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STATE	:	SOMERSET COUNTY
	:	
v.	:	MONTGOMERY TOWNSHIP
	:	MUNICIPAL COURT
	:	
JOHN DUNKLE and GERARD	:	
MCWILLIAMS	:	
	:	

**MEMORANDUM OF LAW IN SUPPORT OF PROPOSED
ORDER ALLOWING COMPLAINING WITNESS
TO TESTIFY IN PROTECTIVE DISGUISE**

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Mary Blanks, M.D., by and through her attorneys, Dechert LLP and The Women's Law Project, respectfully submits this Memorandum of Law in support of her Proposed Order Allowing Complaining Witness to Testify in Protective Disguise and affidavits thereto.

I. INTRODUCTION

This issue has arisen because Defense Counsel, in his July 12, 2005, argument before this Court, stated that he believes Dr. Blanks' protective disguise raises constitutional concerns. Counsel's argument is without support in fact or law. Dr. Blanks' disguise does not negate any of the essential elements of either the state or federal confrontation clauses. Moreover, even if this Court were to find that the protective disguise raises constitutional concerns, Dr. Blanks' disguise falls under the exceptions to the confrontation clause carved out by both federal and state courts. These exceptions, allowing a complaining witness to testify in disguise when the court deems it necessary, were carved out for precisely the situation at hand—a situation in which a protective disguise is necessary to both ensure the witness's personal safety and to ensure that the fact finder is provided with accurate and reliable testimony. As discussed more fully below, Dr. Blanks has a reasonable fear that her safety would be severely jeopardized if Defendants were allowed to see her undisguised. As such, the Proposed Order Allowing Complaining Witness to Testify in Protective Disguise (the "Order") should be granted.

II. DR. BLANKS' PROTECTIVE DISGUISE DOES NOT RAISE ANY CONCERNS ABOUT THE DEFENDANTS' CONSTITUTIONAL RIGHT TO CONFRONTATION.

New Jersey courts have made clear that the Confrontation Clause of the New Jersey Constitution provides no more protection of a defendant's right to confrontation than does the Sixth Amendment to the United States Constitution.¹ As such, federal interpretation and application of the Sixth Amendment is instructive of New Jersey's corresponding constitutional protection. Interpreting that Amendment, the United States Supreme Court has enumerated four essential elements that, when combined, "serve[] the purpose of the Confrontation Clause by ensuring the evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm" in our justice system.² The four elements include (1) physical presence of the accuser in the courtroom, (2) testimony under oath, (3) cross-examination by the defense, and (4) observation of the witness's demeanor by the trier of fact.³

Dr. Blanks' disguise does not negate any of these elements. She will be physically present in the courtroom during her testimony; she will give her testimony under oath;

¹ See *State v. Daniels*, 364 N.J. Super. 357, 371-72 (App. Div. 2003) ("There is nothing we are referred to, or can find, in its wording, intent or history to suggest that [the New Jersey constitutional provision that contains the right to confront witnesses] grants a defendant greater protection than the Sixth Amendment."), *rev'd on other ground*, 182 N.J. 80 (2003); *State v. Davenport*, 177 N.J. 288, 302 (2003) (finding that New Jersey's right to counsel found in the same article as the right to confrontation is substantially identical to federal constitutional rights); *State v. Bey*, 258 N.J. Super. 451, 466 (App. Div. 1992) (finding federal and state constitutional rights to counsel as co-extensive); *State v. Washington*, 202 N.J. Super. 187, 191 (App. Div. 1985) (finding that New Jersey protects an accused's right of confrontation by "parroting" the language of the Sixth Amendment in the state constitution).

² *Maryland v. Craig*, 497 U.S. 836, 847 (1990).

³ *Id.* at 846.

Defense Counsel will have an opportunity to conduct a cross-examination; and this Court will have an opportunity to assess her demeanor through her voice, body language and other “fully observable facts of her demeanor.”⁴

III. EVEN IF DR. BLANKS’ DISGUISE RAISES CONFRONTATION CLAUSE CONCERNS, IT IS PERMISSIBLE UNDER WELL-ESTABLISHED EXCEPTIONS TO THE CLAUSE.

Even if this Court were to find that Dr. Blanks’ disguise raises Confrontation Clause concerns, federal and state courts, including New Jersey, have created exceptions to the right to confront for circumstances such as those present in this case.

