



Written Testimony Submitted: March 8, 2017

Written Testimony for Judiciary Committee Hearing
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Re: Legislative Bill 434

Thank you for inviting the National Juvenile Defender Center (NJDC) to provide written testimony regarding the Nebraska Legislature's consideration of changes to state practice related to videoconferencing and other remote-access¹ technology in juvenile court. NJDC has grave concerns about the use of videoconferencing for youth. Children are entitled to due process protections under the Fourteenth Amendment, as guaranteed by the United States Supreme Court in *In Re Gault*.² Videoconferencing diminishes the integrity of juvenile court proceedings, presents insurmountable barriers to effective assistance of counsel, harms attorney-client relationships and confidentiality, and impedes procedural justice for youth. For all of these reasons, videoconferencing places youth at a significant disadvantage in juvenile proceedings and should be avoided. However, if this body determines that videoconferencing is absolutely unavoidable in Nebraska, at a minimum, it should be done so only with the consent of the youth and his or her attorney.

NJDC's mission is to promote justice for all children by ensuring excellence in juvenile defense. NJDC believes that all youth have the right to ardent, well-resourced representation. NJDC acknowledges the unique and special status of childhood and the impact that immaturity, disabilities, and trauma may have on that representation. NJDC works to improve access to and quality of counsel for all young people in delinquency court, provides technical assistance, training, and support to juvenile defenders across the country, and supports the reform of court systems and policies that negatively impact our nation's youth. One way NJDC has supported effective and developmentally appropriate juvenile court reform has been through state assessments of access to and quality of juvenile defense counsel. Our assessment of access to and

¹ Throughout this testimony, the use of the term "videoconferencing" should be read to include any and all remote-access technology, unless specifically stated otherwise.

² 387 U.S. 1 (1967).

the quality of juvenile defense representation in Nebraska was published in 2009³ and has been cited in other conversations before this body as it considered juvenile justice reform efforts.

I. THE CONSTITUTIONAL RIGHT TO BE PRESENT AT HEARINGS

As a U.S. Constitutional matter, the right to be present in juvenile proceedings is typically based on the Fourteenth Amendment's Due Process Clause requirement that youth have a right to confrontation equal to that of adults under the Sixth Amendment.⁴ As such, youth have a right to confront witnesses against them and have their attorney subject those witness to cross-examination in their presence.⁵ Videoconferencing is not identical to face-to-face confrontation.⁶ It has been found to satisfy confrontation requirements only in limited circumstances where "denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured," such as the need to have a young victim of sexual abuse testify remotely if found that the witness would suffer severe emotional distress as a result of being in the defendant's presence.⁷ Where videoconferencing is used for the sake of convenience or to save money, courts have found that videoconferencing does not meet the constitutional threshold.⁸ Furthermore, the Supreme Court clarified that where a witness is offering "testimonial statements," the constitutional requirement of face-to-face confrontation may not be relaxed simply to accommodate the needs of the proceedings.⁹

The right to be present, however, is not limited to hearings in which confrontation is at issue. The right for the accused to be present is all encompassing right under Due Process Clause of the Fourteenth Amendment. The U.S. Supreme Court has held that "a defendant has a due

³ The full report, JUVENILE LEGAL DEFENSE: A REPORT ON ACCESS TO AND QUALITY OF REPRESENTATION FOR CHILDREN IN NEBRASKA is available at: <http://njdc.info/wp-content/uploads/2013/11/FINAL-Nebraska-Assessment-Report.pdf>.

⁴ See *In Re Gault*, 387 U.S. 1 (1967).

⁵ *Coy v. Iowa*, 487 U.S. 1016 (1987) ("[T]he Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact."); *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987) ("[E]ven in situations where the defendant is not actually confronting witnesses or evidence against him, he has a due process right to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge . . . due process clearly requires that . . . a defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome.").

⁶ Fern L. Kletter, *Constitutional and Statutory Validity of Judicial Videoconferencing*, 115 A.L.R. 5th 509 (2004) [hereinafter *Validity of Judicial Videoconferencing*] ("Even with advancing technology, presence via video-audio link-up remains less than the complete equivalent of actual presence."). Amendments to Rule 26(b) of the Federal Rules of Criminal Procedure, 207 F.R.D. at 94 (citing *U.S. v. Gigante*, 166 F.3d 75, 81 (2nd Cir. 1999)) (Scalia) (noting that a witness testifying via two-way videoconference is different than confronting the defendant face-to-face).

⁷ *Maryland v. Craig*, 497 U.S. 836, 850 (1990) (establishing a test to determine when videoconferencing is permissible, and emphasizing that face-to-face confrontation is not easily dismissed).

