

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL ANDREW KING, JR., *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Wesley P. Page
Federal Public Defender

Jonathan D. Byrne
Appellate Counsel
Counsel of Record

Rachel E. Zimarowski
Assistant Federal Public Defender
Office of the Federal Public Defender
Southern District of West Virginia
300 Virginia Street, East, Room 3400
Charleston, West Virginia 25301
304/347-3350
jonathan_byrne@fd.org

Counsel for Petitioner

Dated: December 22, 2023

I. QUESTION PRESENTED FOR REVIEW

Whether an appellate court's traditional deference to credibility determinations made by jurors in returning a guilty verdict should give way where the witnesses at trial were required to testify while wearing masks, thus inhibiting the jury's traditional role in making credibility determinations.

II. TABLE OF CONTENTS

I.	QUESTION PRESENTED FOR REVIEW	1
II.	TABLE OF CONTENTS.....	2
III.	TABLE OF AUTHORITIES	4
IV.	LIST OF ALL DIRECTLY RELATED PROCEEDINGS.....	6
V.	OPINIONS BELOW.....	6
VI.	JURISDICTION.....	6
VII.	STATUTES AND REGULATIONS INVOLVED.....	7
VIII.	STATEMENT OF THE CASE.....	7
	A. Federal Jurisdiction	7
	B. Facts Pertinent to the Issue Presented	8
	1. An informant testifies that she purchased drugs twice, allegedly from King.	9
	2. A traffic stop of the vehicle driven by King's girlfriend leads to the discovery of methamphetamine and crack cocaine.....	11
	3. The Fourth Circuit affirms King's convictions.....	13
IX.	REASONS FOR GRANTING THE WRIT.....	13
	The writ should be granted to determine whether an appellate court's traditional deference to credibility determinations made by jurors in returning a guilty verdict should give way where the witnesses at trial were required to testify while wearing masks, thus inhibiting the jury's traditional role in making credibility determinations.....	13

A.	There was insufficient evidence to convict King on all counts of the indictment because the witnesses upon whom those convictions relied were not credible. Given the nature of King's trial, the Fourth Circuit should not have deferred to the jury's flawed conclusions.....	15
B.	Because all witnesses who testified against King did so while wearing face masks, the traditional deference to the factual conclusions of the jury should not apply.....	16
C.	Neither Carter nor Hamilton were credible in their testimony implicating King in drug trafficking.....	20
D.	King's convictions should be vacated.....	23
X.	CONCLUSION.....	23
APPENDIX A: Unpublished Opinion of the United States Court of Appeals for the Fourth Circuit entered September 29, 2023.....		A-1
APPENDIX B: Excerpt of Transcript of Trial before The Honorable Joseph R. Goodwin of the United States District Court for the Southern District of West Virginia on August 19, 2021.....		B-1
APPENDIX C: Excerpt of Transcript of Sentencing Hearing before The Honorable Joseph R. Goodwin of the United States District Court for the Southern District of West Virginia on June 10, 2022		C-1
APPENDIX D: Judgment of the United States District Court for the Southern District of West Virginia entered June 10, 2022.....		D-1

