



Parole Revocation Defense Unit
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Tina M. Stanford, Esq.
Chairwoman
New York State Board of Parole
1220 Washington Avenue
Albany, New York 12226

Anthony J. Annucci, Esq,
Acting Commissioner
NYS Department of Corrections and Community Supervision
1220 Washington Ave., Bldg. #2
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RE: Providing Accused Parole Violators Video Hearings During COVID Pandemic

Dear Chairwoman Stanford and Acting Commissioner Annucci:

As the COVID pandemic continues to make in-person parole court appearances at local correctional facilities across the state unsafe, we write to demand that DOCCS and the NYS Board of Parole immediately transition to the existing Teams video platform for all preliminary hearings, arraignments and contested hearings. The current telephonic platform is inappropriate for these critical court appearances. A hearing with no video component, during a crucial stage of the parole violation process, presents a serious, ongoing and long-term abridgment of our clients' due process rights. During these proceedings, hearing officers and administrative law judges make substandard factual decisions based on evidence that our clients cannot see, at hearings in which they cannot meaningfully participate.

The initial implementation of the DOCCS' WebEx telephone system was created out of necessity and was meant to serve as a stop gap in the middle of a global health crisis. In the early days of the pandemic, and after the center was forced to close, our clients were imprisoned on Rikers Island with absolutely no information about their parole hearing dates. As was extensively documented in our writs of habeas corpus and in the media, the New York City Department of Corrections ("DOC") facilities were crowded and unsanitary, and the risk of infection was high. At a time when neither

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in-person appearances nor video hearings were possible because of DOCCS' inability to provide a video connection to DOC booths, the telephonic hearing system provided our clients with critical access to the courts. It was never meant to be a permanent alternative to in-person hearings. Now, a year later, DOCCS has still failed to implement a meaningful video platform for most accused parole violators on Rikers Island. There have been numerous inexcusable delays and broken promises as to when our clients would finally have access to video technology. Seven months into the pandemic - from October 13, 2020 to November 4, 2020 - DOCCS finally conducted a select number of parole revocation hearings by Skype, but those hearings ended abruptly once DOC and the Office of Court Administration ("OCA") switched their video platform from Skype to Microsoft Teams on November 9, 2021.

Now that Teams has finally been implemented as a temporary measure until in-person hearings can safely resume, the roll out has been entirely inadequate. Since its implementation on March 1, 2021, DOCCS has held only 2-5% of parole violation hearings on video; an average of 2 video hearings a day in a schedule of 30-40 cases. The few hearings that are calendared to take place by video, appear to be scheduled arbitrarily, thereby depriving all accused persons of the reasonable expectation that their hearings will be conducted in a manner that comports with their constitutional and statutory rights.

Due process demands that parolees receive a fair hearing at every stage of the parole revocation process. Such a hearing provides our clients with an opportunity to be heard and to confront and cross-examine witnesses. See *Coy v. Iowa*, 487 U.S. 1012 (1988). As the U.S. Supreme Court stated in *Morrissey v. Brewer*, 408 U.S. 489 (1972), the minimum requirements of due process include "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)." Confrontation gives "the accused the opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the [fact-finder] in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Barber v. Page*, 390 U.S. 719, 721, 88 S. Ct. 1318, 1320, 20 L. Ed. 2d 255 (1968). In New York, the right of confrontation has been codified into state law. See Executive Law, § 259-I (3)(f)(v).

There is a strong preference by the NY courts for face-to-face confrontation and cross examination. *People ex rel. McGee v. Walters*, 62 N.Y.2d 317 (Ct. App. 1984). Accordingly, New York courts do not take the dispensation of in-person proceedings lightly. In *People v. Wrotten*, 14 N.E.3d 33 (N.Y. 2009), the Court of Appeals articulated that "(l)ive televised testimony is certainly not the equivalent of in-person testimony, and the decision to excuse a witness's presence in the courtroom should be weighed carefully. Televised testimony requires a case-specific finding of necessity; it is an exceptional procedure to be used only in exceptional circumstances." NYC courts and stakeholders appropriately found the public health crisis caused by the deadly COVID 19 crises to be such a circumstance and presumably will return to in-person proceedings as soon as it is safe to do so.

While video proceedings are imperfect and do not provide the same level of due process as in-person hearings, it is an unconscionable stretch to assert that telephonic hearings provide any due process at all. In the absence of the ability to see a witness during telephonic testimony, the trier of fact cannot measure important indicia of credibility such as facial expression and overall demeanor both on direct testimony and during cross examination. In the case of In re Neamiah Harry-Ray, 4 N.Y.S.3d.502 (N.Y.App. Div. 2015), the New York Appellate Division held that a petitioner's request to testify via telephone was properly rejected by the court because witness credibility would be difficult to determine over the phone. The continued use of a telephonic system in lieu of personal appearance is particularly egregious where there is a viable video system already in place.

Even in the context of a prison infraction hearing, the New York Appellate Division has ruled that not allowing the accused an opportunity to view evidence against them violates due process. In Matter of Wyche v. Coughlin, 191 A.D.2nd 945 (N.Y. App.Div. 1993) the court found a Hearing Officer's denial of petitioner's¹ request to allow him or his employee assistant to view a videotape observed by the hearing officer off the record, and referred to by the officer on the record, a "denial of due process."

Without a visual component, the accused sits through their telephonic hearing blindfolded to the evidence against them. Essentially, our clients are jailed and sent to NYS prisons without ever having seen the documentary, photographic, and/or video evidence against them. Moreover, there are serious evidentiary problems with in-court identification by witnesses, such as suggestive photo show-up testimony to identify the accused. Furthermore, the lack of accountability inherent to telephonic hearings leads to concerns including the inability to confirm a witness' true identity, coaching by prosecutors, and interference by outside parties during the hearing.

For the reasons stated, telephonic hearings are problematic and inhumane. Our clients are completely invisible, sitting alone in unclean jail phone booths during their hearings. They cannot see the judges and the hearing officers who decide their fate, the parole revocation specialists and parole officers who prosecute them, or the witnesses who testify against them. Furthermore, our clients are deprived of the right to view the body language and demeanor of testifying witnesses, view evidence entered against them, and are unable to see or speak privately with their attorney in a confidential setting. In order to provide our clients, the fair hearings to which they are entitled, DOCCS and the Parole Board must hold all preliminary hearings, arraignments and contested hearings on the Teams video platform until such time as it is safe to return to court.

Thank you,

¹ The petitioner in this case was an inmate serving a sentence in a NYS DOCCS facility and was contesting charges in a disciplinary infraction hearing.

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Enclosure

CC: Rhonda Tomlinson, *Chief, NYS Parole Board Adjudication Bureau*

Timothy O'Brien, Director of Operations, Community Supervision, NYS Department of Corrections and Community Supervision

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