

## Memorandum

To: Ron Swanson  
From: Student  
Re: Andy Dwyer, non-compete clause – Case File 18-1234  
Date: November 21, 2018

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### Questions Presented

1. Under Indiana law, is a covenant not to compete enforceable when it restricts a public relations manager from engaging in the business of game development, in any capacity, anywhere in the world?
2. Under Indiana law, can the blue pencil doctrine be applied to make a covenant not to compete enforceable when it contains unreasonable geographic and scope of activities restrictions?

### Brief Answers

1. Probably no. A covenant not to compete is enforceable when its duration, geographic, and scope of activities restrictions are reasonable. In this case, the geographic and scope of activities restrictions placed on Dwyer exceed Wyatt Enterprises' interest served by those restrictions.
2. Probably no. The blue pencil doctrine is applied to a covenant not to compete to strike or narrow the unreasonable portions. In this case, the blue pencil doctrine could only strike the geographic restriction in its entirety. A covenant not to compete silent in regard to geographic restriction is unenforceable.

### Facts

Wyatt Enterprises is a board game company created by Ben Wyatt. The company is headquartered in Indiana. When Wyatt created the company, he hired an old friend, Andy Dwyer, to be the public relations manager. When Dwyer was hired, the company had only three employees. Therefore, each employee was well aware of all areas of the business. As Wyatt Enterprises' public relations manager, Dwyer has access to significant proprietary company information, including all games currently in development, and interacts frequently with the public. After the release of a couple popular board games, Wyatt Enterprises experienced a growth in business and hired additional staff. As the company grew, Wyatt asked all employees to sign an employment contract containing a covenant not to compete. The covenant states:

Employee agrees that [he/she] shall not:

- At any time within three years from the Employee's termination of employment with Wyatt Enterprises, for whatever reason including termination for cause;
- Either solely or jointly with or as an agent for any other person, firm, or company;
- Directly or indirectly carry on, or be engaged, concerned or interested in carrying on;

- Within the United States, or anywhere in the world;
- The trade or business of game development, in any capacity, regardless of Employee's position within Wyatt Enterprises;
- Or any other trade or business carried on by Wyatt Enterprises in which Employee was involved while [he/she] was employed by Wyatt Enterprises;
- Except with the written consent of the President or CEO of Wyatt Enterprises.

At a recent board game convention, Dwyer was approached by one of Wyatt Enterprises' competitors, Hasbro, Inc. Hasbro, Inc. offered Dwyer a position in its board game innovation group. Dwyer has never before worked in the area of game innovation. Dwyer is interested in accepting the offer and has come to us seeking legal advice regarding whether the covenant not to compete he signed at Wyatt Enterprises prohibits him from accepting the position at Hasbro, Inc.

### **Discussion**

The court will examine whether Wyatt Enterprises' covenant not to compete is enforceable and whether the blue pencil doctrine is applicable. The enforceability of a covenant not to compete depends on whether the covenant is deemed reasonable in regard to three aspects. *Gleeson v. Preferred Sourcing, LLC*, 883 N.E.2d 164, 172 (Ind. Ct. App. 2008). First, the court will consider whether the covenant is necessary to protect a legitimate interest of the employer. *Id.* Second, the court will consider the effect the covenant will have on the employee based on duration, geographic, and scope of activities restrictions. *Id.* Third, the court will consider the covenant's effect on public interest. *Id.* If a covenant not to compete is found to be reasonable in part and unreasonable in part the blue pencil doctrine can be applied to preserve the intent of the parties. *Id.* The blue pencil doctrine is applied to strike or narrow the unreasonable portions and enforce only the reasonable portions of the covenant not to compete. *Sharvelle v. Magnante*, 836 N.E.2d 432, 440 (Ind. Ct. App. 2005).

It is undisputed that, as a public relations officer for Wyatt Enterprises, Dwyer has access to significant proprietary company information and frequently interacts with the public. Therefore, the court will likely find that Wyatt Enterprises possesses a legitimate interest to be protected by the covenant not to compete. *See Gleeson*, 883 N.E.2d at 174. Indiana law suggests that the three-year duration restriction is reasonable. *See id.* (holding that two-year restrictions are usually upheld under Indiana law). It is undisputed that, although public interest is a factor in determining the reasonableness of a covenant not to compete, public interest concerns are not applicable in the context of game development and will therefore not be discussed. It is also undisputed that any undiscussed portions of the employment contract are valid. In regard to blue pencil applicability, it is likely that the court will determine that the covenant is divisible because it is written in individual provisions. *See Sharvelle*, 836 N.E.2d at 439 (holding that covenant was clearly divisible into parts).