III. TABLE OF AUTHORITIES

Cases

<i>Coy v. Iowa</i> , 487 U.S. 1012 (1988).....	17
<i>Harvard v. Florida</i> , 459 U.S. 1128 (1983)	18
<i>Maryland v. Craig</i> , 497 U.S. 836 (1990)	17
<i>United States v. Allen</i> , 34 F.4th 789 (9th Cir. 2022)	18
<i>United States v. Bell</i> , 795 F.3d 88 (D.C. Cir. 2015)	18
<i>United States v. Burgos</i> , 94 F.3d 849 (4th Cir. 1996).....	13, 16
<i>United States v. Cunningham</i> , 133 F.3d 1070 (8th Cir. 1998).....	18
<i>United States v. King</i> , ____ F. App'x ___, 2022 WL 1056087 (7th Cir. 2022).....	14, 19
<i>United States v. King</i> , 2023 WL 6366695 (4th Cir. 2023)	13
<i>United States v. Murray</i> , 65 F.3d 1161 (4th Cir. 1995).....	18
<i>United States v. Olsen</i> , 21 F.4th 1036 (9th Cir. 2022).....	16
<i>United States v. Penniegraft</i> , 641 F.3d 566 (4th Cir. 2011)	17
<i>United States v. Scheffer</i> , 523 U.S. 303 (1998)	13
<i>United States v. Smith</i> , ____ F. App'x ___, 2021 WL 5567267 (6th Cir. 2021)	14, 19
<i>United States v. Tagliaferro</i> , 531 F. Supp. 3d 844 (S.D.N.Y. 2021).....	18, 19
<i>United States v. Thompson</i> , 543 F. Supp. 3d 1156 (D.N.M. 2021)	14, 18, 19
<i>United States v. United Medical and Surgical Supply Corp.</i> , 989 F.2d 1390 (4th Cir. 1993).....	16, 18

Constitutional Provision

U.S. Const. amend. V.....	7
---------------------------	---

U.S. Const. amend. VI	17, 18, 19
-----------------------------	------------

Federal Statutes

18 U.S.C. § 3231.....	7
18 U.S.C. § 3742	7
21 U.S.C. § 841(a)(1)	7
28 U.S.C. § 1254.....	6
28 U.S.C. § 1291.....	7

Rules

Sup. Ct. R. 10(c)	15
Sup. Ct. R. 13.1	6
Sup. Ct. R. 13.3	6

Other Authorities and Sources

Cynthia Alkon, <i>Criminal Court System Failures During COVID-19: An Empirical Study</i> , 37 Ohio St. J on Dispute Resolution 453 (2022).....	14
General Order 13, U.S.D.C. S.D.W. Va., August 2, 2021, Available online at https://www.wvsd.uscourts.gov/sites/wvsd/files/general-orders/general_order_13_8-2-21.pdf (last visited December 21,2023)	8
Judge Edward D. Marisco, Jr., <i>Virtual Proceedings and Constitutional Rights in the Time of a Pandemic</i> , 31 Widener Commonwealth L. Rev. 205, 205 (2023).....	14
<i>Tracking Coronavirus in West Virginia: Latest Map and Case Count</i> , New York Times, https://www.nytimes.com/interactive/2021/us/west-virginia-covid-cases.html (last visited December 20, 2023)	16

IV. LIST OF ALL DIRECTLY RELATED PROCEEDINGS

- *United States v. King*, No. 2:21-cr-00023, U.S. District Court for the Southern District of West Virginia. Judgment entered June 10, 2022.
- *United States v. King*, Appeal No. 22-4349, U.S. Court of Appeals for the Fourth Circuit. Judgment entered on September 29, 2023.

V. OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit affirming King's conviction is unpublished and is attached to this Petition as Appendix A. The portion of the trial transcript containing the district court's oral ruling at trial denying King's motion for a judgment of acquittal is attached to this Petition as Appendix B. The portion of the sentencing transcript containing the district court's ruling denying King's post-trial renewal of that motion is attached to this Petition as Appendix C. The judgment order is unpublished and is attached to this Petition as Exhibit D.

VI. JURISDICTION

This Petition seeks review of a judgment of the United States Court of Appeals for the Fourth Circuit entered on September 29, 2023. No petition for rehearing was filed. This Petition is filed within 90 days of the date the court's entry of its judgment. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254 and Rules 13.1 and 13.3 of this Court.

