

## **GUIDANCE TO JUVENILE COURTS ON CONDUCTING REMOTE HEARINGS DURING THE COVID-19 PANDEMIC**

Social distancing and community shutdowns are having a deep impact on our nation's juvenile courts. As a result, many courts have moved to "remote" hearings to handle cases. Depending on the jurisdiction, remote hearings may be via video or may only be telephonic. Some jurisdictions are holding remote hearings only for critical matters affecting youth liberty, such as detention and parole hearings. Other juvenile courts are handling all kinds of hearings remotely.

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 present 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 facilitated by remote technology.

**For emergency situations like the COVID-19 pandemic, NJDC recommends youth and defense attorneys limit their consent to participate in, and juvenile courts limit their use of, remote hearings to only proceedings targeted at increasing youth liberty, whether that be release from facilities or programs, or terms of probation or commitment.**

### 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.<sup>1</sup> Every person charged with a crime has a constitutional right to be present at hearings in which their participation may affect the outcome.<sup>2</sup>

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,<sup>3</sup>

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<sup>1</sup> *In re Gault*, 387 U.S. 1 (1967).

<sup>2</sup> *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).

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

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.”<sup>4</sup>

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 hearing should be permitted only with the consent of the defense after thoughtful weighing of the advantages and disadvantages the client may face.

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## Considerations

When conducting remote hearings, juvenile courts should consider each of the following questions and put in place measures 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 a youth’s due process rights and a defense attorney’s effectiveness.

- ☐ Is the purpose of the hearing targeted at youth liberty (i.e., considering potential release from detention or commitment)?
- ☐ Is there a confidential means of communication (i.e., a separate phone line) that allows for privileged two-way communication between the defense attorney and their client before, during, and after the hearing?
- ☐ Will the court permit breaks in the hearing whenever private attorney-client communication is required?
- ☐ Is the youth 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?
- ☐ Does the court’s video technology allow the young person to see the other actors who are speaking?
- ☐ Has defense counsel been provided sufficient time and access to their client prior to the hearing to explain how the process of a remote hearing will work, answer any questions their client has prior to the hearing, and establish a plan for communicating post-hearing?

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

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<sup>4</sup> See *Kentucky v. Stincer*, 482 U.S. at 745.