⁸ See *Commonwealth v. Atkinson*, 987 A.2d 743, 750-51 (Pa. Super. Ct. 2009) (finding that allowing a witness to testify remotely via videoconference at a suppression hearing violated the defendant's constitutional right to confrontation, noting that "[w]hile efficiency and security are important concerns, they are not sufficient reasons to circumvent [defendant's] constitutional right to confrontation"); *Commonwealth v. Musser*, 82 Va. Cir. 265, at *4-5 (Ca. Cir. Ct. 2011) (finding that state's interest in saving money by having a medical examiner testify remotely did not satisfy the public policy prong of the *Craig* test).

⁹ See *Crawford v. Washington*, 541 U.S. 36 (2004); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 325 (2009).

process right to be present at a proceeding whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.... The presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence....”¹⁰ Videoconferencing diminishes the integrity of juvenile court proceedings, presents insurmountable barriers to effective assistance of counsel, harms attorney-client relationships and confidentiality, and impedes procedural justice for youth. For all of these reasons, videoconferencing places youth at a significant disadvantage in juvenile proceedings and should be avoided.

When a child’s ability to consent to these shortcomings is removed, the violations are compounded. Any right provided by the Constitution can only be waived by the person who holds that right, and must be done so knowingly, intelligently, and voluntarily.¹¹ In the case of the right to be present, the child holds that right in juvenile proceedings. As such, a legislative move to eliminate a child’s need to consent to a video hearing runs afoul of the U.S. Constitution.

II. PROBLEMS WITH THE SOLEMNITY AND EFFECTIVENESS OF VIDEO PROCEEDINGS

Remote videoconferences present issues for all court actors—including judges, prosecutors, defense lawyers, courtroom personnel, and the youth themselves. Individuals appearing from remote locations on camera or via audio feed are physically separated, and thus are less likely to feel as though they are participants in the proceeding.¹² This physical barrier creates a psychological and emotional barrier that can prevent youth from engaging in the proceedings, even if they can view them.

Even judges acknowledge that children whose hearings are held via video are less likely to have fair and dignified hearings than their in-person counterparts. As one federal judge remarked, video presence connotes “second-classness.”¹³ Another judge noted that “the hearings totally lacked the dignity, decorum, and respect one would anticipate in a personal appearance before the court.”¹⁴ The consequences of this paradigm shift are very real. “If those in court . . . do not consider the person important enough to be there in court, then this may impact their opinion of

¹⁰ *United States v. Gagnon*, 470 U.S. 522, 526(1985) (internal citations omitted).

¹¹ *Brady v. United States*, 397 U.S. 742, 748 (1970) (“Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.”).

¹² WILLIAM RETERT ET AL., *PROTECTING QUALITY REPRESENTATION IN VIDEO COURT: A PRACTICAL HANDBOOK FOR WISCONSIN JUVENILE DEFENSE ATTORNEYS* 13 (Sept. 2005), <http://wispd.org/images/AppellateFolder/templates/forms/QI.pdf> (“Peering at a small screen that may only show the head and shoulder shots of the main participants in the courtroom diminishes the real sense of the significance of appearing in court. This effect is not beneficial to litigants, especially juveniles or witnesses, whom society intends to impress with the gravity of the situation that brings them to the formal court setting.”).

¹³ DANIEL DEVOE AND SARITA FRATTAROLI, *VIDEOCONFERENCING IN THE COURTROOM: BENEFITS, CONCERNS, AND HOW TO MOVE FORWARD* 29 (2009) [hereinafter *VIDEOCONFERENCING IN THE COURTROOM*], <http://perma.cc/2SUJ-6MHP>.

¹⁴ Amendment to Florida Rule of Juvenile Procedure 8.100(a), 796 So.2d 470, 473 (Fla. 2001).

the person and the case.”¹⁵ The Florida Supreme Court reviewed the issue of video detention hearings and determined, based on the personal experiences of lower court judges running courtrooms with videoconferencing, that this “robotic justice” limits judicial decision making and imposes unreasonable barriers to client representation.¹⁶

Videoconferencing alienates children who are already limited in the control they have over their own cases and in their understanding of court proceedings.¹⁷ One trial court judge has noted that “most juveniles at video first appearance hearings appear almost like zombies . . . Conversation via a video screen with a juvenile who is in detention is extremely difficult and problematic.”¹⁸ Similar remarks and conclusions have been made by various juvenile defenders and by children themselves.¹⁹ Separating youth from the court can ultimately lead to the youth feeling like they are not an important party in the matter, the proceedings are not serious, or the system is stacked up against them because they are the only party not in the courtroom; which in turn can lead to higher recidivism rates.²⁰

Videoconferences are generally ineffective at capturing important aspects of testimony and courtroom behavior. The Illinois Court of Appeals has noted that “[i]n a televised appearance, crucial aspects of a defendant’s physical presence may be lost or misinterpreted, such as the participants’ demeanor, facial expressions and vocal inflections, the ability for immediate and unmediated contact with counsel, and the solemnity of a court proceeding.”²¹ Both research and practice confirm this.²² Indeed, studies find that videoconferencing actually alters actions—

¹⁵ VIDEOCONFERENCING IN THE COURTROOM, *supra* note 13, at 29.

