

JUVENILE DEFENDER CHECKLIST ON REMOTE HEARINGS DURING THE COVID-19 PANDEMIC

As a general principle and under normal circumstances, the National Juvenile Defender Center (NJDC) strongly opposes the use of remote hearings in juvenile delinquency proceedings. Remote hearings present serious due process concerns, as they create insurmountable barriers to effective assistance of counsel, harm attorney-client relationships and confidentiality, and lead to worse outcomes for youth.

However, there are times, as with the current COVID-19 crisis, when youth and defense attorneys who are fully informed of the risks and challenges may find it appropriate to consent to waiving the youth's physical presence in court and participate in hearings conducted with remote technology. In such cases, defenders must carefully balance the opportunities for increasing youth liberty and the limitations of due process in a particular situation.

For emergency situations like the COVID-19 pandemic, NJDC recommends youth and defense attorneys limit their consent to participate in remote hearings to only proceedings targeted at increasing youth liberty, such as release from facilities or programs, or terms of probation or commitment. Youth and defense attorneys should object on the record to remote participation in any other hearings, as a violation of youth's due process rights. Before consenting to remote hearings, youth and defense attorneys should use the following checklist to ensure due process rights are protected to the greatest extent possible under the circumstances.

Remote Hearings Generally Harm Due Process

Youth are entitled to due process protections under the Fourteenth Amendment, as guaranteed by the U.S. Supreme Court.¹ Every person charged with a crime has a constitutional right to be present at hearings in which their participation may affect the outcome.²

Remote hearings create challenges for the effectiveness of court proceedings, inhibit and harm the attorney-client relationship, hamper effective juvenile defense advocacy, and lead to disparate outcomes. Due to the limitations inherent in remote hearings and youth's still-developing cognition and socioemotional maturity,³ the lack of physical presence at hearings makes it more likely "that a fair and just hearing would be thwarted by [the young person's] absence."⁴

While the practice of remote hearings can never be justified by concerns of judicial economy, transportation time and costs, or administrative ease, how youth and defense attorneys weigh the advantages and disadvantages during this pandemic will obviously vary—and may well vary in each case. Remote hearings should be permitted

¹ *In re Gault*, 387 U.S. 1 (1967).

² *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987) ("Although the Court has emphasized that this privilege of presence is not guaranteed 'when presence would be useless, or the benefit but a shadow,' due process clearly requires that a defendant be allowed to be present 'to the extent that a fair and just hearing would be thwarted by his absence.' Thus, a defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure.") (internal citations omitted).

³ See *generally*, National Research Council, *REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH* 89-118 (Richard J. Bonnie et al. eds., 2013).

⁴ See *Kentucky v. Stincer*, 482 U.S. at 745.

only with the consent of the defense, after consultation with the client and thoughtful weighing of the advantages and disadvantages the client may face.

CHECKLIST

When engaging in defense remotely, juvenile defense attorneys should consider each of the following questions and advocate for ways to limit the due process obstacles remote hearings create.

Answering “no” to any of the following questions increases the risk that a remote hearing is creating undue harm to your client’s interests and due process rights and to your effectiveness as an attorney.

- Is the purpose of the hearing targeted at increasing youth liberty (i.e., considering potential release from detention or commitment)?
- Do you have a confidential means of communication (i.e., a separate phone line) that allows for privileged two-way communication with your client before, during, and after the hearing?
- Will the court permit breaks in the hearing whenever private attorney-client communication is required?
- Is your client in a confidential space—meaning there is no other person in the room with them—at the remote location that allows for private attorney-client communications?
- Do you have video technology that will, at a minimum, allow the young person to see the other actors who are speaking?
- Have you been provided sufficient time and access to your client prior to the hearing to:
 - explain how the process of a remote hearing will work (including how you will communicate with your client during the proceeding)?
 - learn from your client their goals and reservations about the upcoming hearing?
 - discuss your intentions for helping to achieve those goals and minimize those reservations?
 - establish a plan for communicating post-hearing?
 - answer any questions your client has prior to starting the hearing?

Juvenile defense attorneys should consider outlining, on the record at the start of each remote hearing, any concerns, including structural barriers created by the court or the holding facility that may be inhibiting your effectiveness as defense counsel or your client’s due process rights. Making a record of any due process concerns may be critical for appeals or collateral actions.

NJDC would like to thank our colleagues at Juvenile Law Center for their input on this resource.