Because the court will likely find that Wyatt Enterprises possesses a legitimate protectable interest and that the duration restriction is reasonable, the court will examine whether the covenant is reasonable in regard to the geographic and scope of activities restrictions. If the

court finds any restriction unreasonable, it will then examine the applicability of the blue pencil doctrine.

### ***1. Enforceability of Covenant Not to Compete***

The court will likely find that the covenant not to compete contains geographic and scope of activities restrictions that are unreasonable because Wyatt Enterprises does not possess a legitimate protectable interest in every region of the world and it is unreasonable to restrict an employee from competing in any capacity.

A covenant not to compete is enforceable only if it is reasonable in regard to the duration, geographic, and scope of activities restrictions. *Gleeson*, 883 N.E.2d at 172. A reasonable geographic restriction is limited to the regions in which an employer can demonstrate a legitimate protectable interest. *Buffkin v. Glacier Grp.*, 997 N.E.2d 1, 13 (Ind. Ct. App. 2013). An employer has a protectable interest in each region in which it carries out business and where the employee has customer contact. *Coates v. Heat Wagons, Inc.*, 942 N.E.2d 905, 915 (Ind. Ct. App. 2011).

A scope of activities restriction must not extend beyond the scope of the employer's protectable interest. *Gleeson*, 883 N.E.2d at 175. It is unreasonable to restrict an employee from performing activities unrelated to the employee's employment or that the employee has never associated with. *Clark's Sales and Serv., Inc. v. Smith*, 4 N.E.3d 772, 782 (Ind. Ct. App. 2014). It is also unreasonable for an employer to restrict an employee from competing in any capacity. *Gleeson*, 883 N.E.2d at 175.

Where an employer sought to restrict an employee from competing anywhere in the continental United States, the restriction was found unreasonable. *Buffkin*, 997 N.E.2d at 13. In *Buffkin*, the employer justified the geographic restriction encompassing the continental United States by claiming that it had clients in numerous cities and that the employer may wish to expand its business services nationwide. *Id.* at 13. The court held that the employer did not possess a legitimate protectable interest in the geographic regions in which it did not conduct business. *Id.* Similarly, in *Coates*, where an employer sought to restrict an employee from competing in thirty-two states, the restriction was found to be overly restrictive. 942 N.E.2d at 915. In *Coates*, the employee had contact with customers in nineteen of the thirty-two restricted states. *Id.* The court held that although the employer had a protectable interest in all states it conducted business in, because the employee did not have customer contacts in all thirty-two of the restricted states, the geographic restriction was unreasonable. *Id.*

Where a covenant not to compete restricted an employee from engaging in any competitive business, it was found unreasonable. *Gleeson*, 883 N.E.2d at 175-76. In *Gleeson*, the employer sought to restrict the employee from competing in any competitive business. *Id.* at 175. The court determined that by restricting the employee from engaging in any competitive business, the employer sought to prevent the employee from competing in any capacity. *Id.* The court held that because the provision restricted the employee from competing in any capacity, it was unreasonable. *Id.* Similarly, where a covenant not to compete restricted an employee from providing services competitive to those offered by the employer, but unrelated to the activities

actually performed by employee, the scope of activities restriction was found to be overly broad. *Clark's*, 883 N.E.2d at 781-82. In *Clark's*, the employee was an inside salesman, yet his employer sought to restrict him from performing any other service offered by the employer, such as ordering and delivering. *Id.* at 782. The court held that because the restriction prevented the employee from performing activities unrelated to his position, the scope of activities restriction was unreasonable. *Id.*

Dwyer will argue that the covenant contains a geographic restriction that is unreasonable. Like in *Buffkin*, where the employer sought to restrict the employee from competing anywhere in the continental United States, Wyatt Enterprises seeks an even greater restriction encompassing the entire world. Like the employer in *Buffkin*, which had customers in numerous cities, Wyatt Enterprises in an international business. However, as was held by the *Coates* court, an employer had a protectable interest only in regions in which it conducted business and where the employee had customer contact. Although Wyatt Enterprises competes internationally, it is unlikely that Wyatt Enterprises conducts business in every region of the world. It is also unlikely that Dwyer has contact with customers in every region of the world. Therefore, it is likely that the geographic restriction encompassing the entire world is unreasonable and therefore unenforceable.