¹⁶ Amendment to Florida Rule of Juvenile Procedure 8.100(a), 796 So.2d at 474 (internal citation omitted) (While the concerns raised by those in favor of the use of videoconferencing—elimination of transportation costs, increased security, decreased disruptions due to the spectacle of handcuffed children—were acknowledged by the court, the majority reasoned that these concerns could not be dealt with by implementing a form of “robotic justice.” The majority was further concerned that the “multiple and complex problems” facing children before the court could only be dealt with through personalized attention. The use of an audio-visual device would lead, the court worried, to a detached form of justice where children are not treated as “society’s most precious resource.”).

¹⁷ See, e.g., TEAMCHILD & JUVENILE INDIGENT DEFENSE ACTION NETWORK, WASHINGTON JUDICIAL COLLOQUIES PROJECT: A GUIDE FOR IMPROVING COMMUNICATION & UNDERSTANDING IN JUVENILE COURT 5 (2012) [hereinafter WASHINGTON JUDICIAL COLLOQUIES PROJECT],

http://www.teamchild.org/docs/uploads/JIDAN_Judicial_Colloquies_FINAL.pdf; Pamela Snow & Martine Powell, *The Language Processing and Production Skills of Young Offenders: Implications for Enhancing Prevention and Intervention Strategies*, Criminology Research Council grant 23/00-01 (2002); Michele LaVigne & Gregory Van Rybroek, *Breakdown in the Language Zone: The Prevalence of Language Impairments among Juvenile Adult Offenders and Why it Matters*, 15 U.C. DAVIS J. JUV. L. & POL’Y 71 (2011).

¹⁸ Amendment to Florida Rule of Juvenile Procedure 8.100(a), 796 So.2d at 474.

¹⁹ See *id.* at 473.

²⁰ No matter the outcome of the proceedings, studies have shown that when a youth feels like the proceedings were fair, his or her voice was heard, and he or she was treated with respect by all parties, that procedural fairness generally results in lower recidivism rates among juvenile defendants. Tamar R. Birckhead, *Toward a Theory of Procedural Justice for Juveniles*, 57 BUFF. L. REV. 1447, 1476-83 (2009).

²¹ *People v. Guttendorf*, 723 N.E.2d 838, 840 (Ill. App. Ct. 2000).

²² See, e.g., Lothar Muhlbach et al., *Telepresence in Videocommunications: A Study on Stereoscopy and Individual Eye Contact*, 37 HUM. FACTORS 290, 296-97 (1995) (discussing the challenges of videoconferencing technology).

including nonverbal cues, eye contact, and even viewer expectations.²³ Videoconferencing also impairs a judge's ability to assess a defendant's credibility²⁴ and the substance of an attorney's argument.²⁵ Thus, "[t]o the extent that technology changes behavior or masks or distorts information, it may undermine the accuracy of perceptions and corrupt the result of the proceeding."²⁶ These decisions are not only important in the adjudicatory context. As the Federal Rules of Criminal Procedure note, the decision to use videoconferencing in detention hearings has potential negative ramifications for defendants.²⁷ "Much can be lost when video teleconferencing occurs the magistrate judge may miss an opportunity to accurately assess the physical, emotional, and mental condition of a defendant—a factor that may weigh on pretrial decisions, such as release from detention."²⁸ Though not subject to the same due process rights as a juvenile hearing, a study examining the use of videoconferencing in the asylum hearing context found general problems with overall respondent engagement and the judge's decision-making:

²³ See Bert Pryor and Raymond W. Buchanan, *The Effects of a Defendant's Demeanor on Juror Perceptions of Credibility and Guilt*, J. COMM. 92, 93 (Summer 1984); Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 TUL. L. REV. 1089, 1106-1114 (2004) [hereinafter *The Remote Defendant*]; G. Daniel Lassiter & Audrey A. Irvine, *Videotaped Confessions: The Impact of Camera Point of View on Judgments of Coercion*, 16 J. APPLIED SOCIAL PSYCHOLOGY at 268-76 (1986) (noting that subtle changes in camera angle can affect the judgments of jurors).

²⁴ *Validity of Judicial Videoconferencing*, supra note 6 ("As personal impression is often a crucial factor in persuasion, videoconferencing may render it difficult for the fact finder to make credibility determinations and gauge demeanor.").

²⁵ Carlos Ferran & Stephanie Watts, *Videoconferencing in the Field: A Heuristic Model*, 54 MANAGEMENT SCIENCE 1565 (2005) (finding that participants in a videoconference evaluated speakers by how likable they perceived them to be, rather than the quality of their arguments, while in-person participants did the opposite, because due to the lesser cognitive load of in-person communication, listeners were able to allocate cognitive resources more efficiently and more accurately evaluate the quality of information).