VII. STATUTES AND REGULATIONS INVOLVED

The issue in this Petition requires interpretation and application of the Fifth Amendment to the United States Constitution, which provides, in pertinent part:

No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

VIII. STATEMENT OF THE CASE

A. Federal Jurisdiction

On February 23, 2021, an indictment was filed in the Southern District of West Virginia charging Michael Andrew King, Jr. with possessing 50 grams or more of methamphetamine and 28 grams or more of crack cocaine with the intent to distribute them, in violation of 21 U.S.C. § 841(a)(1). JA012.¹ On June 10, 2021, a three-count superseding indictment was returned recharging King with that offense in Count Three, as well distribution of methamphetamine (Count One) and crack cocaine (Count Two), both under 21 U.S.C. § 841(a)(1). JA013-015. Because those charges constitute offenses against the United States, the district court had original jurisdiction pursuant to 18 U.S.C. § 3231. This is an appeal from the final judgment and sentence imposed after King was convicted by a jury of the charges in the superseding indictment. JA323-324. A judgment order was entered on June 10, 2022. JA401-408. King timely filed a notice of appeal on June 16, 2022. JA409. The United States Court of Appeals for the Fourth Circuit had jurisdiction pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291.

¹ “JA” refers to the Joint Appendix filed in this appeal before the Fourth Circuit.

B. Facts Pertinent to the Issue Presented

This case involves a two-part investigation into alleged drug dealing by King in southern West Virginia. The first involved a pair of controlled purchases by an informant. The second involved a traffic stop of a vehicle driven by King's girlfriend, Chelsey Hamilton, which uncovered substantial quantities of methamphetamine and crack cocaine. King was initially charged in a single-count indictment with possessing methamphetamine and crack cocaine with the intent to distribute it. JA012. The Government then secured a three-count superseding indictment recharging that offense as well as two counts of distribution, one of methamphetamine and one of crack, based on the two controlled buys. JA013-015. King pleaded not guilty and proceeded to trial on August 18, 2021. JA018-317.

Prior to trial, the district court entered an order resolving several outstanding pretrial motions. JA016-017. It also addressed the ongoing impact of the COVID-19 pandemic. Since the onset of the pandemic in spring 2020, the Southern District of West Virginia had operated under a series of general orders regarding access to the district's courthouses and required precautions in the buildings, such as wearing masks.² At the time of King's trial the court was operating under General Order 13, entered on August 2, 2021.³ It required that "all persons" seeking to enter the courthouse "must wear a face covering or mask . . . regardless of vaccination status."

² An archive of the orders can be found here: <https://www.wvsd.uscourts.gov/court-info/local-rules-and-orders/general-orders> (last visited December 21, 2023).

³ Available online at https://www.wvsd.uscourts.gov/sites/wvsd/files/general-orders/general_order_13_8-2-21.pdf (last visited December 21, 2023).

It also required that masks “must be worn by all participants during in-court proceedings unless otherwise directed by the presiding judge.” The presiding judge in this case, in the order resolving pretrial motions, reiterated that “masks are still required at all times, for all individuals, in my courtroom.” JA017.⁴

After a two-day trial, King was convicted on all three counts of the superseding indictment. JA310-311. The district court sentenced King to concurrent terms of 120 months in prison, the mandatory minimum for his conviction for possession with intent to distribute. JA430.

1. An informant testifies that she purchased drugs twice, allegedly from King

Kanawha County Sheriff’s Deputy Paul Hodge testified that in January 2019, he received information from an informant, Cassie Carter, that King was selling drugs. JA058. Hodge placed GPS trackers on King’s vehicles and eventually decided to use Carter to make a pair of controlled purchases of drugs at a home in Montgomery, West Virginia. JA058-059. The home belonged to Eloise Canada and her grandson, RJ. JA064. Hodge learned that King lived in Kanawha City, but one of his vehicles was parked out front of the Montgomery home. JA059, 061.

For the first controlled buy, Carter was given \$140 and outfitted with a recording device. JA065. Hodge admitted that he was limited in the search he was able to make of Carter before the buy because she was a woman. JA066. Carter went to the home and returned with methamphetamine and \$15 in change. JA067. For the

⁴ King did not challenge the district court’s ruling on masks until after trial. JA365-366. The district court concluded that King’s objection had been waived. JA381-382.

second controlled buy, Carter was given \$100. JA072. She returned with crack cocaine, but needed an additional \$25 to complete the purchase. JA073. Hodge conceded that the video recording of the first buy did not show any drugs or money, nor did it show anyone's face. JA107. The video of the second buy showed drugs on the kitchen table, but did not show money changing hands or anyone's face. JA113-114. Carter testified, briefly, about the controlled buys as well. JA131-137. She explained that she did not use drugs herself, but bought them for other people. JA133. She also testified that King, whom she referred to as "Bleed," had told her he was going to go to Cleveland to get more drugs. JA139. As to another controlled buy (which did not form the basis for any of the charges in the superseding indictment), she was unable to state from whom she bought drugs. JA138, 152.