Dwyer will argue that the covenant contains a scope of activities restriction that is unreasonable. Like in *Clark's*, where an employer sought to restrict an inside sales employee from performing unrelated services such as ordering and delivering, Wyatt Enterprises seeks to restrict Dwyer from engaging in any activities related to the business of game development, even those unrelated to his position. By restricting Dwyer from performing acts unrelated to his public relations position, the scope of activities restriction is unreasonable. Similarly, like in *Gleeson*, where an employer sought to restrict a sales manager from competing in any capacity, Wyatt Enterprises seeks to restrict Dwyer from engaging in the business of game development in any capacity. Courts generally find restrictions that prohibit an employee from competing in any capacity to exceed the employer's legitimate interests. Therefore, it is likely that the scope of activities restriction is unreasonable and therefore unenforceable.

Wyatt Enterprises will argue that the covenant contains a geographic restriction that is reasonable. Unlike in *Buffkin*, where the employer could not demonstrate that it conducted business in every geographic region in the continental United States, Wyatt Enterprises will argue that it can demonstrate business in every geographic region of the world. By its nature, the board game industry is global, therefore, Wyatt Enterprises' customers are located across the world. In addition, one of Wyatt Enterprises' main competitors, Hasbro, Inc., is a multinational company. Because Wyatt Enterprises competes internationally, it can be concluded that Wyatt Enterprises has a global legitimate protectable interest as to make the worldwide geographic restriction reasonable and therefore enforceable.

Wyatt Enterprises will argue that the covenant contains a scope of activities restriction that is reasonable. Unlike in *Clark's*, where the employee worked in sales but was restricted from competing in unrelated activities, Dwyer has engaged in all aspects of the board game industry and Wyatt Enterprises therefore seeks to restrict Dwyer from related activities. Prior to becoming public relations manager, Dwyer was made intimately aware of all aspects of the

industry. As public relations manager, Dwyer has access to proprietary information, interacts with the public, and is aware of all games currently in development. Therefore, Dwyer has engaged in all areas of the game development industry which makes the scope of activities restriction reasonable and therefore enforceable.

Wyatt Enterprises' covenant not to compete will likely be found unenforceable. The geographic restriction is unreasonable because it restricts regions in which Wyatt Enterprises does not conduct business and where Dwyer does not have customer contacts. The scope of activities restriction is unreasonable because it prevents Dwyer from performing unrelated activities and from competing in any capacity. Because the covenant not to compete is not reasonable in regard to duration, geographic, and scope of activities restrictions, it is unenforceable.

## ***2. Applicability of Blue Pencil Doctrine***

The court will likely find the blue pencil doctrine inapplicable because its application would result in a covenant lacking a geographic restriction, which would render the entire covenant unenforceable.

When a covenant not to compete is found unenforceable and clearly divisible, the court may apply the blue pencil doctrine to make the covenant enforceable. *Sharvelle*, 836 N.E.2d at 439. When applying the blue pencil doctrine, the court should give effect to the intentions of the parties. *Clark's*, 4 N.E.3d at 784. The blue pencil doctrine allows the court to strike the covenant's unreasonable portions and enforce only those portions that are reasonable. *Id.* at 783. The blue pencil doctrine does not allow for the adding of terms not originally included in the covenant. *Id.* at 783-84.

Where a covenant's geographic restriction listed the individual states which it sought to restrict, the court was able to strike the overly restrictive states. *Coates*, 942 N.E.2d at 915. In *Coates*, the covenant's geographic restriction listed thirty-two states. *Id.* The employee had contacts with customers in only nineteen of the thirty-two states. *Id.* The court applied the blue pencil doctrine to strike the thirteen states with which the employee had no contacts and enforced the restriction as to the reasonable nineteen states. *Id.* Distinguishably, where a geographic restriction encompassed the entire United States, but did not list individual states, the court held that the blue pencil doctrine was inapplicable. *Dicen v. New Sesco, Inc.*, 806 N.E.2d 833, 844 (Ind. Ct. App. 2004). In *Dicen*, the employer sought to restrict the employee from competing anywhere in the United States. *Id.* The employee performed services for the employer in only six states. *Id.* The court declined to apply the blue pencil doctrine because the application would result in a covenant lacking a geographic restriction. *Id.* at 845. The court reasoned that eliminating the geographic restriction would render the covenant even more restrictive. *Id.* Conversely, where a covenant had no geographic restriction but was highly restrictive in other regards, the court held that the covenant was not void merely for lack of geographic restriction. *Seach v. Richards, Dieterle & Co.*, 439 N.E.2d 208, 213 (Ind. Ct. App. 1982). In *Seach*, the covenant not to compete lacked a geographic restriction but was highly restrictive as to contact with a class of persons. *Id.* The court held that the covenant was not void merely for lack of geographic restriction. *Id.* The court reasoned that as the specificity of the class of persons restriction increases, the need for a geographic restriction decreases. *Id.* Where a covenant's

scope of activities restriction prohibited an employee from competing in an entire trade, the court declined to apply the blue pencil doctrine. *Sharvelle*, 836 N.E.2d at 439. In *Sharvelle*, the employer sought to restrict the employee from competing in health care of every nature and kind. *Id.* at 434-35. The employer claimed that the court could strike ‘of every nature and kind’ to render the restriction reasonable. *Id.* at 439. The court declined to do so, reasoning that by striking ‘of every nature and kind’, the restriction would still prohibit all activities related to health care, which encompasses the entire medical practice and is therefore overly restrictive. *Id.*

