

COVID-19 and Delinquency Continued Custody Hearings

As we all come to terms with the new reality of social distancing and a global pandemic, the potential health risks for youth and staff in secure custody settings is cause for concern. Staff in a New York City juvenile detention center have already [tested positive](#) for COVID-19. The North Carolina Department of Public Safety has [suspended visitation and volunteer activities](#) at all juvenile justice facilities. Currently legal visits for juveniles in secure custody are still allowed. These heightened concerns about secure confinement of youth raise questions about whether and how ongoing secure custody hearings can happen in our current environment and what alternatives exist to both preserve public safety and prevent use of the congregate juvenile detention setting as much as possible. This blog will discuss when hearings on continued secure custody must be held, even in light of the emergency directive; important considerations if those hearings are conducted remotely; and the range of release options available to the court.

Hearings on Continued Secure Custody Should Be Held Unless Waived by the Juvenile

[Emergency Directive 1](#) ordered by Chief Justice Beasley on March 13, 2020 and effective March 16th requires rescheduling of district court proceedings unless, among other things, the proceeding is necessary to preserve the right to due process of law. Hearings on the need for continued secure custody are critical for the preservation of due process of law. The North Carolina Court of Appeals has clearly held that “[a]lthough juvenile proceedings are not criminal prosecutions, due process rights attach when the violation complained of places the juvenile in danger of confinement,” [In the Matter of Reginald Lee Wade, Juvenile 67 N.C.App. 708 \(1984\)](#). The decision to continue a juvenile in secure custody is precisely about the loss of liberty resulting in confinement. These hearings are therefore necessary to preserve the right to due process of law as required by the emergency directive.

The Juvenile Code requires that an initial hearing to determine the need for continued secure custody occur within five calendar days of the initial remand to secure custody. [G.S. 7B-1906\(a\)](#). In localities where the initial secure custody order is issued by the juvenile court counselor pursuant to delegated authority under [G.S. 7B-1902](#), the initial hearing on continued secure custody must occur on the day of the next regularly scheduled session of district court if that session is less than five calendar days from the initial remand to secure custody. Importantly, the Juvenile Code does not allow this hearing to be continued or waived.

Once the initial hearing is held, most juveniles who remain in secure custody are entitled to hearings to determine the need for continued secure custody every ten calendar days. G.S. 7B-1906(b). If the juvenile is accused of committing a Class A – Class G felony at age 16 or 17, then ongoing hearings on the need for continued secure custody are required only every 30 days. The juvenile can request to be on a 10-day schedule and the court can order this 10-day schedule for good cause. G.S. 7B-1906(b1). Ongoing hearings on the need for continued secure custody may be waived if the juvenile consents. If the juvenile does not consent, these hearings must occur

on the applicable statutory timeline.

Therefore, even under the court's emergency directive, initial hearings on the need for continued secure custody and any ongoing hearings on the need for continued secure custody that are not waived by the juvenile must continue to occur.

Hearings to Determine the Need to Continue Secure Custody May Be Conducted by Audio Video Transmission

Pursuant to G.S. 7B-1906(h), courts may conduct hearings to determine the need to continue secure (and nonsecure) custody by audio and video transmission if:

- The transmission allows the court and the juvenile to see and hear each other and
- The juvenile can communicate fully and confidentially with his or her attorney during the proceeding.

While G.S. 7B-1906(h) does not expressly state that only the juvenile can appear through audio and video transmission, the language refers only to the capacity of the court and juvenile to see and hear each other and for the juvenile's capacity to have confidential communication with his or her attorney. The question of whether the prosecutor and parents can also appear through audio and video transmission was likely not anticipated at the time the statute was drafted. While the statutory language does not prohibit that possibility, many additional factors would need to be considered if multiple parties appear through audio and video transmission.

Ordinarily, this statute also requires that information regarding the procedures and type of equipment to be used be approved by the Administrative Office of the Courts (NCAOC) prior to use. However, NCAOC Director McKinley Wooten issued a memorandum to judicial branch employees on March 13, 2020 containing an NCAOC temporary audio video policy. This memorandum provides "a temporary pre-approval for the use of audio video procedures, when authorized by statute, in lieu of requiring each county to submit an individual request for approval." This temporary pre-approval applies to hearings to determine the need to continue secure custody if:

- The parties to the proceeding can see and hear each other;
- The juvenile can communicate fully and confidentially with counsel;
- The procedures are reasonably secure to preserve the confidentiality of the proceeding; and
- The procedures have recording capability.

The memorandum also notes that once the public health concerns have passed, retroactive approval of any equipment and procedures may be required.

Considerations When Conducting Remote Hearings with Juveniles

There is a dearth of research about best practices regarding remote hearings for juveniles involved in delinquency proceedings. Although the practice is explicitly authorized under North Carolina law, there are no implementing Rules or policies providing the courts with guidance. However, other states have examined the use of remote video participation for juveniles, and lessons can be learned from their findings.

