

Remote Delinquency Proceedings Not Otherwise Authorized in Statute

Last month I [blogged](#) about the one type of delinquency hearing for which remote proceedings are expressly authorized in statute—hearings on continued custody. This blog analyzes the legal and practical considerations for holding other types of delinquency proceedings through the use of audio and video technology. It will provide an overview of the authority to hold other delinquency proceedings remotely, discuss special considerations related to delinquency proceedings, and address what it all means for first appearances, probable cause hearings, transfer hearings, adjudication hearings, and dispositional hearings.

Authority to Hold Delinquency Proceedings Remotely

Chief Justice Beasley issued an [order](#) on April 2, 2020 that contains several emergency directives in light of catastrophic conditions resulting from the COVID-19 outbreak. Emergency Directive 1 requires the scheduling or rescheduling of district court proceedings no sooner than June 1, 2020 unless one of the listed exceptions exist. These exceptions include when the proceeding can be conducted remotely, is necessary to preserve the right to due process of law, is for the purpose of obtaining emergency relief, or can be conducted under conditions that protect the health and safety of all participants.

Emergency Directive 3 of the April 2, 2020 order authorizes the use of remote audio and video transmissions in order to conduct court proceedings notwithstanding any other provision of law. This means that proceedings for which the use of remote technology is not expressly authorized in statute or regulation may be held remotely if the criteria for safeguarding the constitutional rights of the people involved and preserving the integrity of the judicial process, as established in Emergency Directive 3, are met. These criteria include that

Each party must consent;

In criminal proceedings where the defendant's right to confront witnesses or to be present is implicated, the defendant must waive these rights;

If confidentiality is required by law, it must be maintained;

If recording is required by law, the proceeding must be recorded; and

Each party represented by an attorney must be able to communicate fully and confidentially with his or her attorney.

Emergency Directive 3 does not prohibit in-person proceedings that are otherwise authorized by Emergency Directive 1. While this order expires on May 1, 2020, it explicitly states that the Chief Justice fully expects to extend the directives for an additional 30 days and that judicial officials should expect the directives in the order to last throughout May 2020.

How should these criteria be applied to the range of delinquency proceedings that are not already authorized in statute to be held remotely? I believe the answer to this question rests largely on the special considerations unique to delinquency proceedings and the nature of the various proceedings.

Special Considerations in Delinquency Proceedings

Enhanced Constitutional Protections

Emergency Directive 3 expressly requires that judicial officials who conduct remote proceedings pursuant to the Directive must safeguard the constitutional rights of the people involved in the proceeding. Although juvenile delinquency proceedings are civil proceedings, they implicate constitutional rights that apply in criminal actions. [In re Gault, 367 U.S. 1 \(1967\)](#). Additionally, the Juvenile Code sometimes requires heightened protection of constitutional rights for juveniles in delinquency proceedings.

For example, [G.S. 7B-2405](#) requires the court to protect the rights of the juvenile (and his or her parent, guardian, or custodian) to “assure due process of law” at adjudicatory hearings. This includes all rights afforded to adult offenders except the rights to bail, self-representation, and trial by jury. The North Carolina Court of Appeals has taken this affirmative duty on the part of the district court seriously, holding that the failure of the district court to engage in some colloquy with the juvenile to ensure that the juvenile understands his or her right against self-incrimination prior to testifying at an adjudicatory hearing is reversible error unless the error is proven harmless beyond a reasonable doubt. [In re J.B., 261 N.C.App. 371 \(2018\)](#).

Juveniles are also provided enhanced protection of the right against self-incrimination during custodial interrogations. The US Supreme Court established that the determination of whether or not a juvenile is in custody for the purposes of triggering the need for Miranda warnings must be based on whether a reasonable child would have felt free to terminate the questioning and leave, rather than the adult reasonable person standard. You can find a full analysis of this child-specific standard in LaToya Powell’s [Juvenile Law Bulletin](#) from 2016. [G.S. 7B-2101\(b\)](#) further protects juveniles from self-incrimination by prohibiting the use of any confession or admission made by a juvenile under the age of 16 during a custodial interrogation held outside the presence of the juvenile’s parent, guardian, custodian, or attorney.

These are just a few examples of the enhanced protections afforded to juveniles regarding their constitutional rights. These protections highlight the need for special considerations regarding how to safeguard juvenile constitutional rights in the context of Emergency Directive 3.

Practical Considerations

There are also practical considerations that impact a court’s capacity to safeguard juvenile

constitutional rights during remote proceedings. These include the sheer number of participants who must be involved in delinquency proceedings and the scientific knowledge about a juvenile's capacity to understand and reason in a delinquency proceeding.

The reality is that any delinquency proceeding requires the attendance of many people. At a bare minimum, each proceeding requires the presence of the juvenile; his or her attorney; the juvenile's parent(s), guardian(s), or custodian(s); the judge; the bailiff; the clerk; the juvenile court counselor; and the prosecutor. The victim also has the right to attend court proceedings upon request. [G.S. 7B-2052\(b\)\(2\)](#). This means that there are easily eight to ten people who must be in attendance for each juvenile proceeding. Participation by any witness, multiple victims, or service providers will only add to this number. The capacity for a remote proceeding to meaningfully involve this large number of people in a manner that supports understanding for the juvenile and his or her parent(s), guardian(s), or custodian(s) may be difficult.