²⁶ *The Remote Defendant*, supra note 23, at 1114. See also Martin S. Remland, *The Importance of Nonverbal Communication in the Courtroom*, 2 N.J. COMM. 124, 124 (1994); John Storck & Lee Sproull, *Through a Glass Darkly: What Do People Learn in Videoconferences?*, 22 HUM. COMM. RES. 197, 199 (1995); Brid O'Conaill et al., *Conversations Over Video Conferences: An Evaluation of the Spoken Aspects of Video-Mediated Communication*, 8 HUM. COMPUTER INTERACTION 389, 418 (1993); Nancy Gertner, *Videoconferencing: Learning through Screens*, 12 WM. & MARY BILL OF RTS. J. 769, 784 (2004) (discussing verbal and non-verbal cues, and the capacity to understand and perceive these cues via video); Gene D. Fowler & Marilyn E. Wackerbarth, *Audio Teleconferencing Versus Face-to-Face Conferencing: A Synthesis of the Literature*, 44 W. J. SPEECH COMM. 236, 245 (1980) [hereinafter *Synthesis of Literature*] (finding that alliances formed among those on the same side of a video conference); Ederyn Williams, *Social and Psychological Factors*, 28 J. COMM. 125, 126 (1978) [hereinafter *Social and Psychological Factors*] (finding that those in the same room during a videoconference viewed each other as "more intelligent, competent, sensible, trustworthy, and constructive and less unreasonable, boring, and impersonal than the people at the far end of the link"); Shari Seidman Diamond, Locke E. Bowman, Manyee Wong, Matthew M. Patton, *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. Crim. L. & Criminology 869, 900 (2010) (finding that after controlling for other factors, bail increased after hearings started being conducted by videoconference, and decreased after videoconferencing ceased, leading to the conclusion that conducting bail hearings by videoconference significantly disadvantaged defendants); CHICAGO APPLESEED FUND FOR JUSTICE, VIDEOCONFERENCING IN REMOVAL HEARINGS: A CASE STUDY OF THE CHICAGO IMMIGRATION COURT (2005) [hereinafter VIDEOCONFERENCING IN REMOVAL HEARINGS] (finding in an evaluation of 110 videoconference hearings in Chicago's immigration court, that videoconferencing resulted in an alarming number of adverse rulings, problems in communication, interpretation and an increased difficulty in judges making credibility determinations).

²⁷ FED. R. CRIM. P. 10(c), advisory committee's notes to the 2002 Amendments.

²⁸ *Id.*

The expressions, gaze, posture, and gestures that provide important insight into ... credibility or level of understanding are skewed when viewed via [video conferencing]. Video transmission may exaggerate or flatten an applicant's affect and audio transmission may cut off the low and high frequencies of the applicant's voice; both of these anomalies impair the fact finder's ability to assess the veracity of the applicant's story.²⁹

For these reasons, the American Bar Association's Criminal Justice Standards recommend that "the trial judge should maintain a preference for live public proceedings in the courtroom with all parties physically present."³⁰

The issues encountered in videoconferencing for adult criminal and civil hearings are amplified in the juvenile context. While a Kansas Supreme Court Blue Ribbon Commission strongly recommended expanding the use of video technology in Kansas state courts, it explicitly excluded juvenile proceedings from that recommendation, noting that "in conducting juvenile proceedings there is a salutary effect in having a young offender appear in court and experience the seriousness and formality of proceedings conducted by a robed judge sitting behind an elevated bench."³¹

Videoconferencing also has developmental side effects. Developmental research confirms that youth are less likely than adults to understand and anticipate the future consequences of their decisions and actions.³² Recent progress in brain imaging provides physical evidence to show that regions of the brain controlling decision making and impulse regulation are the last to mature.³³ These developmental factors can contribute to a youth retreating, both cognitively and emotionally, from a hearing that is happening on a television screen. Additionally, young people on average are more prone to distraction than adults.³⁴ Videoconferencing increases opportunities for distraction, as youth in these settings feel more removed from the solemnity of the courtroom. This will have harsh consequences for young people forced to videoconference into hearings, placing them at a disadvantage compared to peers that have in-person hearings. Judges are likely to interpret distracted behaviors as a sign of disinterest in and/or disrespect for the proceedings and treat youth who appear remotely more harshly because of this perception.

²⁹ Frank Walsh & Edward Walsh, *Effective Processing or Assembly-Line Justice? The Use of Teleconferencing in Asylum Removal Proceedings*, 22 GEO. IMMIGR. L. J. 259, 268 (2008) [hereinafter *Effective Processing or Assembly-Line Justice*].

³⁰ AM. BAR ASS'N STANDARDS FOR CRIMINAL JUSTICE, SPECIAL FUNCTIONS OF THE TRIAL JUDGE § 6-1.8(a): PROCEEDINGS IN AND OUTSIDE OF THE COURTROOM (3d ed. 2000).

³¹ KAN. SUPREME COURT'S BLUE RIBBON COMM'N, RECOMMENDATIONS FOR IMPROVING THE KANSAS JUDICIAL SYSTEM at 81 (2012).

³² REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 89-118 (Richard J. Bonnie, Robert L. Johnson, Betty M. Chemers & Julie A. Schuck eds., The National Academies Press 2013), <https://www.nap.edu/catalog/14685/reforming-jvenile-justice-a-developmental-approach>.

³³ *Id.* at 96-99.

³⁴ Tracy Rightmer, *Arrested Development: Juveniles' Immature Brains Make Them Less Culpable Than Adults*, 9 QUINNIPIAC HEALTH L. 1, 14-15 (2005).

Judicial proceedings are confusing enough for youth, even without their physical exclusion from potentially life-changing arguments and decisions that concern them. Detention, adjudicatory, disposition, and other hearings held via video further mystify and perplex youth who may already feel alienated from their own proceedings.³⁵ This process may potentially restrict judges and other court personnel from aggressively pursuing viable alternatives to detention. Children require specialized attention that may be muted through this attenuated process. Additionally, videoconferencing severely reduces the ability of judges to form impressions of respondents.³⁶ This is particularly worrisome in juvenile delinquency cases where many youth may also have abuse, neglect, and trauma issues that may leave visible traces, difficult to see over video monitor.

The Supreme Court reasoned in *In re Gault* that children need access to counsel in order to engage in their own defense; to help them become direct participants in their cases instead of spectators.³⁷ Remote access videoconferencing or telephonic hearings directly undermines this premise of *In re Gault*. These problems are compounded when the court alone imposes the separation, rather than it being a reasoned agreement among all parties, including the child. Removing the youth's agreement from changes to the process, as this bill would do, significantly infringes upon due process.

III. VIDEOCONFERENCING HARMS THE ATTORNEY-CLIENT RELATIONSHIP AND INHIBITS ADVOCACY

Effective communication with a client is the key to meaningful advocacy for any attorney. The use of videoconferencing to engage in court hearings requires either that the defense attorney be in court, away from his or her client, or be with the client, away from the courtroom and other

³⁵ Amendment to Florida Rule of Juvenile Procedure 8.100(a), 796 So. 2d 470, 473 (Fla. 2001) (“[T]he mechanical process produced a proceeding where, on many occasions, multiple parties would speak at once, adding to the confusion. At the conclusion of far too many hearings, the child had no comprehension as to what had occurred and was forced to ask the public defender whether he or she was being released or detained.”)

³⁶ See, e.g., *Thornton v. Snyder*, 428 F.3d 690 (7th Cir. 2005) (noting the myriad difficulties and challenges with using videoconferencing, and remarking that videoconferencing is “no substitute for actual presence”); *Edwards v. Logan*, 38 F.Supp.2d 463, 467 (W.D. Va. 1999) (“Video conferencing . . . is not the same as actual presence, and it is to be expected that the ability to observe demeanor, central to the fact-finding process, may be lessened in a particular case by video conferencing. This may be particularly detrimental where it is a party to the case who is participating by video conferencing, since personal impression may be a crucial factor in persuasion.”). See also *Effective Processing or Assembly-Line Justice*, *supra* note 29, at 268 (examining the use of videoconferencing in asylum removal proceedings and finding that “[t]he expressions, gaze, posture, and gestures that provide important insight into an asylum applicant’s credibility or level of understanding are skewed when viewed via [video teleconferencing]”); *The Remote Defendant*, *supra* note 23, at 1114 (noting that videoconferencing “may undermine the accuracy of perceptions and corrupt the result of the proceeding”); *Developments in the Law – Access to Courts: Access to Courts and Videoconferencing in Immigration Court Proceedings*, 122 HARV. L. REV. 1181, 1185 (2009) (finding that “testifying through a video monitor is less persuasive because it is a less direct form of communication”).

³⁷ 387 U.S. 1, 34-42 (1967).

key personnel in the case. Neither is effective for maintaining successful communication with the client or for effective representation in the courtroom.

A. Harms of Videoconferencing When the Lawyer and Client are in Different Locations

Where the defender is in a separate location from the client, the child is isolated, becomes disengaged, and is rarely if ever afforded the representation to which he or she is entitled under the U.S. Constitution. Essential private conversations and collaboration between attorney and client are rendered impossible.³⁸ In court, an attorney can turn and whisper quietly to a client; if the client and attorney are in different locations, private conversation would require a recess and access to separate, secured communications systems outside of the courtroom that would allow the child and the attorney to communicate confidentially.³⁹ It is likely that this obstacle will entice some defense attorneys to “make do” and not properly consult with their clients at key points, make assumptions as to their client’s desires, or fail to ensure that their client understands the proceedings. Any of these concessions would be in violation of the defender’s ethical responsibilities.⁴⁰ For example, national standards require counsel to maintain regular contact with their clients, and to provide them with complete information concerning all aspects of their cases.⁴¹ Additionally, even if some communications system is set up that enables reliably secure communication between the youth and his or her attorney, it can never be confidential if staff members at the detention facility are with the youth. Anything less would violate the attorney-client privilege.