The U.S. Supreme Court has made clear that the right to confrontation is not absolute. That Court has found that “the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial” and that this preference “must occasionally give way to considerations of public policy and the necessities of the case.”⁵ New Jersey courts are in agreement with this conclusion.⁶ As stated by the Supreme Court, “in certain narrow circumstances, ‘competing interests, if closely examined, may warrant dispensing with

⁴ See *Morales v. Artuz*, 281 F.3d 55, 61-62 (2d Cir. 2002). The witness was allowed to testify in protective disguise because her demeanor could still be observed through assessment of “the delivery” of her testimony, “notice [of] any evident nervousness” and “observ[ation] of her body language.” *Id.* at 61. The court continued, “Most important, [the fact finder] 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.” *Id.* at 61-62.

⁵ *Craig*, 497 U.S. at 849 (quoting *Ohio v. Roberts*, 448 U.S. 56, 63 (1980), and *Mattox v. U.S.*, 156 U.S. 237, 244 (1895)).

⁶ See generally *State v. Smith*, 158 N.J. 376 (1999); *State v. Benitez*, 360 N.J. Super. 101 (App. Div. 2003); *State v. Rodriguez*, 264 N.J. Super. 261 (App. Div. 1993).

confrontation at trial.”⁷ In these circumstances, the court has found it permissible to do away entirely with the defendant’s right to face-to-face confrontation, whether through the admission of deposition testimony or hearsay statements or permitting a witness to testify from a location outside the courtroom and not visible to the defendant.⁸

In this case, Dr. Blanks does not seek to eliminate Defendants’ right to confront her face-to-face. The Order proposes a measure of alleged interference with Defendants’ confrontation of Dr. Blanks that is significantly *less* detrimental than measures the U.S. Supreme Court has found acceptable. Dr. Blanks’ testimony will not be admitted via deposition testimony or written statements, nor will she be testifying from a location other than the very courtroom in which Defendants will be tried.

Courts have traditionally accepted minimal modifications in cases in which they are deemed necessary.⁹ For example, in *Morales v. Artuz*,¹⁰ (note: changed font of footnote

⁷ *Craig*, 497 U.S. at 848 (quoting *Ohio v. Roberts*, 448 U.S. 56, 64 (1980)).

⁸ See generally *Craig*, 497 U.S. 836; *State v. Smith*, 158 N.J. 376 (1999); *State v. Rodriguez*, 264 N.J. Super. 261 (App. Div. 1993).

⁹ It is true that in *Coy v. Iowa*, 487 U.S. 1012 (1988), the U.S. Supreme Court found that the Confrontation Clause guarantees a “face-to-face meeting with” the witness. *Id.* at 1016. In so doing, the Court found that placing an obstructive screen between the defendant and the witness violated the Confrontation Clause. *Id.* at 1022. This case is inapplicable to the present matter for two reasons. First, as stated in the subsequent case of *Maryland v. Craig*, the Court in *Coy* “expressly ‘le[ft] for another day . . . the question whether any exceptions’” to the right to face-to-face confrontation exist. *Craig*, 497 U.S. at 844. The Court answered that question in *Craig*, finding that face-to-face confrontation was merely a “preference” that, in certain cases, must “give way to considerations of public policy and the necessities of the case.” *Id.* at 849. Second, the *Coy* Court found it significant that the lower court made no particularized findings that the witness needed special protection. *Id.* at 845. For reasons discussed later in this Memorandum, this Court has particularized facts demonstrating that Dr. Blanks indeed requires such special protection.

number) the court permitted a sexual assault victim to testify while wearing dark sunglasses. In affirming the use of the disguise, the Second Circuit stated:

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 [trier of fact] 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.¹¹

As in *Morales*, this Court will have an opportunity to observe the delivery of Dr. Blanks' testimony, including her body language, and to combine these "observable aspects" with the substance of her testimony in order to properly assess her credibility as a witness.

Importantly, those courts that have rejected a complainant's request to testify in protective disguise have been driven by a concern that the disguise would have a negative impact on the jury—a concern that simply is not an issue in this case. For example, in *Romero v. Texas*,¹² a Texas Appeals court found that a testifying witness' disguise violated the defendant's confrontation rights. In so doing, that court distinguished the *Romero* case from *Morales* because (1) the disguise compromised the defendant's presumption of innocence by communicating to the jury that the defendant was dangerous,¹³ and (2) the witness had no specific or real fear of the defendant.¹⁴

¹⁰ 281 F.3d 55 (2d Cir. 2002).