The special confidentiality that applies to juvenile records pose another unique challenge for remote delinquency hearings. [G.S. 7B-3000](#), [G.S. 7B-3001](#). Even victims, who have a constitutional right to be present at juvenile proceedings, are prohibited from examining or obtaining confidential juvenile records. [G.S. 7B-2057](#). At in-person hearings, confidential records are submitted to the judge at the bench for his or her consideration. Any remote juvenile hearing will need to be conducted in a manner that preserves the confidentiality of juvenile records. Sharing them on a screen to which all remote participants have access will likely violate the statutory confidentiality requirements.

All of these special considerations must be taken in the context of what is known about juveniles' abilities to understand court proceedings, provide relevant information to their attorneys, and to process information about what is happening in the proceeding. These abilities are called understanding and reasoning, and they are part of the analysis of a juvenile's legal capacity. The seminal study regarding these two juvenile abilities found that juveniles under the age of 16 have significantly impaired reasoning or understanding abilities when compared to people ages 16 to 24 and many juveniles under age 16 have significant impairment in both reasoning and understanding. [Thomas Grisso et al., Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants, 27 L. & HUM. BEHAV. 333, 336 \(2003\)](#). This study included participants between the ages of 11 and 24. Perhaps not surprisingly, the study found that the younger the participant, the higher the level of impairment. This research supports the need for enhanced protections for juveniles to ensure that they are understanding the proceedings and are able to meaningfully participate in their defense with their attorney. It appears that these enhanced protections become more important for younger juveniles.

The realities of remote proceedings may further call into question a juvenile's ability to understand and reason about his or her case. It also enhances the need to ensure that juveniles have the opportunity for full and confidential communication with their attorneys throughout any remote proceeding as required by Emergency Directive 3. If the juvenile and his or her attorney are not

physically together during the proceeding, any remote proceeding must accommodate the opportunity for truly private communication between the juvenile and his or her attorney at any time, and likely many times, throughout the proceeding.

Application to Various Juvenile Proceedings

First Appearance

A first appearance is required in every delinquency proceeding in which a felony is alleged. [G.S. 7B-1808](#). The first appearance can be continued for good cause unless the juvenile is being held in secure or nonsecure custody. If the juvenile is in custody, then the first appearance must be held at the same time that the initial custody hearing is held pursuant to [G.S. 7B-1906](#). As described in my previous blog, this initial custody hearing has express statutory authorization for the use of audio and video technology.

The first appearance does not involve introduction of any evidence, confrontation of any witnesses, or any judicial decision-making regarding custody, adjudication, or disposition. The first appearance requires the important function of appointing counsel, and the court is tasked with informing the juvenile of the allegations in the petition and the date of the probable cause hearing (if required). The court must also inform the juvenile's parent(s), guardian(s), or custodian(s) of their obligation to attend all hearings. G.S. 7B-1808.

Because the first appearance must occur in conjunction with the initial custody hearing for youth in custody, the court should continue to hold the first appearance during any remote hearing on initial custody. The first appearance for juveniles who are not in custody can be continued for good cause. The current catastrophic conditions are likely sufficient to find good cause. Given the complex nature of remote juvenile proceedings a continuance to June may be the more prudent course for juveniles who are not in custody.

Probable Cause Hearings

[G.S. 7B-2202](#) allows probable cause hearings to be continued for good cause. Significant procedures are involved in a probable cause hearing. A juvenile has the right to testify, call and examine witnesses, and to present evidence. The rules of evidence largely apply, with some statutory exceptions. G.S. 7B-2202. Counsel for the juvenile can waive the right to a probable cause hearing in writing and stipulate to a finding of probable cause. If the juvenile chooses to litigate the issue of probable cause, the complex nature of this proceeding and the special considerations that apply in juvenile matters weigh strongly against conducting a probable cause hearing remotely.

Transfer Hearing

The decision made at a transfer hearing is of great consequence—will the juvenile be tried as an adult in the criminal justice system? The United States Supreme Court has long recognized this decision as one that demands protection of a juvenile’s constitutional right to due process. [Kent v. U.S., 86 S.Ct. 1045 \(1966\)](#). The Juvenile Code allows both the prosecutor and the juvenile to be heard and offer evidence at a transfer hearing. [G.S. 7B-2203\(a\)](#). The court is required to consider eight statutory factors when making its decision. [G.S. 7B-2203\(b\)](#). Both the prosecutor and the juvenile’s attorney will likely present evidence to inform the court’s consideration of each of those factors.

The Juvenile Code requires that juveniles have at least five days-notice of the intent to seek transfer before holding a transfer hearing, but it does not prescribe an outer limit on the time in which the date for a transfer hearing must be set. [G.S. 7B-2202\(e\)](#). Given the importance of the transfer decision, the special considerations of juvenile proceedings, and the absence of a statutorily prescribed timeline for transfer hearings, remote transfer hearings are not advisable.

