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COVID-19 Jail Restrictions and Access to Counsel

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In response to COVID-19 outbreaks in their facilities, a number of sheriffs around the state have taken steps in recent months to regulate access to detainees in county jails more closely. These restrictions on in-person visitation in some places have extended to defense attorneys. As a result, some attorneys may have to speak with clients by way of telephone or video kiosks, which might not allow for the sort of confidential communications to which they are accustomed. In some locations, attorneys can still visit their clients, but doing so may be unsafe if visitation rooms do not allow for effective socially distancing.

Many attorneys have expressed concerns about their ability to effectively communicate with their clients in jail during the pandemic. Courts too have recognized that the pandemic has interfered with the ability of attorneys to interact with their clients, particularly when they are in custody, and that COVID-related restrictions on access may take on a constitutional dimension given the essential role defense attorneys play in the criminal process.[1] The following discussion explores the legal principles governing attorney access to clients and ways that attorneys can raise concerns.

Right to Meaningful Access to Counsel and Confidentiality

A criminal defendant's Sixth Amendment right to counsel and "right to communicate with counsel . . . necessarily includes the right of access to them."[2] This right of access is also guaranteed by the Fourteenth Amendment.[3] The U.S. Supreme Court has gone so far as to say

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1. *United States v. Davis*, 449 F. Supp. 3d 532, 540–41 (D. Md. 2020) (observing that "[t]he disruption to the attorney-client relationship caused by this public health crisis likely will have broader implications for the Court and the administration of justice").

2. *State v. Hill*, 277 N.C. 547, 552 (1971); *cf. Geders v. United States*, 425 U.S. 80, 91 (1976) (holding Sixth Amendment was implicated where defendant was prevented "from consulting with his attorney . . . when an accused would normally confer with counsel").

3. *Procunier v. Martinez*, 416 U.S. 396, 419 (1974) ("The constitutional guarantee of due process of law has as a corollary the requirement that prisoners be afforded access to the courts . . . [and] a reasonable opportunity to seek and receive the assistance of attorneys."), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401 (1989); *In re Oliver*, 333 U.S. 257, 273 (1948) (finding due process violation because,

that "to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself."[4] To give effect to this right of access, jails must provide "a reasonable opportunity to seek and receive the assistance of attorneys, and . . . practices that unjustifiably obstruct the availability of professional representation to inmates are invalid."[5]

These principles do not mean that jail officials must allow unfettered access to people in custody. They "may regulate contact with attorneys to a point—to keep staff and detainees safe."[6] Such regulations must be "reasonably necessary to 'safeguard[ ] institutional security,'" and officials must consider whether reasonable alternatives exist that "would safeguard the detainees' constitutional rights . . . without impairing . . . institutional concerns."[7] Officials must be careful not to limit the opportunities of detainees to consult with their counsel any more than is necessary to protect important institutional interests.[8]

The case law indicates that courts will order officials to broaden attorney access to detainees where circumstances indicate that entry to, or the ability to meet confidentially within, a jail has been unreasonably restricted.[9] Courts will likewise strike down jail regulations that inhibit access to counsel as violative of the Sixth Amendment where "obvious, easy alternatives" exist.[10]

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among other reasons, the defendant's lawyer "was denied an opportunity to see and confer with him" while the defendant was in custody before trial).

4. *Maine v. Moulton*, 474 U.S. 159, 170 (1985); *cf. Bell v. Wolfish*, 441 U.S. 520, 528–29 & n.10, 563 (1979) (reversing much of the injunctive relief granted by the lower courts but not disturbing injunctions entered against practices that unreasonably burdened the right to attorney consultation within detention facility).

5. *Watson v. Daniels*, No. 1:19CV249, 2019 WL 7863092, at *7 (M.D.N.C. Dec. 3, 2019) (citations omitted).

6. *J.B. v. Onondaga Cty.*, 401 F. Supp. 3d 320, 336 (N.D.N.Y. 2019).

7. *Id.* (quoting *Bell*, 441 U.S. at 547; *Benjamin v. Fraser*, 264 F.3d 175, 187 (2d. Cir. 2001)).

8. *See, e.g.*, *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1052 (8th Cir. 1989) (finding that the "limited opportunity to consult with counsel [was] . . . inadequately justified" and violated due process where jail limited the number of detainees' outgoing calls to attorneys and counted calls even "where the attorney was not reached"); *Cobb v. Aytch*, 643 F.2d 946, 957 (3d Cir. 1981) (stating "pretrial detainees have a constitutionally protected right to the effective assistance of counsel" that can be infringed by jail transfers that "interfere[ ] with their access to counsel").