Hodge testified that after the two controlled buys he and other officers executed a search warrant at the house in Montgomery. JA082-083. King's car was there when the warrant was executed, but he was not one of the people officers encountered in the home, which included Canada and RJ. JA084. Officers recovered crack cocaine and marijuana during the search, but none of the people present were arrested or questioned about the drugs, including Slade Terrell, who attempted to flee during the search and was carrying a significant amount of cash. JA115, JA116-118. A small amount of methamphetamine was found in RJ's room as well, but he was not questioned about it. JA116.

2. A traffic stop of the vehicle driven by King's girlfriend leads to the discovery of methamphetamine and crack cocaine.

Hodge testified that, in early February 2019, the GPS tracker showed that one of King's vehicles drove to Cleveland. JA088. Carter had told Hodge that King was going to Cleveland, but he admitted that that is where King's parents lived. JA122. Hodge and other officers set up to stop King's vehicle the next day after it returned to West Virginia. JA089. King's vehicle was stopped for speeding, as was a second vehicle that was registered to and driven by Hamilton. JA090-092. Hamilton was alone in her vehicle, while King was in his vehicle with his mother and "a couple of cousins maybe." JA092, JA122.

Daniel Johnson, another officer, actually stopped Hamilton in her vehicle. JA209. He testified that after the stop, a drug dog was brought to the scene and alerted on Hamilton's vehicle. JA250. A third officer, Matt Petty, began searching the vehicle. Petty recovered a bag from between the second and third rows of seats. JA235.⁵ In the bag was a pound of methamphetamine and three ounces of crack cocaine. JA091-093. While her vehicle was being searched, Hamilton was in Johnson's cruiser. Johnson testified that "[i]nitially she was not very cooperative" but "as the traffic stop progressed, and especially as the dog alerted . . . she became more cooperative." JA214. After the roadside search, Hamilton was allowed to accompany Hodge to the headquarters of the drug task force for further questioning, then allowed

⁵ The Government's expert witness testified that there were two sets of fingerprints on the bag. One belonged to one of the police officers involved and King was "excluded" as the contributor of the other print, meaning "[h]e did not make them." JA246.

to proceed to her ultimate destination. JA169, JA170. She was not arrested. JA184. When an officer discovered marijuana debris in her car he said merely that she “needed to vacuum it out.” JA182. Hamilton also testified that she was given immunity, but when confronted with proof that no such immunity had been granted, she declined to revise her testimony. JA184, JA200-201.

Hamilton, who had known King for approximately two years, testified about the stop. JA153-206. She testified that she got a call from King that he was in Cleveland and supposed to bring family members back to the Charleston area, but did not have enough room in his vehicle and asked if she could help. She agreed to come up and bring either people or luggage back. JA160. She was in Cleveland about two hours while King loaded her car. JA162-163. She testified that before they left, as she was sitting in her car, King put a bag in the back of her vehicle and when she asked what it was he said “don’t worry about it; it’s mine.” JA163-164. Hamilton admitted that she lied both to the original officers on the scene and to Hodge when he arrived that she was coming from Michigan, not Cleveland, and had been attending her niece’s birthday. JA169, JA173. While Hamilton testified that there was at “one time” a romantic relationship with King and that it ended the day of the traffic stop, she was forced to admit recorded phone calls made “months, if not more than a year” after the stop showed she and King were still discussing a romantic relationship. JA168, JA203.