The decision regarding whether or not to hold a remote proceeding following the return of an indictment on a Class A-Class G felony alleged to have been committed at age 16 or 17 is different. Any such proceeding would, of course, require that the grand jury meet. This may not be the reality under the current conditions. However, if an indictment that triggers an automatic transfer under [G.S. 7B-2200.5\(a\)\(1\)](#) is returned, the court may want to consider holding a remote proceeding to acknowledge that finding and order the transfer of the case. The considerations in this scenario are different. The only evidence necessary is the returned indictment that alleges a Class A-Class G felony at age 16 or 17. The court does not have discretion once the finding of the returned indictment is made. If the case is transferred, then the juvenile has the right to have conditions for pretrial release set. [G.S. 7B-2204](#). The unique nature and consequences of this proceeding make it more amenable to conducting it remotely.

Adjudication

Adjudication hearings implicate the entire range of constitutional rights that juveniles have in delinquency proceedings. [G.S. 7B-2405](#) requires the court to affirmatively protect all the rights provided to the juvenile to assure due process of law. The rules of evidence apply. [G.S. 7B-2408](#). An adjudication hearing is a complex proceeding, usually with witnesses who testify under oath and are subject to cross examination. The allegations in the petition must be proven beyond a reasonable doubt to adjudicate the youth delinquent. [G.S. 7B-2409](#).

If the juvenile is prepared to make an admission during adjudication, the court must engage in a six-part inquiry with the juvenile prior to accepting the admission. [G.S. 7B-2407](#). The court is also only allowed to accept an admission after determining that the admission is based on informed choice and that there is a factual basis for the admission. While the process for a juvenile admission is less complicated in terms of evidence and witnesses, it still requires a significant inquiry by the court. North Carolina’s appellate courts have taken this inquiry seriously, overturning adjudications

where the district court's inquiry was incomplete. [In re T.E.F., 359 N.C. 570 \(2005\)](#), [In re J.A.G., 206 N.C.App. 318 \(2010\)](#), [In re A.W., 182 N.C.App. 159 \(2007\)](#).

The Juvenile Code expressly allows for the continuance of adjudication hearings if the court needs additional information, for a reasonable time to conduct expeditious discovery, or in extraordinary circumstances when necessary for the proper administration of justice or in the best interests of the juvenile. [G.S. 7B-2406](#). Once again, given the complexities of these proceedings and the special considerations attendant to juveniles, continuances of adjudication proceedings may be the most prudent course of action at this time. There is one potential exception, discussed below.

Dispositional Hearings

Dispositional hearings are less formal than adjudication proceedings. [G.S. 7B-2501\(a\)](#). Evidence need only be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition. The juvenile and his or her parent(s), guardian(s), or custodian(s) must have the opportunity to present evidence and they can advise the court of the disposition they believe to be in the best interests of the juvenile. [G.S. 7B-2501\(b\)](#). There is no timeline provided for holding the dispositional hearing other than the direction that it should happen following the court's receipt of the predisposition report. [G.S. 7B-2413](#).

While the process necessary at a dispositional hearing is less complex than at adjudication, it is nonetheless critically important. A disposition can include a year on probation or an undetermined amount of time in a secure juvenile facility. [G.S. 7B-2506](#). As a general matter, these are high stakes for a remotely held proceeding that includes the challenges attendant to any juvenile proceeding. However, there is one circumstance in which the balance of the juvenile's rights and protections may lean in favor of conducting the adjudication and disposition remotely.

Special Circumstance: Admission and Level 3 Commitment

A special circumstance is when the juvenile is in secure custody pending adjudication and/or disposition and all the parties are in agreement that the adjudication will happen through an admission (if adjudication has not already occurred) and disposition will be a Level 3 commitment to a Youth Development Center (YDC). I consider this a special circumstance because juveniles are not entitled to any credit off their commitment period for time served in secure custody prior to disposition. [In re D.L.H., 364 N.C. 214 \(2010\)](#). Therefore, if all the parties agree to the juvenile's admission of responsibility and commitment to a YDC is the required disposition, then a delay of the proceedings will simply be extending the juvenile's time in secure custody. If the juvenile is not going to contest a finding of delinquency and a Level 3 commitment then it would be in the best interests of the juvenile to be able to participate in those proceedings and begin his or her period of commitment at a YDC.

Should a court decide to hold any such proceeding remotely, it remains imperative that the

requirements of Emergency Directive 3 are met and that the six-part inquiry with the juvenile that is necessary for the acceptance of an admission occurs.

Conclusion

As I write this blog in my home, juggling all that comes with staying at home for weeks with three children, I am reminded that everything involving young people is complicated. Weighing the balance between protection of their procedural rights, their health and safety (and the health and safety of the adults involved in the case), their developmental immaturity, and their right to have petitions resolved with all possible speed is no different. Please know that I am available to help you think this through during this challenging time.