided by the simple pronouncement in *Strickland* that:

> [T]he Sixth Amendment refers simply to 'counsel,' not specifying particular requirements of effective assistance. It relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. . .[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.

Strickland, 466 U.S. at 688 (1984) (internal citations omitted); *see also Engle v. Isaac*, 456 U.S. 107, 134 (1982) ("We have long recognized, however, that the Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim.").

In the case before the Court, neither of Defendants' counsel chose to raise the novel claim that a witness who testifies in a criminal trial while wearing a niqab violates a defendant's constitutional right to confront the witnesses against him. Indeed, Defendants concede that there is no District of Columbia case, nor, to counsel's knowledge, a case in any jurisdiction that squarely addresses this issue. This Court cannot find that either trial counsel's failure to raise a constitutional issue that has not previously been addressed in the context of religious clothing means that they provided deficient performance that "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. Indeed, the competing citations to various state and federal cases establish that the issue and

resolution which Defendants claim is so obvious is in fact a matter of considerable dispute.

Assuming *arguendo*, however, that defense counsel was ineffective for failing to object to the witness testifying while wearing a niqab, the Court would then have to reach the second prong of *Strickland*. The second prong, often referred to as the prejudice prong, requires the defendant to "show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. The Court cannot resolve that issue without resorting to pure speculation. There is no basis for the Court to find that if the witness had not worn a niqab some movement of her lips, cheeks, or other areas of her face that were covered by the niqab would have led the jury not to credit her testimony. Thus, even if both counsel failed to meet the professional standards established by the first prong of *Strickland,* Defendants cannot meet the second prong of *Strickland*. The Court, therefore, will not grant a new trial on the basis of ineffective assistance of counsel.

It is important to recognize that on direct appeal in this case the District of Columbia Court of Appeals will resolve the issue of whether a witness who testifies in a criminal trial while wearing a niqab violates a defendant's constitutional right to confront the witnesses against him. If the District of Columbia Court of Appeals rules that testimony by a witness wearing a niqab violates a defendant's constitutional confrontation rights, then the Defendants will be granted a

new trial without having to establish that they were prejudiced.[11]

CONCLUSION

The Court finds that it was not a violation of the Defendants' Confrontation Clause rights to have Ms. Everhart testify while wearing a niqab. Assuming that the "face-to-face" element of the Confrontation Clause was frustrated, Ms. Everhart's ability to testify while wearing a niqab furthered an important public policy and the reliability of her testimony was otherwise reassured as understood in the *Craig* opinion. Because the Court has made this finding, it finds that the Defendants' counsels were not ineffective for failing to object because such an objection would have been meritless.

WHEREFORE, for the forgoing reasons, it is this 29th day of December, 2020 hereby

ORDERED that Reynaud Cook's "Motion to Vacate, Set Aside, Or Correct Sentence Pursuant to D.C. Code § 23-110, And For Other Relief" is DENIED; and it is further

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[11] Although the Court applied a *Strickland* analysis, as is appropriate when ineffective assistance of counsel is alleged, it is arguable that this case is not best considered under *Strickland*. This Court found that the Defendants' Confrontation Clause rights were not violated, and therefore that the trial attorneys provided objectively reasonable assistance of counsel. Even if the District of Columbia Court of Appeals were to find that there is a constitutional right not to have a witness testify against a defendant while wearing a niqab, that right was not clear under settled law at the time of the trial. The newly recognized right is what would trigger the new trial, and not ineffective assistance of counsel.

ORDERED that Don Hancock's "Motion to Vacate, Set Aside, or Correct Sentence Pursuant to D.C. Code § 23-110, And For Other Relief" is DENIED.

SO ORDERED.

/s/ Craig Iscoe
Judge
(Signed in Chambers)

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Date: December 29, 2020

APPENDIX C

DISTRICT OF COLUMBIA
COURT OF APPEALS

[Filed February 6, 2023]

2013-CF1-009030
Nos. 18-CF-0738 & 21-CO-0004

REYNAUD COOK,
Appellant,

2013-CF1-015041
Nos. 18-CF-0758 & 21-CO-0046

DON FITZGERALD HANCOCK,
Appellant,
v.
UNITED STATES,
Appellee.