3. The Fourth Circuit affirms King's convictions.

King appealed to the Fourth Circuit, arguing that “insufficient evidence supports his convictions.” *United States v. King*, 2023 WL 6366695, *1 (4th Cir. 2023). Specifically, King argued that the court should not give the traditional deference to the jury’s credibility findings because all the witnesses who testified at trial were masked and that neither Cater nor Hamilton were credible. *United States v. King*, Appeal No. 22-4349, Dkt. No. 10 at 10-17. In a footnote, the Fourth Circuit “decline[d] King's invitation to make our own credibility determinations because the witnesses were required to wear masks while testifying,” without analyzing the issue. *King*, 2023 WL 6366695 at *1, n.*. As a result, the court concluded that there was sufficient evidence to support King’s convictions. *Id.* at *1-2.

IX. REASONS FOR GRANTING THE WRIT

The writ should be granted to determine whether an appellate court’s traditional deference to credibility determinations made by jurors in returning a guilty verdict should give way where the witnesses at trial were required to testify while wearing masks, thus inhibiting the jury’s traditional role in making credibility determinations.

This Court has held that a “fundamental premise of our criminal trial system is that the jury is the lie detector.” *United States v. Scheffer*, 523 U.S. 303, 313 (1998)(cleaned up). “Determining the weight and credibility of witness testimony, therefore, has long been held to be the part of every case that belongs to the jury.” *Ibid.* (cleaned up); *see also United States v. Burgos*, 94 F.3d 849, 863 (4th Cir. 1996)(“determinations of credibility are within the sole province of the jury and are not susceptible to judicial review”)(cleaned up). But the “COVID-19 pandemic created

an unprecedeted challenge for the criminal justice system,” Judge Edward D. Marisco, Jr., *Virtual Proceedings and Constitutional Rights in the Time of a Pandemic*, 31 Widener Commonwealth L. Rev. 205, 205 (2023), that upended numerous “fundamental premises” of the criminal justice system. *See, e.g.*, Marisco at 207-211 (exploring how the pandemic impacted rights to a speedy trial, confront witnesses, and have a public trial); Cynthia Alkon, *Criminal Court System Failures During COVID-19: An Empirical Study*, 37 Ohio St. J. on Dispute Resolution 453, 459-460 (2022)(the “pandemic demanded immediate action” which was “complicated by the need to protect defendants’ constitutional rights while protecting the health and safety of all those coming into the courts”).

This case presents another aspect of the pandemic that upended traditional practice during trial – requiring witnesses to wear masks while testifying. While there is no dispute that the trial court in this case faced unprecedeted challenges in terms of trial management, it can also not be disputed that there were alternatives to requiring all witnesses to wear masks. *See, e.g.*, *United States v. Thompson*, 543 F. Supp. 3d 1156, 1164 (D.N.M. 2021)(requiring witnesses to remove masks to testify or wear a mask with a “clear face shield”); *United States v. King*, ____ F. App’x ___, 2022 WL 1056087 at *2 (7th Cir. 2022)(agreeing with counsel that it would be frivolous to argue that COVID protocols at trial deprived him of constitutional rights as “the witnesses wore clear face shields while testifying”); *United States v. Smith*, ____ F. App’x ___, 2021 WL 5567267 at *1 (6th Cir. 2021)(approving COVID restrictions at trial, including masks, where there were “limited exceptions to this

rule, including that witnesses could remove their masks when testifying, attorneys could remove their masks when addressing the jury, and prospective jurors could remove their masks and put on a clear face shield when responding to questions during *voir dire*"). The district court's decision in this case to require opaque face masks for witnesses when testifying impacted the jury's ability to judge the credibility of those witnesses. Whether that should require the Court of Appeals, when reviewing the sufficiency of the evidence, to look more critically at the credibility of those witnesses is an important question of federal law that this Court should resolve. See Rules of the Supreme Court 10(c).