The distance between attorney and client is especially challenging for hearings in the early stages of a case. An attorney cannot work effectively without developing a relationship of trust with a client. This holds particularly true for the juvenile defender.⁴² Trust is built up over time. It cannot exist if defense attorneys and their clients are “meeting” for the first time in separate rooms, separated by a video monitor.⁴³ National standards point out that the failure to maintain

³⁸ See, e.g., William M. Binder, *Videoconferencing: A Juvenile Defense Attorney’s Perspective*, WIS. LAW 18 (1997) (describing activities that necessitate direct attorney-client interaction during court appearances, such as the need to examine exhibits or fill out paperwork).

³⁹ *The Remote Defendant*, *supra* note 23, at 1129-31. See, e.g., *People v. Lindsey*, 772 N.E.2d 1268, 1271-71 (Ill. 2002) (describing the system used, where the defender had to leave court and call the client on the telephone to avoid having conversations openly in court; many of the communications thus took place without confidentiality).

⁴⁰ MODEL RULE OF PROF’L CONDUCT, R. 1.2, R. 1.3, R. 1.4, R. 1.6, R. 2.1. See also NAT’L JUVENILE DEFENDER CTR., NATIONAL JUVENILE DEFENSE STANDARDS, § 1.1: ETHICAL OBLIGATIONS OF JUVENILE DEFENSE COUNSEL 18-19; § 1.2: ELICIT AND REPRESENT CLIENT’S STATED INTERESTS 19-21; § 2.4: MAINTAIN REGULAR CONTACT WITH THE CLIENT 40-41.

⁴¹ MODEL RULE OF PROF’L CONDUCT, R. 1.4. See also NAT’L JUVENILE DEFENDER CTR., NATIONAL JUVENILE DEFENSE STANDARDS § 2.4: MAINTAIN REGULAR CONTACT WITH THE CLIENT 41.

⁴² See Christine S. Pierce & Stanley Brodsky, *Trust and Understanding in the Attorney-Juvenile Relationship*, 20 BEHAV. SCI. & L. 89 (2002).

⁴³ See David A. Davis, *Talking Heads—Virtual Reality and the Presence of Defendants in Court*, FLA. BAR J. at 30 (2001) (suggesting that a client appearing in court by video will not connect well with counsel and “may believe his lawyer is merely processing his case without any real connection with him”).

regular and sufficient contact with a youth client undermines confidence in his or her representation.⁴⁴

The challenges of remote access to the client do not diminish as the case continues, however. National standards require attorneys to consult with their clients,⁴⁵ but communication challenges for youth, already commonplace in face-to-face settings, are exacerbated by the physical barrier of distance.⁴⁶ Counsel must already navigate obstacles inherent in juvenile defense, including communication with clients who have developmental and cognitive disabilities,⁴⁷ cultural differences,⁴⁸ and varying levels of maturity and understanding.⁴⁹ One study in Washington State found that youth who appeared in court understood fewer than one-third of the court-ordered release conditions.⁵⁰ That lack of comprehension led to low rates of recall and compliance, and often resulted in additional sanctions, including detention.⁵¹ Removing children from the court setting and from their attorneys and placing them in a withdrawn, isolated environment will likely lead to lower rates of comprehension, poorer quality of communication, and worse outcomes—including higher rates of recidivism.

B. Harms of Videoconferencing When the Lawyer and Client are Together in a Remote Location

If juvenile defense attorneys are on-site with their clients and appearing remotely via videoconference, they cannot be meaningful advocates in the courtroom. An attorney who is not in the courtroom cannot fully participate in conversations with the prosecutor or the judge, may

⁴⁴ MODEL RULE OF PROF'L CONDUCT, R. 1.4 cmt. See also NAT'L JUVENILE DEFENDER CTR., NATIONAL JUVENILE DEFENSE STANDARDS, § 2.4: MAINTAIN REGULAR CONTACT WITH THE CLIENT 41 (2012).

⁴⁵ MODEL RULE OF PROF'L CONDUCT, R. 1.4. See also NAT'L JUVENILE DEFENDER CTR., NATIONAL JUVENILE DEFENSE STANDARDS, § 2.6: OVERCOMING BARRIERS TO EFFECTIVE COMMUNICATION WITH CLIENT 43-46 (2012).

⁴⁶ See generally Joel V. Oberstar et al., *Cognitive and Moral Development, Brain Development, and Mental Illness: Important Considerations for the Juvenile Justice System*, 32 WM. MITCHELL L. REV. 1051 (2006) [hereinafter *Cognitive and Moral Development*].