Dwyer will argue that the blue pencil doctrine is inapplicable to make the geographic restriction reasonable. There is no case law suggesting that a geographic restriction encompassing the entire world is reasonable, therefore, unlike in *Coates*, where the court was able to strike individual states, the court’s only option would be to strike the geographic restriction in its entirety. Like in *Dicen*, where the court held that applying the blue pencil doctrine to strike the entire geographic restriction would render the covenant invalid, striking the geographic restriction in its entirety would result in a covenant just as restrictive. In addition, unlike in *Seach*, where the court held that the covenant was not void merely for lack of geographic restriction because the covenant was restrictive as to a class of persons, there is no such restriction in Wyatt Enterprises’ covenant not to compete. Therefore, it is likely that the blue pencil doctrine will be inapplicable to make the geographic restriction reasonable, which renders the entire covenant not to compete unenforceable and eliminates the need to consider the applicability of the blue pencil to the scope of activities restriction.

Wyatt Enterprises will argue that the blue pencil doctrine is applicable to make the geographic and scope of activities restrictions reasonable. Wyatt Enterprises will claim that the geographic restriction can be made reasonable by striking ‘anywhere in the world’ and enforcing only ‘within the United States’. Unlike in *Dicen*, where the court determined that the geographic restriction encompassing the entire United States was overly restrictive because the employee only had contacts in six states, Dwyer’s role as the public relations manager requires him to have contacts throughout the entire United States. Therefore, striking ‘anywhere in the world’ and enforcing only ‘within the United States’ would not exceed Wyatt Enterprises’ protectable interest, and would make the geographic restriction reasonable. Wyatt Enterprises will argue that the scope of activities restriction can be made reasonable by striking ‘in any capacity, regardless of employee’s position within Wyatt Enterprises’ and enforce only ‘the trade or business of game development’. Unlike in *Sharvelle*, where the court held that striking ‘of every nature and kind’ would result in an unreasonable restriction because the remaining restriction encompassed the entire industry, striking ‘in any capacity’ would render the restriction reasonable because game development does not encompass the entire board game industry. Therefore, it is likely that the blue pencil doctrine could be applied to make the geographic and scope of activities restrictions reasonable.

The blue pencil doctrine will likely be found to make the covenant’s restrictions reasonable. The blue pencil doctrine could only be applied to the geographic restriction to strike it entirely, which would render the covenant not to compete unenforceable. For this reason, it is likely that the court will decline to apply the blue pencil doctrine to the covenant not to compete.

## **Conclusion**

Because it is likely that the covenant not to compete will be found unenforceable as written and the blue pencil doctrine inapplicable, Dwyer will likely not be prohibited from taking the position at Hasbro, Inc. To further bolster Dwyer's case, we should look into acquiring documentation regarding the states in which Dwyer has customer contacts and Wyatt Enterprises' sales reports. This will help us prove that a geographic restriction encompassing the entire United States is overly broad.

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**United States District Court  
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Eastern Division**

<b>United States of America</b>	)	
	)	Criminal Case No. X-19-2344
<b>v.</b>	)	Honorable Rebecca R. Pallmeyer
	)	
<b>LeMond Bishop</b>	)	<b>Brief in Support of</b>
	)	<b>Prosecution’s Motion in Limine</b>
	)	

**Introduction**

The court should grant the motion in limine to sufficiently protect the witness known as Diane Lockhart from Defendant who has proven to manifest power over people in his community. Lockhart’s testimony will provide essential evidence to the prosecution’s case against Defendant who is charged with the serious offense of murder. Under the circumstances, the prosecution recognizes an important public policy interest to protect a key witness, Lockhart, who expresses a legitimate safety concern and fear of retaliation from Defendant. In order to secure Lockhart’s testimony and effectively protect Lockhart’s identity from Defendant, the prosecution proposes a few alterations to Lockhart’s appearance. Accordingly, the prosecution respectfully requests the court grant the entire motion in limine to permit Lockhart to testify in disguise and use a pseudonym.