- A. There was insufficient evidence to convict King on all counts of the indictment because the witnesses upon whom those convictions relied were not credible. Given the nature of King's trial, the Fourth Circuit should not have deferred to the jury's flawed conclusions.**

King was convicted of distributing drugs and possessing them with intent to distribute. There was no non-testimonial evidence presented during his trial that linked King to any of those crimes. As Hodge admitted at trial, the video recordings of the two controlled buys did not show King or the actual transactions that allegedly took place. Moreover, the buys took place in a home filled with drug users (if not dealers) other than King. Similarly, there is no physical evidence that the drugs found during the traffic stop were connected to King.

In order to make the necessary connections between the drugs and King, the Government was required to rely upon the testimony of Carter, the informant who made the controlled purchases, and Hamilton, in whose vehicle the drugs were found.

If they are not credible witnesses, there is insufficient evidence to support King's convictions. Typically, Courts of Appeals would not review the credibility determinations made by the jury. *See United States v. United Medical and Surgical Supply Corp.*, 989 F.2d 1390, 1402 (4th Cir. 1993); *Burgos*, 94 F.3d at 863. However, in light of the unusual circumstances of King's trial, which took place during an unprecedented global pandemic with witnesses wearing masks on their faces, the Fourth Circuit should not have extended the same level of deference to the jury's findings in this case. Reviewed with fresh eyes, neither Carter nor Hamilton were credible and there is insufficient evidence to support King's convictions.

B. Because all witnesses who testified against King did so while wearing face masks, the traditional deference to the factual conclusions of the jury should not apply.

"The COVID-19 pandemic has presented courts with unprecedented challenges" including "determining when and how to conduct jury trials without endangering public health and safety" while respecting constitutional rights. *United States v. Olsen*, 21 F.4th 1036, 1040 (9th Cir. 2022). Those challenges persisted at the time of King's trial, even though West Virginia was in a relative lull at the time in terms of COVID transmission. *Tracking Coronavirus in West Virginia: Latest Map and Case Count*, New York Times, <https://www.nytimes.com/interactive/2021/us/west-virginia-covid-cases.html> (last visited December 20, 2023). In that environment, King's trial was allowed to take place, but with restrictions put in place by the district court.

The restriction most relevant to this appeal is the district court's requirement relates to witnesses wearing masks while testifying. The general order in effect in the Southern District of West Virginia at the time of King's trial required that masks "must be worn by all participants during in-court proceedings unless otherwise directed by the presiding judge." Prior to King's trial, the presiding judge made clear that "masks are still required at all times, for all individuals, in my courtroom." JA017.

The Sixth Amendment provides that in "all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." This guarantees a criminal defendant a "face-to-face meeting with witnesses appearing before the trier of fact." *Coy v. Iowa*, 487 U.S. 1012, 1015-1016 (1988). That is because it "is always more difficult to tell a lie about a person 'to his face' than 'behind his back" and "even if the lie is told, it will often be told less convincingly." *Id.* at 1019. The right to face-to-face confrontation can give way only "where denial of such confrontation is necessary to further an important public policy and . . . where the reliability of the testimony is otherwise assured." *Maryland v. Craig*, 497 U.S. 836, 850 (1990).

The importance of face-to-face confrontation is evident from the way courts of appeals normally treat the conclusions of fact finders on appeal. When reviewing the sufficiency of evidence supporting a conviction this Court "is to construe the evidence in the light most favorable to the government, assuming its credibility." *United States v. Penniegraft*, 641 F.3d 566, 571 (4th Cir. 2011). A Court of Appeals, therefore,