⁴⁷ See Linda A. Teplin et al., *Psychiatric Disorders in Youth in Juvenile Detention*, 59 ARCHIVES OF GEN. PSYCHIATRY 1133 (2002); Thomas Grisso, *Adolescent Offenders with Mental Disorders*, 18 THE FUTURE OF CHILDREN 143 (2008); Solomon Moore, *Mentally Ill Offenders Strain Juvenile System*, N.Y. TIMES, Aug. 10, 2009, at A1; Karen M. Abram et al., *Post-Traumatic Stress Disorder and Trauma in Youth in Juvenile Detention*, 61 ARCHIVES OF GEN. PSYCHIATRY 403 (2004) (finding in a scale study in Cook County, Illinois that 92.5% of detained juveniles had experienced at least one traumatic experience in their lifetimes and that 11.2% suffered from PTSD, levels higher than those of the general juvenile population); Charles Huffine, *Bad Conduct, Defiance, and Mental Health*, 20 FOCAL POINT 13 (2006) (claiming that many youth in the juvenile justice system are misdiagnosed and that conduct disorder and oppositional defiant disorder diagnoses often have co-occurring mental health conditions, like bipolar disorder or post-traumatic stress disorder, requiring individualized evaluations and treatment); *Cognitive and Moral Development*, supra note 46.

⁴⁸ Cassandra McKeown & Michael Miller, *Say What?: South Dakota's Unsettling Indifference to Linguistic Minorities in the Courtroom*, 54 S. D. L. REV. 33 (2009).

⁴⁹ See Praveen Kambam & Christopher Thompson, *The Development of Decision-Making Capacities in Children and Adolescents: Psychological and Neurological Perspectives and Their Implications for Juvenile Defendants*, 27 BEHAV. SCI. & L. 173 (2009) (noting the findings of several studies on developmental issues, such as the influence of time perspective, impulsivity, and peers on decision-making).

⁵⁰ WASHINGTON JUDICIAL COLLOQUIES PROJECT, supra note 17, at 9.

⁵¹ *Id.*

miss opportunities for informal negotiation with probation officers or prosecutors, and may not have ready access to reports, evidence, or other documents that are in the courtroom. Moreover, any conversations between the judge and the prosecutor about the case can easily become inappropriately *ex parte* without the defense attorney present.

Regardless of the stage of the case, appearing remotely can impair effective questioning of hearing participants or challenging of reports.⁵² In more formal hearings, such as fact-finding or probation revocation hearings, remote lawyering severely impedes advocacy as it is impossible to effectively present evidence or conduct cross-examination, both of which are vital components in adequate—let alone quality—representation. At hearings with less strict rules of evidence, documents, reports, and other evidence outside the physical reach of the defense attorney may be discussed. A host of technological systems beyond video equipment—such as computers, document-sharing programs, and the like—would be necessary to provide some access to materials in the courtroom, and these would still not solve the problem of an attorney needing to handle a particular piece of evidence or an unscanned document in the moment. This barrier to accessing evidence runs against the juvenile defense attorney’s ethical responsibility to review and investigate all evidence presented.⁵³ The Supreme Court itself requires juvenile defense attorneys to “insist upon regularity of the proceedings,”⁵⁴ but videoconference proceedings are anything but regular. In addition, the physical distance between attorney and other court actors will limit the effectiveness of last-minute negotiations with the state, which are much more productive when done face-to-face and in private. In our experience consulting with attorneys across the country, when juvenile defenders cannot communicate with other courtroom participants effectively, client representation suffers.

During hearings or immediately before, juvenile defense attorneys must also regularly work closely with clients’ families to put together documentation and social information for the client. Videoconferencing renders this vital task overly burdensome when the family is in court and the attorney is in a remote location with the client. Family engagement and cooperation with defense-proposed release or disposition plans requires effective attorney, client, and family collaboration, which videoconferencing all but prevents. Gathering and understanding information for pre-trial hearings and motions, pre-sentencing reports, disposition terms, and post-disposition advocacy is a task that cannot be effectively performed in isolation from the parties most able to help collect it or understand it in context.

⁵² See, e.g., Richard D. Friedman, *Remote Testimony*, 35 U. MICH. J. L. REFORM 695, 702 (2002); Petition for Writ of Certiorari at 5-9, *Junkin v. Florida*, 133 S. Ct. 670 (2012) (No. 12-475).

⁵³ NAT’L JUVENILE DEFENDER CTR., NATIONAL JUVENILE DEFENSE STANDARDS, § 2.4: MAINTAIN REGULAR CONTACT WITH THE CLIENT 41 (2012). See also A.B.A., CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION STANDARD 4-4.1: DUTY TO INVESTIGATE AND ENGAGE INVESTIGATORS (4th ed.).

⁵⁴ 387 U.S. at 36.

Because problems arise regardless of the attorney's location during videoconferencing, at least one federal court has called this issue a "Catch-22."⁵⁵ In other words, regardless of where the child's attorney is situated during this process, videoconferencing is a hindrance to effective assistance of counsel.