On December 3, 2019, Defendant was charged with first-degree murder for allegedly killing Kalinda Sharma, a private detective working for the Federal Bureau of Investigations, while Sharma



engaged in official duties. Compl. ¶ 4. At Defendant's initial hearing, he pled not guilty. Ex. 1 at 4. On February 3, 2020, the prosecution filed this motion in limine. Mot. in Lim. ¶ 3.

While the Confrontation Clause of the Sixth Amendment states "in all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him," this right is not absolute and under certain circumstances a face-to-face encounter is dispensable. *Maryland v. Craig*, 497 U.S. 836, 844 (1990). First, the court should permit Lockhart's disguise because the prosecution has an important public policy interest in protecting Lockhart's safety and there is a sufficient showing of necessity in the case. *Id.* at 850. Moreover, the disguise will not violate Defendant's confrontation right because the four elements of confrontation that otherwise assure reliability of testimony will be completely satisfied. *Id.* Second, the court should allow Lockhart to use a pseudonym because the prosecution has presented sufficient evidence to justify protecting Lockhart's safety and using a pseudonym will not deprive Defendant of cross-examination. *Smith v. Illinois*, 390 U.S. 129, 132 (1968).

The court should grant the entire motion in limine because there is an important public policy interest in protecting Lockhart's safety. Furthermore, the reliability of Lockhart's testimony is assured through the four elements of confrontation; thus, the motion will not violate Defendant's confrontation right.

### **Statement of Facts**

On November 5, 2019, Kalinda Sharma, a private detective for the FBI, was found dead in front of the Palmer House Hotel. Ex. 1 at 2. Soon after, three witnesses came forward, which led authorities to commence a homicide investigation with Defendant as the sole perpetrator. *Id.* At that time, Diane Lockhart, a key witness for the prosecution, lived on the fifteenth story of a condominium across from the Palmer House Hotel. Ex. 1 at 3, 6. From Lockhart's balcony, which

has an unobstructed view of the hotel's roof, Lockhart witnessed Sharma and Defendant in an altercation. Ex. 1 at 3. To Lockhart's shock, she saw Defendant touch Sharma's neck, which ultimately resulted in Sharma falling to her death. *Id.*

Lockhart is a development officer for an educational institution and regularly does business with wealthy clientele. *Id.* In fact, Defendant does business with Alinea, a colleague of Lockhart's. *Id.* Further, Lockhart encountered Defendant with Alinea at a restaurant. *Id.* During those encounters, Lockhart stopped at their table, said hello to Alinea and went on her way. *Id.* Defendant is the heir to an extremely successful global financial service company headquartered in Chicago. Ex. 1 at 1. Instead of working at his father's company, Defendant started a philanthropic organization. *Id.* In spite of Defendant's attempt to alter his image with philanthropic involvement, rumors continue to circulate that Defendant uses his wealth to finance a lifestyle of criminal activities. *Id.* For the last several years, these rumors depicted Defendant's alleged association with blackmail, theft, kidnapping, and murder. *Id.*

Additionally, the FBI is investigating Defendant's alleged involvement in the theft of confidential government files from the CIA and for the poisoning deaths of four aldermen. *Id.* Consequently, the FBI requested Sharma, the victim, investigate Defendant's involvement in these two serious crimes. *Id.* Hence, Sharma tracked down a cab driver who allegedly poisoned the aldermen. Ex. 1 at 2. However, the driver said the only reason he poisoned the alderman was because Defendant instructed him to kill them in exchange for a large payout. *Id.*

One day before two witnesses were set to meet with FBI officials regarding Defendant's involvement in the CIA theft, the two witnesses *disappeared*. Ex. 1 at 5. One witness was later found *dead* and the other is still *missing*. Ex. 1 at 6. As a result of Defendant's alleged involvement in a number of criminal activities and a missing, plus dead witness, Lockhart is concerned for her safety and fearful of retaliation from Defendant, who is a powerful figure in their area. Although up to this

point Defendant has not personally threatened Lockhart, under the circumstances presented Lockhart's concerns are legitimate. The prosecution suggests maintaining Lockhart's anonymity using a pseudonym and a disguise consisting of a portable voice changer, a black wig that does not cover her face, tinted green contact lenses, white face paint, eye makeup, and lipstick. Ex. 1 at 4-5.