ORDER

BEFORE: Blackburne-Rigsby, Chief Judge, and Beckwith,* Easterly,* McLeese, Deahl, Howard, AliKhan,* and Shanker, Associate Judges.

On consideration of appellants' petitions for rehearing or rehearing en banc, and it appearing that no judge of this court has called for a vote on the petitions for rehearing en banc, it is

ORDERED by the merits division* that appellants' petitions for rehearing are denied. It is

FURTHER ORDERED that appellants' petitions for rehearing en banc are denied.

PER CURIAM

Nos. 18-CF-0738, 18-CF-0758, 21-CO-0004, & 21-CO-0046

Copies emailed to:

Honorable Judith Bartnoff
Director, Criminal Division

Copies e-served to:

Sean R. Day, Esquire

Paul D. Schmitt, Esquire

Chrisellen R. Kolb, Esquire
Assistant United States Attorney

pii

APPENDIX D

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA

Case No. 2013 CFI 015041
PDID No. 522100
DCDC No. 303334

UNITED STATES OF AMERICA

vs.

DON FITZGERALD HANCOCK
DOB: 02/18/1984

JUDGMENT IN A CRIMINAL CASE
(Incarceration)

THE DEFENDANT HAVING BEEN FOUND GUILTY ON THE FOLLOWING COUNT(S} AS INDICATED BELOW:

Count	Court Finding	Charge
2	Jury Trial Guilty	Murder II While Armed

SENTENCE OF THE COURT

Count 2 Murder II While Armed Sentenced to 20 year(s) incarceration with credit for time served, 5 year(s) supervised release., $100.00 VVCA, VVCA Due Date 07/09/2038

The defendant is hereby committed to the custody of the Attorney General to be incarcerated for a total term of 20 YEARS. MANDATORY MINIMUM term of 5 YEARS applies.

Upon release from incarceration, the Defendant shall be on supervised release for a term of: 5 YEARS

The Court makes the following recommendations to the Bureau of Prisons/Department of Corrections:

Court recommends placement at a facility to accommodate mental health treatment needs and vocational services.

Total costs in the aggregate amount of $ 100.00 have been assessed under the Victims of Violent Crime Compensation Act of 1996, and ☐ have ☑ have not been paid. ☑ Appeal rights given ☑ Gun Offender Registry Order Issued

☐ Advised of right to file a Motion to Suspend Child Support Order

☐ Sex Offender Registration Notice Given

☐ Domestic violence notice given prohibiting possession/purchase of firearm or ammunition

☐ Restitution is part of the sentence and judgment pursuant to D.C. Code § 16-711.

☐ Voluntary Surrender

7/9/2018
Date

/s/ Judith Bartnoff
JUDITH BARTNOFF
Judge

Certification by Clerk pursuant to Criminal Rule 32(d)

7/9/2018
Date

/s/ Michelle Henson
Michelle Henson
Deputy Clerk

Received by DUSM: [Illegible]
Printed Name

Badge: 31109

Signature: [Illegible]

Date: 7/9/18

Time: 1300

APPENDIX E

[1] SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
CRIMINAL DIVISION

Criminal Action No.:

2013-CF1-9030
2013-CF1 15041

UNITED STATES OF AMERICA

v.

REYNAUD COOK,
DON HANCOCK,

Defendants.

Washington, D.C.

Monday, July 10, 2017

The above-entitled action came on for a Jury Trial before the HONORABLE JUDITH BARTNOFF, Associate Judge, and a jury impaneled and sworn, in Courtroom Number 203, commencing at 9:54 a.m.