¹¹ *Id.* at 61-62.

¹² 136 S.W.3d 680 (Tex. App. 2004).

¹³ *Id.* at 689

¹⁴ *Id.* at 685-686.

The *Romero* case is entirely distinguishable from the case at hand.¹⁵ In this case, there is no jury, so there is no risk of a jury interpreting Dr. Blanks' disguise in an unfair manner. Second, and perhaps more importantly, Dr. Blanks' situation is exactly the opposite from that of the testifying witness in *Romero*. *Dr. Blanks holds an entirely reasonable and specific fear of Defendants.*

Defendants in the present matter have threatened Dr. Blanks' life and have forced her to profoundly alter the manner in which she conducts her daily activities.¹⁶ As a result of her very real fear and in response to Defendants' expressed desire to obtain her photograph to provide to other protesters and to prisoners who have murdered other doctors, Dr. Blanks has resorted to significant protective measures.¹⁷ Dr. Blanks regularly wears a disguise so Defendants cannot publish and provide her photograph or description to such dangerous individuals.¹⁸ Defendant John Dunkle has written a letter to Dr. Blanks' neighbors calling on them to protest against their neighbor and asking that they provide a picture of Dr. Blanks so that he may share it with others—including those convicted of murder.¹⁹ Dr. Blanks also wears a bullet-proof vest out of fear that one of these protestors will resort to what Mr. Dunkle has referred to as the "duty" and "moral necessity" of justifiable homicide.²⁰

¹⁵ Moreover, it is not binding on this Court.

¹⁶ See Aff. of Mary S. Blanks, M.D. [hereinafter *Blanks Aff.*], attached hereto as Exhibit A.

¹⁷ *Id.* at ¶ 9.

¹⁸ *Id.* at ¶ 10.

¹⁹ John Dunkle, *Stop the Killing of Young People* [hereinafter *SKYP*], March 2005, Vol. 2, No. 11, attached hereto as Exhibit D, at 11.

²⁰ *Blanks Aff.* at ¶ 12.

Defendant John Dunkle also distributes a monthly newsletter entitled *Stop the Killing of Young People*.²¹ Every copy of this newsletter begins with a list of “Prolife Prisoners” who also receive a copy of the newsletter.²² This list includes prisoners who were convicted of murdering doctors such as Dr. Blanks and bombing reproductive health clinics such as the clinic that employs Dr. Blanks.²³ The newsletter advocates “every legitimate means, *including force*” in the attempt to interfere with reproductive rights.²⁴ Mr. Dunkle states in his newsletter that he is “particularly eager to hear from people who’ve had the courage to employ force.”²⁵ Significantly, Mr. Dunkle devoted the entire July issue of his newsletter, which regularly advocates the “moral necessity” of violence in achieving its ends, to the topic of justifiable homicide.²⁶

In addition to these generalized threats against those who work in reproductive clinics, Defendant Dunkle has specifically threatened Dr. Blanks’ life. In the same newsletter provided to criminals already convicted of murdering doctors, Mr. Dunkle advocated the use of violence and provided Dr. Blanks’ name, address and phone number.²⁷ Along with this information appeared the statement “Blanks looks as if she won’t run Once one of these

²¹ See *SKYP*, Vol. 2, Nos. 9-12; Vol. 3, Nos. 1-5, attached hereto as Exhibits B, C, D, E, F, G, H, I, and J.

²² *Id.*

²³ *Id.*

²⁴ *Id.* (emphasis added).

²⁵ *Id.*

²⁶ See Exhibit H.

²⁷ Exhibit D at 11.

former MDs gets a taste of blood, and the money that goes with it, she or he is almost impossible to stop – *short of a bullet.*”²⁸ Defendant Dunkle has even lain in wait for Dr. Blanks to leave the clinic, only to follow her out of the parking lot in his own car.²⁹ It is these actual and apparent threats against her life that have caused Dr. Blanks to wear a disguise to work every week along with a bullet-proof vest.