In the 1990s, courts in Florida piloted remote juvenile detention hearings in an effort to determine whether to change a Rule of Juvenile Procedure to allow for the juvenile's presence at detention hearings by electronic audiovisual device. *Amendment to Florida Rule of Juvenile Procedure 8.100(a). and Petition Requesting Approval to Implement a Pilot Project Utilizing Electronic Audiovisual Devices in Juvenile Detention Hearings*. 667 So.2d 195 (Mem)(1996). The Florida Public Defender Association reported several problems with the pilot efforts including:

- Lack of proper opportunity for meaningful, private communications between the child and the parent or guardians, between the parents or guardians, and the juvenile's attorney (who was with the juvenile at the detention center), and between the public defender in the courtroom and the juvenile's attorney at the detention center;
- Multiple parties speaking at the same time, creating confusion;
- Confusion for the juvenile regarding the court's decision;
- Lack of access to the court file for the juvenile's attorney;
- No opportunity to approach the bench regarding private matters; and
- An absence of the dignity, decorum, and respect among the juveniles that one would normally anticipate at a personal court appearance.

Participating judges also provided feedback on the pilots, including that

“[m]ost people coming into court have difficulty in grasping the process. This is magnified with children and youth. The detention decision is one of the most important to be made in delinquency cases-both for the child and society. The value of observation of the child, interaction with family (and sometimes victims) is extremely helpful in making a fair and just decision.” *Amendment to Florida Rule of Juvenile Procedure 8.100(A)*. 796 So.2d 470 (2001).

Another judge noted that

“most juveniles at video first appearance hearings appear almost like zombies. Conversation between a parent and a teenager under normal conditions when there is conflict is difficult. Conversation via a video screen with a juvenile who is in detention is extremely difficult and problematic.”

After weighing all the feedback on the pilot sites, the Supreme Court of Florida decided not to amend the Rules of Juvenile Procedure to allow for electronic audiovisual appearance by juveniles. *Amendment to Florida Rule of Juvenile Procedure 8.100(A)*. 796 So.2d 470 (2001).

In a [more recent analysis](#) of the use of video conference technology in juvenile court hearings the Illinois Juvenile Justice Commission unanimously passed a motion opposing the practice. That analysis concluded that detention hearings are of such constitutional significance that anything other than an in-court appearance would be inappropriate. The Commission also found that “there are significant adverse impacts to the quality and effectiveness of counsel, the court’s ability to maintain impartiality, and the court’s ability to engage youth meaningfully in proceedings.”

Suggestions:

While the concerns voiced in Florida and Illinois were significant enough to oppose the use of video conferencing technology for juvenile appearances at detention hearings, the practice is explicitly authorized under North Carolina law. We are also in an unprecedented time of a global pandemic with significantly heightened public health considerations regarding even small gatherings of people. The concerns voiced in other states suggest that if video conferencing is used for ongoing secure custody hearings, courts may want to seriously consider:

- How to ensure that the juvenile has effective opportunity to talk privately with his or her attorney throughout court proceedings;
- The impact that viewing a juvenile through a video connection may have on one’s perception of the child;
- The impact of the inability for the juvenile to communicate and make eye contact with his or her family; and
- The impact that the use of video conferencing may have on the juvenile’s understanding of the proceedings.

Use of video conferencing may call for heightened awareness of its potential negative impacts and intentional efforts to meaningfully engage juveniles in a remote hearing experience.

Options to Release Youth from Secure Custody

The court is required to find that restraints on the juvenile’s liberty are necessary and that no less intrusive alternative will suffice at each hearing to determine the need for continued secure custody. G.S. 7B-1906(d). The Juvenile Code provides a wide range of restrictions that can be placed on juveniles upon release from secure custody. G.S. 7B-1906(f). These include:

- Release on the written promise of the juvenile’s parent, guardian, or custodian to produce the juvenile in court for subsequent proceedings;

- Release into the care of a responsible person or organization;
- Release conditioned on restrictions on activities, associations, residence, or travel if reasonably related to securing the juvenile's presence in court; or
- Any other conditions reasonably related to securing the juvenile's presence in court.

Many courts use electronic monitoring as a less intrusive alternative to secure custody and impose it as a condition reasonably related to securing the juvenile's presence in court. The current public health conditions may push courts to consider whether other restrictions on liberty might be used if electronic monitoring is not available or appropriate. It may be necessary to dig deep to find a responsible person who is not the parent, guardian, or custodian who is willing to care for the juvenile and ensure his or her return to court. Perhaps significant restrictions on leaving one's residence are more appropriate right now given the fact that schools are closed. The statute allows courts to impose any condition "reasonably related" to securing the juvenile's presence in court. The health and safety of youth and detention center staff may call for some creative thinking about what this could mean in the present circumstances. I welcome your suggestions about what that might be.