* * *

[42] GOVERNMENT'S OPENING STATEMENT

* * *

[50] * * *

So, how are we going to prove this? We are going to prove it through several witnesses. The first witness is going to be someone by the name of Alisha Everhart, Twin. Alisha grew up in the Deanwood neighborhood,

which is where this all takes place. As I told you, she knew the defendants from a very early age and she had stayed friends with them throughout the course, over the years.

* * *

[51] * * *

You are going to hear, ladies and gentlemen, that, in fact, when she first spoke with the police, that is the very morning of Nick's murder, she didn't tell the police the truth. She was protecting her friends, Don and Rey. She said that it was somebody else and she gave a description of another person who killed Nick.

But you are also going to hear that as time goes on, that loyalty and those feelings that she had, friendship for Nick started to got to her. And by the time she testifies in the grand jury, about a month later, she tells the police what happened. She identifies Rey and says that's the guy who was there that night. She doesn't identify Don, although she tells the police his full name and she gives a

* * *

[52] * * *

In two-thousand – one thing about the grand jury of 2007, ladies and gentlemen, is that she told them that she was high. She said that she had – Nick had already smoked part of that dipper. What you are going to hear today, ladies and gentlemen in the courtroom, is that she was not high at that time. She will tell you that she said that she was high because she was scared. It's a tough situation to be in when you are 23 years old. 2012, 2011 or so, Alisha did have a problem with PCP. You are going to hear about that and she will discuss that with you a little bit. But you are also going to hear

that PCP never caused her to hallucinate, never caused her to hear things that weren't really there or see things that were not really there. She's going to tell you that PCP made her pretty mellow.

In 2011 or so, Ms. Everhart pulled herself together. She got her life together. She got sober. She had a child. She became religious. She converted to Islam. She became very active in the Islamic community. And, in fact, ladies and gentlemen, she is such a devout individual that you will see, when she testifies here today, she's actually going to be in a [53] headdress and face covering for religious reasons.

* * *

APPENDIX F

[1] SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
CRIMINAL DIVISION

Criminal Action No.:

2013-CF1-9030

2013-CF1 15041

UNITED STATES OF AMERICA

v.

REYNAUD COOK,
DON HANCOCK,

Defendants.

Washington, D.C.

Tuesday, July 11, 2017

The above-entitled action came on for a Jury Trial before the HONORABLE JUDITH BARTNOFF, Associate Judge, and a jury impaneled and sworn, in Courtroom Number 203, commencing at 1:08 p.m.

* * *

[30] * * *

Q Could you please state and spell your name for the jurors and for the court reporter.

A My name is Alisha Everhart. A-L-I-S-H-A, E-V-E-R-H-A-R-T.

Q And Ms. Everhart, do you go by any other names?

A My muslim name is Khadeejah.

Q Can you spell that?

A K-H-A-D-E-E-J-A-H.

* * *

[33] * * *

Q Do you currently work?

A Right now I'm unemployed, but I am a musician.

Q You are a musician. What instrument do you play?

A I play guitar, piano, but I'm an upcoming singer and rapper.

Q So, do you primarily focus on vocals?

A Yes, ma'am.

Q Now, you said that you are not working right now. Are you involved in any organizations?

A Yes, ma'am. Actually, since I have been converted back over to Islam, I do a lot of community and volunteer work in the community.

Q And you said you converted to Islam. When did you do that?

A August of 2009.

Q Let me ask you. You said that you are involved with in community. Is there anything in particular you do through your mosque?

A Yes, ma'am. We do a lot of feeding the homeless. We do a lot of youth work or what have you work with the elderlies, work with the homeless. Just a lot of giving back to the community.

[34] Q Now, Ms. Everhart, you are testifying today wearing a head covering as well as a face covering?

A Yes, ma'am.

Q And do you normally wear a face covering and a head covering in public?

A Yes, ma'am. Well, sometimes I do and, you know, this is how I cover.

Q And you say that

A It's called a Niqab.

Q Can you spell that for the reporter.

A N-I-Q-A-B.

Q And how long have you been covering you?

A Since I had converted over. For the past eight years.

* * *