### **Argument**

The Supreme Court has interpreted the Confrontation Clause to include a defendant's right to a face-to-face encounter with the witness in the presence of the jury. *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988). Despite a defendant's right to a face-to-face encounter with the witness, the Confrontation Clause is not strictly violated when this encounter is absent. *Craig*, 497 U.S. at 844. Absent a face-to-face confrontation, a defendant's confrontation right is not violated when the reliability of testimony is otherwise assured through rigorous adversarial testing. *Id.* at 845. Hence, the court should grant the motion in limine because the prosecution must further the public policy interest in protecting Lockhart's welfare. Additionally, granting the motion in limine will not violate Defendant's confrontation right because the four elements of confrontation are assured, and thus, Defendant is not deprived of effective cross-examination. Furthermore, the prosecution has demonstrated safety concerns for Lockhart that outweigh Defendant's right to Lockhart's identity. Therefore, the court should grant the entire motion in limine.

#### **I. The court should grant the motion in limine to further the prosecution's policy interest in protecting Lockhart because the disguise satisfies the elements of confrontation.**

The Seventh Circuit and the Supreme Court have not explicitly addressed whether a witness testifying in disguise violates the Confrontation Clause. Nevertheless, other circuits and numerous state courts have produced standards that are rooted in Supreme Court precedent. The court should grant the motion in limine because Lockhart has a legitimate safety concern, the prosecution must

further an important public policy interest, and the disguise will not violate Defendant's confrontation right.

*A. The present case supports furthering the policy interest to protect a key witness by testifying in disguise because Lockhart expresses a legitimate concern for her safety.*

In general, courts concur that a face-to-face confrontation is expendable when there is an adequate showing of necessity in the case and important public policy considerations are advanced. *Craig*, 497 U.S. at 849-60 (holding a defendant's Confrontation Clause was not violated when the child witness testified via a one-way television because there was a showing of necessity). A necessity in a case may include protecting the witness' welfare or whether the witness will be traumatized in the presence of the defendant. *Id.* at 856. Court recognized public policy considerations involve ensuring the safety of the witness, presenting key testimony in severe offenses and preventing additional crimes. *Id.*

A court is likely to grant a witness to testify in disguise when the witness exhibits legitimate fear for testifying against the defendant and the relevant information is disclosed to the trial judge. *See Morales v. Artuz*, 281 F.3d 55, 57 (2d Cir. 2001). In *Morales*, the defendant's confrontation right was not violated when the principal, adult witness testified wearing dark sunglasses. *Id.* at 62. Even though the defendant did not directly threaten the witness, the court concurred with the trial judge's finding that the witness experienced "great fear." *Id.* at 57. Therefore, the witness' fear justified inferring necessity given the prior record of the defendant, the presence of defendant's friends in the courtroom and how crucial the witness' testimony was to the case. *Id.* Similarly, in *Brandon*, the court permitted the witness to testify in sunglasses and a scarf because the witness' fear exhibited before testimony necessitated the use of a disguise. *People v. Brandon*, 52 Cal. Rptr. 3d 427, 446 (Cal. Ct. App. 2006). The prosecutor supplied additional information to the court solidifying the witness' fear. *Id.* at 444. *See United States v. De Jesus-Casteneda*, 705 F.3d 1117, 1120 (9th Cir. 2013) (holding the

Confrontation Clause was not violated when the confidential informant testified in a wig and mustache because inherent dangers in the case required witness protection).

Lockhart has satisfied the requirement of legitimate fear and the relevant information has been disclosed; thus, the court should permit Lockhart to testify in disguise. Similar to the witness in *Morales* who exhibited “great fear” in testifying without a direct threat from the defendant, Lockhart expresses that same fear even though Defendant has yet to threaten Lockhart personally. Lockhart reasonably believes Defendant is a dangerous person and fears retaliation since Lockhart’s job requires working with wealthy clientele, like Defendant. Lockhart personally witnessed what Defendant is capable of. While the court considers the severity and reasons for a witness’ fear, here, the prosecution can provide the court enough information to justify Lockhart’s fear. Like the fearful witness in *Brandon*, the prosecution demonstrated the witness’ fear. Comparably, Lockhart’s fear of retaliation is legitimate because two witnesses conveniently disappeared before they met with FBI officials regarding Defendant’s involvement in CIA theft. One witness was later found *dead*, the other is still *missing*. Furthermore, there is evidence that Defendant instructed a cab driver to poison four aldermen in exchange for a large sum of money; thus, Defendant’s actions display the power he can manifest over people to do what he desires. While the present case may not currently contain a specific inherent danger to Lockhart, inherent danger is one of many standards that courts consider. Moreover, like in *Morales*, Lockhart’s testimony is key to the prosecution’s case against Defendant’s alleged murder of a private detective who was investigating Defendant with the FBI. Thereby, the court established standards weigh in favor of Lockhart testifying in disguise.

