

DISCLAIMER:
This is a sample motion and will require editing prior to use.

IN THE DISTRICT COURT OF _____ COUNTY, KANSAS

STATE OF KANSAS)	
)	
Plaintiff)	
)	
vs.)	Court Case Number: XXXXX
)	
DEFENDANT)	
)	
Defendant.)	

MOTION TO ALLOW TESTIMONY BY VIDEO CONFERENCE

COMES NOW the _____ by and through _____, _____, and moves the Court for an order to allow testimony of the Forensic Analyst with the Kansas Bureau of Investigation (KBI) to be presented through video conferencing.

In support of this motion the State presents the following:

The use of two-way interactive video technology, including internet-based videoconferencing, is authorized in K.S.A. 22-3437(b)(1) during any hearing or trial where there is a report concerning forensic examination from the KBI or other agencies specified in K.S.A. 22-3437(a)(1). The KBI has equipment available to be used to facilitate the connection for testimony.

Note: Contact the KBI to ensure their technology is compatible with the court.

Note: The Kansas Supreme Court Blue Ribbon Commission (BRC) provided additional recommendations for videoconferencing in Kansas courts.

In *Maryland v. Craig*, 497 U.S. 836, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990), the Supreme Court held a district court may constitutionally admit testimony taken in the physical absence of the defendant so long as two conditions are met. *Id.* at 850. First, the denial of "face-to-face confrontation" must be "necessary to further an important public

policy." *Id.* Second, the district court must ensure that protections are put in place so that "the reliability of the testimony is otherwise assured." *Id.*

Prong one requires "furthering an important public policy". Clearly during this pandemic it will further public policy to limit the number of persons present in the courtroom as well as insure the health of the persons present in the courtroom.

Prong two requires the district court to ensure the reliability of the testimony. The person testifying is an analyst that has prepared a report submitted to both parties on the analysis conducted. In the video conference, the analyst will be seen by court, counsel and defendant, sworn in to testify and allowed to be cross-examined by the defendant. Reliability is assured.

Note: Suggestions for tailoring this motion include identifying the type of technology, discussing how many times the technology has been used in your court, describing the quality of the audio/video, offering demonstrations of the technology, and referencing the KBI's ability to accommodate the technology.

However numerous federal and state courts have extended *Craig* to the use of two-way video testimony for adult witnesses. See, e.g., *United States v. Yates*, 438 F.3d 1307, 1313 (11th Cir. 2006) (acknowledging *Craig* as the proper test for the admissibility of two-way video conference testimony and noting agreement with the Sixth, Eighth, Ninth, and Tenth Circuits); *State v. Rogerson*, 855 N.W.2d 495, 506-07 (2014) (Iowa Supreme Court approving the use of two-way video testimony for adult witnesses, provided the *Craig* factors are met); *White v. State*, 223 Md. App. 353, 116 A.3d 520, 540-49 (Md. Ct. Spec. App. 2015) (applying *Craig* to allow a witness in a cold case to testify by two-way video because it would be "cruel and unnecessary to require her to fly" given her health concerns); *People v. Buie*, 285 Mich. App. 401, 775 N.W.2d 817, 825 (Mich. Ct. App. 2009) (applying *Craig* to two-way video testimony, "[l]ike the majority of federal courts that have examined this issue"); *City of Missoula v. Duane*, 2015 MT 232, 380 Mont. 290, 355 P.3d 729, 734 (Mont. 2015) (applying *Craig* to allow the two-way video testimony of a doctor whose testimony in three trials would cause a prohibitive expense

to the city and place a significant burden on the doctor); *Commonwealth v. Atkinson*, 2009 PA Super 239, ¶¶ 16-17, 987 A.2d 743, 750-51 (Pa. Super. Ct. 2009) (applying *Craig* and concluding that the defendant's right to confrontation had been violated because expediting disposition of the case was an insufficient reason for allowing the use of two-way video testimony); *Bush v. State*, 2008 WY 108, ¶¶ 52-53, 193 P.3d 203, 215-16 (Wyo. 2008) (applying *Craig* to allow a witness's testimony via two-way video "to further the important public policy of preventing further harm to his already serious medical condition").

Note: It may be appropriate to include applicable and current Kansas Supreme Court Administrative Order(s).

Applying *Craig*, the State [and defendant] request the strong preference for face-to-face confrontation must give way in the special circumstances of this case to considerations of public policy and the necessities of the case due to the pandemic and the Kansas Supreme Court administrative order. The State's requested accommodation is necessary to further the important public policies.

Therefore, it is the request of the State, **[and defense]** to allow the KBI analyst to testify using video conferencing in the above entitled case.

Respectfully submitted,

Attorney

IN THE DISTRICT COURT OF _____ COUNTY, KANSAS

STATE OF KANSAS)
Plaintiff)
vs.) Court Case Number: XXXXX
DEFENDANT)
Defendant.)

ORDER TO ALLOW TESTIMONY BY VIDEO CONFERENCE

THIS MATTER having come before the Court on Defendant's Motion to Permit Testimony of a Kansas Bureau of Investigation Analyst at hearing by Video-Conference or Telephone. The Court having carefully reviewed the motion and been fully advised in the matter, finds as follows.

There is good cause to allow for the witness to testify by videoconference. Reliabilty will be indicated on the record after hearing the testimony. Arrangements should be made by contacting _____ with courtroom tech support and/or _____ with the Kansas Bureau of investigation.

IT IS HEREBY ORDERED that the witness, _____, KBI analyst, may testify by video conference.

DATED this _____ day of _____, 2020.

Judge