“cannot make our own credibility determinations but must assume that the jury resolved all contradictions in testimony in favor of the Government.” *United Medical and Surgical Supply Corp.*, 989 F.2d at 1402. Similar restrictions exist when the district court is the finder of fact. *See, e.g., United States v. Murray*, 65 F.3d 1161, 1169 (4th Cir. 1995)(though “Murray disagrees with the credibility determination of the district court, it is the role of the district court to observe witnesses and weigh their credibility”). That is because the review of a transcript is “an imperfect substitute for being present.” *United States v. Bell*, 795 F.3d 88, 96-97 (D.C. Cir. 2015). “A witness may be credible on paper but not on the stand,” and presumably incredible in the same way. *Harvard v. Florida*, 459 U.S 1128, 1134 (1983); *see also United States v. Cunningham*, 133 F.3d 1070, 1072 (8th Cir. 1998)(“we give deference to the fact finder, who had an opportunity to observe the demeanor and credibility of the witnesses”). Thus, “an unimpeded opportunity to cross-examine adverse witnesses face-to-face and in full view of the jury is core to the Sixth Amendment right of confrontation.” *United States v. Thompson*, 543 F. Supp. 3d 1156, 1164 (D.N.M. 2021).

Courts struggling with COVID-related issues have noted the importance of trying to preserve that right. In *United States v. Allen*, 34 F.4th 789, 797 (9th Cir. 2022), a case dealing with the right to a public trial during the pandemic, the court noted that “the district court here implicitly acknowledged the value of visual observation when it required witnesses at the suppression hearing and trial to wear clear masks.” Similarly, in *United States v. Tagliaferro*, 531 F. Supp. 3d 844, 850

(S.D.N.Y. 2021), the court rejected the defendant’s argument that him being masked violated his confrontation right where the “witnesses at Tagliaferro’s trial will remain unmasked and complete visible to both him and the jury. Accordingly, the jury will be able to adequately assess their credibility” In *Thompson*, the court granted a defense motion to allow witnesses to remove masks while testifying, going so far as to “require testifying witnesses who do not remove their masks after being informed that vaccinated individuals do not need to wear a face mask to replace their face mask with a clear face shield.” *Thompson*, 543 F. Supp. 3d at 1164; *see also King*, 2022 WL 1056087 at *2; *Smith*, 2021 WL 5567267 at *1.

King did not object to the district court’s masking order before trial and, thus, he has waived the issue of whether his Sixth Amendment rights were violated.⁶ That does not mean that the Fourth Circuit was powerless to take the circumstances in which King’s trial took place into account when evaluating the testimony presented. As set forth above, allowing jurors and King himself to fully judge the credibility of witnesses is “core to the Sixth Amendment right of confrontation.” *Thompson*, 543 F. Supp. 3d at 1164. Because there was no such opportunity in the district court, this Court should not show the usual deference to the jury’s findings when reviewing the credibility of the Government’s key witnesses.

⁶ The Office of the Federal Public Defender was appointed to represent King prior to sentencing.

C. Neither Carter nor Hamilton were credible in their testimony implicating King in drug trafficking.

The two counts of which King was convicted for distribution arose from the controlled buys made by Carter at the home in Montgomery. While Carter was equipped with a video recorder for each of the controlled buys, the resulting recordings were of little value. Hodge conceded that the video of the first controlled buy did not show any drugs or money, nor did it show anyone's face. JA107. While the video of the second controlled buy did show some drugs on the kitchen table in the home, Hodge conceded that it, too, failed to show any faces or the transaction itself. JA113-114. It is only Carter's testimony that the drugs she brought back to Hodge came from King that tie him to the distributions.

Carter's testimony on that matter was not credible. To begin, she could not be searched properly before the controlled buys took place. As Hodge explained, when using an informant to make a controlled buy police "will conduct a search of their person for weapons, contraband, other drugs, and money," JA058, presumably to ensure that any of those things that they return to the officer came from the target of the buy. However, Hodge admitted that he was "somewhat restricted when you're searching a female confidential informant." JA066. He also conceded, after confirming that there were no women on the drug task force of which he is a part, that he was "unable to search her entire person." JA105-106. Thus, there is no certainty that Carter was free of drugs before she performed the controlled buys and there can be no certainty that the drugs she presented to Hodge as a result of the controlled buys came from anyone in the house (least of all King).