Because Lockhart demonstrates that she has a legitimate fear as a result of Defendant’s numerous alleged and evidential criminal activities in their community, the court should hold there is an adequate showing of necessity, which requires furthering the prosecution’s policy interest. Thus, the court should grant the motion in limine.

- B. *Even if Lockhart's disguise minimally impairs the jury's ability to observe the witness' demeanor, the other three confrontation elements are completely satisfied.*

To determine whether a disguise violates the Confrontation Clause, courts analyze the four elements of confrontation that ensure reliability of testimony. *Craig*, 497 U.S. at 486. The four elements of confrontation include oath, physical presence, cross-examination and the jury's ability to observe the witness' demeanor. *Id.* Moreover, the Supreme Court recognizes that absent physical presence, the Confrontation Clause is upheld when the remaining three elements are not substantially impaired. *Id.* at 851.

Courts permit a variety of disguises that do not significantly impair the jury's ability to observe the witness' demeanor or inhibit effective cross-examination. *Morales*, 281 F.3d at 61. In *Morales*, the court reasoned the witness' use of sunglasses did not inhibit the defendant from seeing or cross-examining the witness. *Id.* Even though the witness' eyes were obscured, the jury adequately assessed demeanor by observing the witness' delivery of testimony and body language. *Id.* See also *Brandon*, 52 Cal. Rptr. 3d at 445 (holding no constitutional violation occurred when witness testified in sunglasses and scarf because the defendant and jury could observe facial expressions and body language during cross-examination). Contrastingly, in *Sammons*, the defendant was denied a critical part of his confrontation right when the witness testified in a full-face mask. *People v. Sammons*, 478 N.W.2d 901, 909 (Mich. Ct. App. 1991). The mask precluded the jury from observing the witness' demeanor and therefore, hindered the jury's assessment of credibility. *Id.* e.g., *People v. Smith*, 869 N.Y.S.2d 88, 90 (N.Y. App. Div. 2008) (holding the defendant's confrontation right was not violated when the witness testified in a wig and false facial hair because the jury's ability to assess the witness' demeanor was not impaired).

Lockhart's proposed disguise satisfies the four elements of confrontation; therefore, the disguise does not violate Defendant's confrontation right. For instance, in *Morales*, where the court

held the witness' disguise of sunglasses did not inhibit the defendant from seeing the witness, Lockhart's disguise enables her to be physically present at trial and submit to cross-examination. While courts find one of the ways juries assess demeanor is by observing a witness' eyes, like in *Brandon*, courts recognize that juries also observe the witness' body language and facial expressions. Contrasting to the witness in *Brandon* who testified in sunglasses, Lockhart's use of natural, green tinted contact lenses will allow the jury to observe Lockhart's eye movements, facial expressions and body language. Additionally, in *Smith*, where the court permitted the witness to testify in a wig and facial hair, the court should allow Lockhart to testify in a black wig, white face paint, eye makeup, and lipstick. While the use of makeup and a wig may be considered a more visible alteration of appearance, it is likely jurors have previously observed people who choose to wear makeup and a wig on a daily basis. Hence, the jury will likely think Lockhart's disguise is her natural appearance; therefore, the disguise will not impair the jury's ability to accurately assess Lockhart's creditability. Lastly, Lockhart's proposed disguise is distinct from the mask utilized in *Sammons* because Lockhart's disguise will permit Defendant to effectively cross-examine Lockhart in front of the jury. Thus, Lockhart's proposed disguise will not violate the four elements of confrontation.

Lockhart's disguise is unlikely to impair any of the four elements of confrontation; therefore, Defendant's confrontation right will not be violated. Even if Lockhart's disguise minimally impairs the jury's ability to observe Lockhart's demeanor, the court should hold Lockhart's legitimate fear combined with the prosecution's policy interest favors testifying in disguise since the reliability of testimony is satisfied by the remaining confrontation elements. Therefore, the court should grant the motion in limine.

**II. The court should grant the motion in limine because safety concerns for Lockhart outweigh Defendant's right to identifying information.**

The Supreme Court has not precisely addressed under what conditions the Confrontation Clause permits a witness to testify using a pseudonym. However, a number of circuits, including the Seventh Circuit, have created guiding principles that should apply to this issue. Specifically, the Tenth Circuit utilizes a two-step analysis to establish when a witness may testify using a pseudonym.

When considering the use of a pseudonym, the courts primary concern is the reliability of witness testimony. *See Smith*, 390 U.S. at 133. Generally during cross-examination, courts permit the defendant to ask questions like where the witness lives and who the witness is, to assess the witness' credibility. *Id.* at 131. However, the trial court may exercise reasonable discretion by respectfully limiting the subject inquiry of the defendant's cross-examination. *See id.* at 132. The defendant's right to know the witness' identity is not definitive when there is an actual threat to the life of the witness that is not merely speculative. *United States v. Palermo*, 410 F.2d 468, 472 (7th Cir. 1969). For example, courts may refuse questions that potentially endanger the safety of the witness. *See United States v. Varelli*, 407 F.2d 735, 750 (7th Cir. 1969).

