CAUSE NO. CR15-0342

THE STATE OF TEXAS \* IN THE 415th JUDICIAL

VS. \* DISTRICT COURT

KEVIN SCOTT CRUMBY \* PARKER COUNTY, TEXAS

Hereinafter “Defendant”

 **STATE'S MOTION TO PERMIT WITNESS TO TESTIFY**

**VIA VIDEOCONFERENCING**

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES the State of Texas, represented by her District Attorney, and would respectfully show the Court as follows:

 **I**.

Defendant is charged with violating the terms and conditions of his community supervision in this cause. The allegation in the Motion to Revoke is that in Mohave County, Arizona, Defendant possessed a quantity of marihuana of 4 pounds or more. Defendant was arrested on July 8, 2019 by Deputy Wilbert Jones for said offense. The State requests that the Court permit Dep. Jones to testify utilizing Zoom videoconferencing technology rather than via personal appearance.

 **II.**

Due to the COVID-19 pandemic, travel has become difficult if not dangerous. Currently, the Centers for Disease Control and Prevention warns that “Travel increases your chances of getting *and* spreading COVID-19.” *See* “Coronavirus in the United States--Considerations for Travelers,” accessed on May 21, 2020, at <https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-in-the-us.html> (emphasis in original). Dep. Jones’ ability to maintain recommended social distancing protocols during air travel between Texas and Arizona would be a challenge, and his potential for exposure to COVID-19 during those travels would pose a risk not only to his health, but to public health in both Texas and Arizona. The same testimony from Dep. Jones, with the same ability for confrontation, would be possible were he to testify via the Zoom app. This Court has had recent and largely positive experience conducting other hearings from remote locations using this app so it is now aware that same is feasible.

**III.**

 The Supreme Court of Texas recently issued its First and Twelfth Emergency Orders which would permit witnesses to testify via videoconferencing subject only to constitutional limitations (See attached Exhibits A and B). The Twelfth Emergency Order expired on June 1, 2020, two days prior to the hearing in this case.

**IV.**

 The latest guidance from the Office of Court Administration (Attached as Exhibit C) for proceedings on or after June 1, 2020, states that:

“Courts should use all reasonable efforts to conduct proceedings remotely. All proceedings, both essential and non-essential, should occur remotely (such as by teleconferencing, videoconferencing, or other means) unless litigants or other court participants are unable to successfully participate in a remote hearing for reasons beyond the court’s control. Courts may need to conduct hybrid hearings in certain proceedings.” [footnotes omitted].

Pursuant to paragraph 4 of the Twelfth Emergency Order essentially gives the OCA the authority to promulgate rules for safety related to COVID-19 involving court proceedings. Therefore, the OCA “guidance” is actually binding on this court and is not merely guidance. Permitting Dep. Jones to testify remotely via videoconference is exactly the type of accommodation that the OCA’s binding guidance contemplates.

**IV.**

 This is a hearing on a motion to revoke community supervision rather than an original trial proceeding. As such, the constitutional protections afforded a defendant are more limited than they are at an original trial. See Ex Parte Doan, 369 S.W.3d 205, 208, 212 (Tex. Crim. App. 2012) (recognizing defendants in revocation hearings do not enjoy same panoply of procedural rights as defendants in criminal trials but explaining that proceedings are judicial, not administrative). Because Defendant’s guilt already has been determined, and the State’s burden to prove a probation violation is lessened, Defendant does not have the same confrontation rights as he would have at trial. See, e.g., Olabode v. State, 575 S.W.3d 878, 881 (Tex. App.—Dallas 2019, pet. ref’d) (finding no constitutional right to confrontation at revocation proceeding); Jerry Lee Pickins v. State, No. 02-17-00050-CR, 2018 WL 3468359, at \*4 (Tex. App.—Fort Worth July 19, 2018, no pet. (not designated for publication) (“Agreeing with the overwhelming weight of authority, therefore, we conclude that a community supervision revocation proceeding is not a stage of a criminal prosecution.”). Since utilizing the Zoom app will afford Defendant the contemporaneous opportunity to see, hear, and ask all of the same questions Defendant could ask were the witness to appear in person in the courtroom, this procedure will protect Defendant’s rights to an adversary hearing on the State’s MTR and satisfy any confrontation rights he might have.

**V.**

 Even if Defendant has the same right to confront witnesses as he would have had at a trial, permitting Dep. Jones to testify via the Zoom app does not violate those rights. The “central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.” Maryland v. Craig, 497 U.S. 836, 845 (1990). Although physical, in the same room, face-to-face confrontation is preferred, courts have recognized that it is not an absolute right and it must give way in certain narrow circumstances where considerations of public policy and necessities of the case dictate. See Craig, 497 U.S. at 849. The concerns surrounding Dep. Jones’ travel from another state during the ongoing COVID-19 pandemic present a narrow circumstance in which the risk to his health, and the public’s health, necessitate a relaxation of any physical face-to-face requirement in favor of use of the Zoom app.

**VI.**

When the right to physical face-to-face confrontation must give way, as in this case, the key inquiry is whether the method of electronic testimony used by the State preserves the salutary effects of face-to-face confrontation relevant to a Sixth Amendment analysis. See Stevens v. State, 234 S.W.3d 748, 782 (Tex. App.—Fort Worth 2007, no pet.). Those effects include (1) the giving of testimony under oath, (2) the opportunity for cross-examination, (3) the ability of the fact-finder to observe the demeanor of the witness, and (4) the reduced risk that a witness will wrongfully implicate an innocent defendant when testifying in his presence. See id. Dep. Jones’ testimony via the Zoom app preserves these salutary effects. He will be placed under oath, Defendant will have an opportunity for full and contemporaneous cross-examination, and this Court, as well as the participants and anyone else in the courtroom will be able to observe Dep. Jones’ facial expressions, vocal inflections, and demeanor. Dep. Jones also will be able to contemporaneously observe and hear the Court and the participants in the hearing, including Defendant.

 **PRAYER**

WHEREFORE, PREMISES CONSIDERED, the State of Texas moves this Honorable Court to Dep. Jones to testify utilizing Zoom videoconferencing technology rather than via personal appearance.

Respectfully submitted,

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JEFFREY SWAIN

ASSISTANT DISTRICT ATTORNEY

**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the STATE'S MOTION TO PERMIT WITNESS TO TESTIFY VIA VIDEOCONFERENCING has been sent via email transmission to the attorney of record for the Defendant, Allison Bedore on this the 26th day of May, 2020.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Jeffrey Swain

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**ORDER**

On this the \_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_, 2020, came on to be heard the STATE'S MOTION TO PERMIT WITNESS TO TESTIFY VIA VIDEOCONFERENCING in the above referenced cause, and said Motion is hereby:

\_\_\_ Granted.

\_\_\_ Denied.

\_\_\_ Set for a hearing on \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 2020, at \_\_\_\_\_\_\_ a.m./p.m.

IT IS SO ORDERED.

SIGNED this the \_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_, 2020.

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JUDGE PRESIDING