



Law Office of the
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Seventeenth Judicial Circuit

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Via Email Delivery
In Re: Zoom Hearings

Dear Judge Tuter and Sheriff Tony,

As the court system gears up to resume criminal hearings, we want to make clear that the technology currently utilized for in-custody court appearances does not meet constitutional standards for attorney-client privileged communications.

The May 4, 2020 Florida Supreme Court Administrative Order AOSC20-23 states that its Workgroup on the Continuity of Court Operations and Proceedings During and After Covid-19 has determined that non-evidentiary and evidentiary hearings in all cases can be held remotely "unless inconsistent with the United States or Florida Constitution[.]" It is clear that remote evidentiary hearings are inconsistent with and violate Article 1, sections 9 and 16 of the Florida Constitution and the 5th and 6th Amendments to the United States Constitution. Administrative Order AOSC20-23 is silent with respect to a client's ability to communicate contemporaneously with counsel during an evidentiary hearing. Such communication is constitutionally required and is critical to ensure meaningful and effective confrontation of witnesses. The current technology and procedures utilized thus far in this circuit do not provide for contemporaneous privileged communication between attorney and client and we are unable to participate in any remote evidentiary hearings until other accommodations are made.

Zoom hearings interfere with a defendant's ability to communicate with counsel. The physical separation between a client and defense counsel interferes with the defendant's ability to have instantaneous communication with counsel. The ability to have immediate access to counsel during the presentation of potentially adverse live (electronic) testimony is critical. A client's instantaneous access to counsel, to share

information and strategy, during the examination of witnesses is paramount to the right to counsel.

As noted in an earlier letter to Judge Tuter, the Fourth District Court of Appeal has vigilantly protected the right to counsel in circumstances similar to Zoom proceedings. We are including this case law again because it prevents us from engaging in evidentiary hearings.

The Fourth District Court ruled that conducting a sentencing hearing without the defendant's actual presence was improper, even though defendant appeared by closed-circuit television because the defendant did not have the opportunity to engage in personal and private conference with counsel. *Seymour v. State*, 582 So. 2d 127 (Fla. 4th DCA 1991). The court noted:

"We can imagine no more fettered and ineffective consultation and communication between an accused and his lawyer than to do so by television in front of a crowded courtroom with the prosecutor and judge able to hear the exchange. Quite apart from that obvious inhibition is the added circumstance that the accused is deprived of the opportunity to look directly into the eyes of his counsel, to see facial movements, to perceive subtle changes in tone and inflection, -in short, to use all of the intangible methods by which human beings discern meaning and intent in oral communication. Not every technological advance fits within constitutional constraints or the realities of criminal proceedings. We are most unwilling, even if the Fifth and Sixth Amendments permitted us to do so, to burden this stage of pre-trial proceedings with such an impediment to effective communication and understanding between the accused and counsel." *Id.* at 128-129.

Additionally, the court found a violation of the right to counsel in a criminal contempt case in which the defendant participated by listening to the proceedings via speakerphone. *Haynes v. State*, 695 So. 2d 371 (Fla. 4th DCA 1997). The court found that the speakerphone was insufficient because the defendant had no means by which he could confer privately with counsel who was present at hearing. *Id.* Lastly, in *Coney v. State*, 643 So. 2d 654 (Fla. 3d DCA 1994), the Third District Court of Appeal held that a relay system between the defendant and counsel using a certified legal intern who carried messages to defense counsel violated the right to counsel because the defendant was not allowed instantaneous communications with his attorney during the victim's testimony. *Id.* See also, *Schiffer v. State*, 617 So. 2d 357 (Fla. 4th DCA 1993) (Probation revocation hearing in which defendant participated via video/audio arrangement violated defendant's right to counsel where defendant had no means by which he could confer privately with counsel.) *disapp'd* on other grounds, *Franquiz v. State*, 682 So. 2d 536 (Fla. 1996).

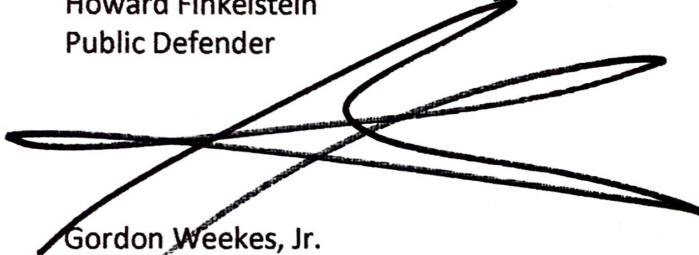
We acknowledge that courts have been accepting remote negotiated pleas. We believe that the problems with remote pleas can be addressed by the court's colloquy of defendants regarding limited communications with counsel during the plea and affirming the defendant's ability to request more time to speak to counsel.

We are, however, unable to waive this critical constitutional right for evidentiary hearings. It does not belong to us as defense counsel. We believe it is incumbent on both the criminal courts and the sheriff to provide means for private and contemporaneous communications between counsel and in-custody clients. We are happy to discuss how to best protect the right to counsel in these difficult circumstances.

Sincerely,

A handwritten signature in black ink, appearing to read "Howard Finkelstein".

Howard Finkelstein
Public Defender

A large, stylized handwritten signature in black ink, appearing to read "Gordon Weekes, Jr.".

Gordon Weekes, Jr.
Executive Chief Assistant Public Defender