A court may utilize a two-step analysis to determine when to grant a pseudonym. *United States v. Gutierrez de Lopez*, 761 F.3d 1123, 1140 (10th Cir. 2014). First, the government has the burden of demonstrating the actual threat or safety concerns. *Id.* Second, the court must establish if anonymous testimony will hinder the defendant's right to cross examination. *Id. Palermo*, 410 F.2d at 473 (concluding that although there was a sufficient display of a threat to the witness' life, the state did not disclose the relevant information for the trial judge to make an informed decision).

A court may permit witnesses to testify using a pseudonym because remaining anonymous does not deprive the defendant from effectively cross-examining the witnesses when the defendant physically confronts the witnesses before the jury. *Gutierrez*, 761 F.3d. at 1146. In *Gutierrez*, the court found the governments safety concerns were too generalized when they did not provide specific information to support the notion that anyone cooperating in a cartel affiliated case was in danger.



*Id.* at 1145. Even though safety concerns did not justify using a pseudonym, the court held the defendant was not denied the opportunity to effectively cross-examine the witnesses and therefore, no error occurred. *Id.* at 1149. Contrastingly, in *Ramos-Cruz*, the information disclosed by the government was sufficient and specific, which showed actual threats to the witnesses' life that required withholding their identities. *United States v. Ramos-Cruz*, 667 F.3d 487, 501 (4th Cir. 2012). Additionally, the court considered the limited substance of the witnesses' testimony when granting pseudonyms. *Id.* The court concluded that even though the defendant did not directly threaten the witnesses, the source of the threat is not a factor in granting pseudonyms. *Id. People v. Frost*, 790 N.E.2d 1182, 1187-1188 (N.Y. 2003) (holding safety concerns of the witness outweighed the defendant's confrontation right in a second-degree murder trial when answering questions regarding the witness' identity would endanger their safety).

Here, the use of a pseudonym will not have constitutional significance because the prosecution has justified the safety concerns for Lockhart that likely outweigh Defendant's right to Lockhart's identity. Similar to *Gutierrez*, where the defendant's right to cross-examination was satisfied when the witness was physically present for the defendant to confront, Lockhart will be physically present to ensure effective cross-examination for Defendant. While a defendant typically is permitted to ask questions about the witness' identity to assess credibility, in this case, the court should exercise its discretion, like in *Frost*, and limit these questions that endanger Lockhart's safety. Dissimilarly to the prosecution in *Gutierrez* who asserted generalized safety concerns without supporting information, here, like in *Ramos-Cruz*, the prosecution presents specific evidence to support allegations that Defendant is dangerous and has the means to inhibit Lockhart from testifying. Specifically, if Lockhart's identity is revealed, Lockhart could become the next missing or dead witness; hence, Lockhart may never testify against Defendant who is allegedly involved in criminal activities like blackmail, theft, kidnapping, and murder. While a court may consider the

substance of testimony the witness will provide as a factor to granting a pseudonym, like in *Ramos-Cruz*, a governments demonstration of specific safety concerns for a witness is likely weighed more than the substance of testimony. Therefore, disclosure of Lockhart's identity is not necessary to ensure Defendant's right to cross-examination.

Because testifying under a pseudonym likely does not violate Defendant's confrontation right, the court should permit Lockhart to protect her identity. Even if the court finds a pseudonym may slightly impair cross-examination, the court should balance necessity to protect Lockhart's identity and Defendant's confrontation right. Hence, the court may permit Lockhart to use a pseudonym at trial and reveal Lockhart's true identity to defense counsel and one investigator to confirm credibility. However, this partial disclosure of Lockhart's identity is likely not necessary because the demonstrated safety concerns for Lockhart outweigh Defendant's right to Lockhart's identity. Thus, the court should grant the motion in limine.

### **Conclusion**

The prosecution respectfully requests this court grant the entire motion in limine to guarantee sufficient safeguards for Lockhart without diminishing Defendant's confrontation right.

Dated: April 19, 2020

Respectfully Submitted,  
Assistant U.S. Attorney

By: *Law Clerk*

Law Clerk

**Certificate of Service**

I certify that I have personally served one copy of this Brief in Support of Prosecution's Motion in Limine on the parties listed below this 19th day of April, 2020.

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April 19, 2020

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