IV. VIDEOCONFERENCING LEADS TO DISPARATE OUTCOMES

Numerous courts have held that videoconferencing simply does not measure up to in-person attendance in hearings.⁵⁶ The asylum study discussed earlier,⁵⁷ which has some of the most concrete outcome data to date, found that there were significant disparities in outcomes of hearings dependent on whether they were carried out via videoconference or in person. The asylum seekers with in-person hearings were twice as likely to have their requests for asylum granted as those who had hearings via videoconference.⁵⁸ These results draw from a civil scenario in which access to counsel is not constitutionally mandated.⁵⁹ Specifically in the justice system context, a study of bail hearings found that conducting these hearings by videoconference resulted in judges setting higher bail.⁶⁰ This is because, as additional studies show, people evaluate those with whom they interact face-to-face more favorably than those with whom they interact via video.⁶¹ Worse yet, for youth who need an interpreter, negative outcomes increase with videoconferencing, due to the greater chance for misinterpretations and miscommunication. For juvenile hearings videoconferencing provides substantial due process concerns.

⁵⁵ *Rusu v. I.N.S.*, 296 F.3d 316, 323 (4th Cir. 2002) ("A . . . problem inherent in the video conferencing of asylum hearings is its effect on a petitioner's lawyer. Because video conferencing permits the petitioner to be in one location and an [immigration judge] in another, its use results in a "Catch 22" situation for the petitioner's lawyer. While he can be present with his client – thereby able to confer privately and personally assist in the presentation of the client's testimony – he cannot, in such a circumstance, interact as effectively with the IJ or his opposing counsel. Alternatively, if he decides to be with the IJ, he forfeits the ability to privately advise with and counsel his client. Therefore, under either scenario, the effectiveness of the lawyer is diminished; he simply must choose the least damaging option.").

⁵⁶ *See, e.g.*, *United States v. Thompson*, 599 F.3d 595, 597 (7th Cir. 2010); *Terrell v. United States*, 564 F.3d 442, 445 (6th Cir. 2009); *Thornton v. Snyder*, 428 F.3d 690, 697 (7th Cir. 2005); *United States v. Torres-Palma*, 290 F.3d 1244 (10th Cir. 2002); *United States v. Lawrence*, 248 F.3d 300, 304 (4th Cir. 2001); *Valenzuela-Gonzalez v. U.S. Dist. Ct. for D. Ariz.*, 915 F.2d 1276 (9th Cir. 2000); *United States v. Navarro*, 169 F.3d 228 (5th Cir. 1999); *Edwards v. Logan*, 38 F.Supp.2d 463 (W.D. Va. 1999).

⁵⁷ *Effective Processing or Assembly-Line Justice*, *supra* note 29.

⁵⁸ *Id.* at 271.

⁵⁹ *See VIDEOCONFERENCING IN REMOVAL HEARINGS*, *supra* note 26, at 7 (noting that in hearings via videoconference that required an interpreter, 30% appeared to misunderstand what happened at the hearing, 70% of non-English speaking respondents experienced a problem related to videoconferencing during the hearing, and 50% of non-English speakers received removal orders compared to only 21% for English speakers).

⁶⁰ Fed. R. Crim. Pro. 10(c), Committee Notes ("Much can be lost when video teleconferencing occurs. First, the setting itself may not promote the public's confidence in the integrity and solemnity of a federal criminal proceeding...Second, using video teleconferencing can interfere with counsel's ability to meet personally with his or her client...Third, the defendant may miss the opportunity to meet with family or friends, and others who might be able to assist the defendant...Finally, the magistrate judge may miss an opportunity to accurately assess the physical, emotion, and mental condition of the defendant—a factor that may weigh on pretrial decisions, such as release from detention.").

⁶¹ *Synthesis of Literature*, *supra* note 26, at 245; *Social and Psychological Factors*, *supra* note 26, at 126.

V. CONCLUSION

Videoconferencing and other remote hearing technology raise great concerns for justice. As the Florida Juvenile Rules Committee pointed out:

Implementing technological devices simply because they are available, while swift and expeditious, causes a misdirection of our objectives; our children must never be short-changed in the name of technological advancement. We strongly believe that the measure of a society can be found not in the words spoken about its youth, but in the action and methods utilized in its relationship with its youth...[O]ur youth must never take a second position to institutional convenience and economy.⁶²

Videoconferencing chips away at the due process rights guaranteed to youth in delinquency cases by decreasing the quality of juvenile court hearings and preventing effective assistance of counsel and the formation of attorney-client relationships. Research and case law support the conclusion that by disrupting verbal and non-verbal communication, videoconferencing presents issues for all court actors, threatens the integrity of proceedings, and eventually leads to worse outcomes for youth. As such, the practice can never be justified by concerns over judicial economy, transportation time and costs, or administrative ease.

While videoconferencing is currently permissible under Nebraska law, this practice impedes justice for children across the state. The current proposal to eliminate the need for all parties to consent to videoconferencing would further exacerbate justice and due process concerns by imposing such measures on children against their will and further removing them from participation in their cases.

Please know that NJDC stands ready to answer any questions you may have or provide any further assistance regarding this issue. Please feel free to contact me at 202-452-0010 at any time.

⁶² Amendment to Florida Rule of Juvenile Procedure 8.100(a), 796 So.2d 470, 474 (Fla. 2001).