In addition, Carter was not a convincing witness when asked for details of her own experience. For example, while she could remember having a prior misdemeanor conviction, she could not remember when it was sustained. JA140. Nor could she initially remember when her latest arrest had been, even though it was only a month prior to trial and for a serious felony (assault with a deadly weapon). JA140, JA143. She initially testified that she could not remember how many times she had purchased methamphetamine,⁷ but was certain she had only purchased it from King. JA146. Shortly thereafter, however (two pages of the trial transcript), she admitted purchasing drugs from other people. JA148. Indeed, Carter's testimony is so lacking in credibility that she could not even remember from whom she bought drugs on a third occasion, explaining that the purchase took place in RJ's bedroom, but King "was in that bedroom a lot, too, so I'm not sure who it came from that day." JA152.

Finally, none of Carter's testimony about the controlled buys was corroborated by the search of the Montgomery home where they took place. While King's car was parked outside the home when police arrived to execute the search, he was not there. JA084. Inside were several other people and amounts of crack cocaine and marijuana. JA115. There was also methamphetamine in RJ's bedroom, where Carter remembered an additional controlled buy taking place. JA116. One of the people present at the home when the search took place was Terrell, who attempted to flee. JA115. He was found in possession of crack cocaine and "a couple of hundred dollars

⁷ Carter's testimony that she was not a drug user herself but did all her drug buying on behalf of others simply strains credulity. JA133.

of currency money.” JA118. In spite of recovering drugs and cash from someone fleeing police, Hodge did not arrest or question Terrel, nor did he search the cell phone also in his possession. *Ibid.* All the search confirmed was that the Montgomery home was full of people who used, and perhaps sold, drugs, none of whom were King.

Hamilton’s credibility fares no better under close scrutiny. That is largely because, as she admitted in her testimony, she lied to police during the traffic stop. She initially told them she was coming from Michigan, not from Cleveland on behalf of King. JA169, JA173. Indeed, she told the same lie twice during the stop. JA169. She was also untruthful with regard to her dealings with the Government. In her testimony, Hamilton stated that she was “granted immunity.” JA184. She admitted that she was not aware that, if that was true, the Government would be required to disclose that to the defense. *Ibid.* After the first day of testimony had ended, the Government explained that it had never made any offer of immunity to Hamilton, nor had Hodge during her initial encounter with police. JA190-191. When her cross examination resumed the next day, Hamilton was informed of the Government’s representation and asked, “is there anything from your testimony yesterday that you would like to change?” JA201. She answered, “no.” *Ibid.*

Hamilton’s testimony is the only thing tying King to the bag in which the drugs were found in her vehicle, given that his fingerprints were not found on that bag. She testified that King put a bag in the back of her vehicle and when she asked about it said, “don’t worry about it; it’s mine.” JA164-164. Without that testimony, Hamilton is left literally holding the bag full of a sufficient amount of drugs to trigger a

mandatory minimum sentence. She had a motive to place the blame on King, but given her false statements to police and statements on the stand regarding immunity there is no reason to credit that attempt.

D. King's convictions should be vacated.

King's convictions are based on the testimony of two unreliable witnesses. The only evidence tying King to the drugs allegedly purchased by Carter is her testimony, yet that testimony is inconsistent and uncorroborated. The only evidence tying King to the drugs found in Hamilton's vehicle are the self-serving statements of an admitted liar in desperate need of finding someone else to whom she could attribute the drugs. Because neither witness was credible, there was insufficient evidence to support King's convictions.

X. CONCLUSION

For the reasons stated, the Supreme Court should grant certiorari in this case.

Respectfully submitted,

MICHAEL ANDREW KING, JR.

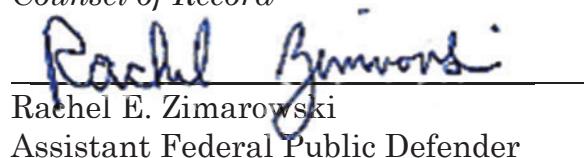
By Counsel

**WESLEY P. PAGE
FEDERAL PUBLIC DEFENDER**



Jonathan D. Byrne

Appellate Counsel
Counsel of Record



Rachel E. Zimarowski
Assistant Federal Public Defender