Defendants’ repeated and constant desire to see what Dr. Blanks actually looks like and to obtain her photograph to provide to other, equally dangerous individuals, along with the ongoing nature of the threats against Dr. Blanks’ life justify her request to testify in the same disguise in which they have always observed her. They have never seen her without the disguise and, therefore, do not know her true appearance. Discovering her true appearance is a matter of importance to Defendants—as demonstrated at the August 12, 2005, hearing before this very Court. On that night, when Defense Counsel requested that this Court require Dr. Blanks to remove her disguise, Dr. Blanks learned from a Montgomery Township police officer that the defendants had planted a photographer in the parking lot of the Montgomery Township Municipal Building in the hopes that they could catch Dr. Blanks without her disguise.³⁰

These facts underscore the need for Dr. Blanks to wear her disguise while testifying, and they significantly distinguish the present case from *Romero*. As the New Jersey Supreme Court has stated, “[b]oth the United States Supreme Court and this Court have held that

²⁸ Exhibit F, at 2 (emphasis added).

²⁹ Blanks Aff. at ¶ 6.

³⁰ Blanks Aff. at ¶ 11.

the right [to confrontation] is subject to certain exceptions of consequence.”³¹ The threats on Dr. Blanks’ life and Defendants’ expressed desire to see her without her disguise set this case squarely within these recognized “exceptions of consequence.”

In *Smith*, the New Jersey Supreme Court also agreed with the U.S. Supreme Court in finding that “where face-to-face confrontation causes significant emotional distress . . . there is evidence that such confrontation would in fact *disserve* the Confrontation Clause’s truth-seeking goal.”³² Dr. Blanks’ fear of the defendants would similarly disserve the aims of the Confrontation Clause. Requiring her to appear before the very people who have threatened her life, without the protection of the disguise in which they have always observed her, would create as traumatic an experience for Dr. Blanks as that at issue in *Smith*. Perhaps more significant than the concern that such trauma could result in inaccurate testimony is the concern that some witnesses may simply decline to testify if denied constitutionally permissible protective measures. Such a result not only further disserves the confrontation clause’s truth-seeking goal, but it could even allow those charged with crimes to avoid trial altogether as a result of their own intimidation of the complaining witness.

Finally, requiring Dr. Blanks to testify without her disguise would itself raise serious constitutional concerns. Dr. Blanks wears her disguise so that she can feel safe in providing reproductive health care, including pregnancy terminations. If her physical identity were made public amidst the threatening environment already described above, Dr. Blanks would possibly be less likely to continue providing these health services to her patients in

³¹ *State v. Smith*, 158 N.J. 376, 384 (1999).

³² *Id.* at 386 (*quoting Maryland v. Craig*, 497 U.S. 836, 857 (1990)).

Reading. Thus, requiring her to testify without her disguise runs the risk of placing a substantial obstacle in the path of Reading-area women seeking an abortion.³³

IV. DR. BLANKS' DISGUISE DOES NOT INHIBIT THIS COURT'S ABILITY TO ASSESS HER CREDIBILITY AS A WITNESS.

In his argument to this Court on July 12, 2005, Defense Counsel argued that the Court should require Dr. Blanks to remove her disguise so that he may have the opportunity to observe Dr. Blanks' demeanor during his cross-examination. Defense Counsel further expressed that this concern was a constitutional issue.

Defense Counsel's assertion lacks any foundation in law. Defense Counsel can cite to no provision of the United States or New Jersey Constitutions granting him, as an attorney, the right to assess a witness' demeanor at trial, nor can he cite to any case law so interpreting either Constitution.

The Sixth Amendment to the United States Constitution and Article I, section 10 of the New Jersey Constitution, as discussed above, provide a right to *defendants* to confront their accusers. Further, the U.S. Supreme Court has found "observation of demeanor by the *trier of fact*" essential to the purposes underlying the Confrontation Clause.³⁴ Neither New Jersey or federal courts have found constitutional protection for the right of the attorney to observe the demeanor of a testifying witness. As discussed above, neither Defendants' right to confrontation nor this Court's need to assess the demeanor and credibility of Dr. Blanks will be infringed by her protective disguise.

³³ See *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833, 877 (1992).

³⁴ *Maryland v. Craig*, 497 U.S. 836, 846 (1990) (emphasis added).

CONCLUSION

For the foregoing reasons, Complaining Witness Dr. Mary Blanks, M.D., respectfully requests this Court grant the Proposed Order Allowing Complaining Witness to Testify in Protective Disguise.

Dated: August 15, 2005

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