9. *See, e.g.*, *Wolfish v. Levi*, 573 F.2d 118, 133 (2d Cir. 1978) (affirming order directing custodial facility to expand attorney visitation hours from two to twelve hours a day where "access to legal counsel was often severely constrained"); *United States v. Whitehorn*, 710 F. Supp. 803, 815 n.38 (D.D.C. 1989) (noting that court's previous order directed that "attorneys be allowed visits at the jail; [and] that all meetings with counsel be private"); *Nicholson v. Choctaw Cty.*, 498 F. Supp. 295, 297, 310, 315 (S.D. Ala. 1980) (ordering sheriff to "permit attorneys to visit jail at any reasonable time" and afford detainees "a reasonable degree of privacy" to meet with them; visitation restrictions violated detainees' Sixth Amendment rights and "plaintiffs [were] prohibited from effectively preparing for trial").

10. *See, e.g.*, *Cty. of Nevada v. Superior Court*, 236 Cal. App. 4th 1001, 1008–11 (2015) (citing *Turner v. Safley*, 482 U.S. 78, 90–91 (1987)); *Brown v. Madison Cty. Ill.*, No. 3:04-CV-824-MJR, 2008 WL 2625912, at *3–4 & n.4 (S.D. Ill. June 27, 2008) (granting detainee's motion for unmonitored phone calls with attorney and rejecting jail's security concerns, reasoning that if jail was genuinely "concerned about ensuring [detainee was] actually speaking with his attorney, there are certainly less drastic means of satisfying this interest").

These and other decisions make clear that jail regulations must account for detainees' rights to meaningful and confidential access to counsel.[11]

Impact of Pandemic

The above principles, requiring meaningful and confidential access to counsel, remain in force during the pandemic. Courts have recognized the strain COVID-related restrictions have placed on access to counsel and have enjoined those that unreasonably interfere with this right.[12]

In one such case, *Banks v. Booth*, pretrial detainees in the District of Columbia filed a class action suit that, among other things, challenged measures that deprived them of access to telephones and confidential communication with their attorneys while in isolation.[13] In response, the court held that it could "not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration,"[14] and it granted a restraining order that directed the facility to provide "access to confidential, unmoored legal calls of a duration sufficient to discuss legal matters."[15]

Other courts have been more skeptical about the adequacy of telephonic and even video communication. In *United States v. Davis*, the court found phones and other pandemic "alternatives to in-person meetings," such as FaceTime and Zoom, to be "no substitute for a face-to-face, in-person, contact meeting between an attorney and his client."[16] The court was considering and ultimately denied a government motion for pretrial detention, finding that the pandemic and its resulting restrictions on jail access continued to "pose myriad challenges for the lawyer, the defendant, and the attorney-client relationship."[17]

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11. *See Weatherford v. Bursey*, 429 U.S. 545, 554 n.4 (1977) (noting that government conceded that "the Sixth Amendment's assistance-of-counsel guarantee can be meaningfully implemented only if a criminal defendant knows that his communications with his attorney are private" (citation omitted)); *Coplon v. United States*, 191 F.2d 749, 758 (D.C. Cir. 1951) (stating that the "right of an accused, confined in jail . . . , to have an opportunity to consult freely with his counsel without any third person, . . . is one of the fundamental rights guaranteed by the American criminal law"); *United States v. Yandell*, No. 2:19-CR-00107-KJM, 2020 WL 3858599, at *5 (E.D. Cal. July 8, 2020) (finding Sixth Amendment is satisfied where "defendants can meet with counsel in a meaningful way when scheduled, albeit with occasional delays"; jail not required to enlarge visitation booth to allow defendants to meet with multiple attorneys and investigators at same time).

12. *See, e.g., Criswell v. Boudreaux*, No. 1:20-cv-01048-DAD-SAB, 2020 WL 5235675, at *21–22 (E.D. Cal. Sept. 2, 2020) (concluding that detainees at county jail had "shown a likelihood of success on the merits of their Sixth Amendment claim" where they "submitted evidence that [sheriff's] new policy with respect to legal visits, as implemented, has prevented inmates from meeting with their criminal defense counsel").

13. No. CV 20-849(CKK), 2020 WL 1914896, at *10 (D.D.C. Apr. 19, 2020).

14. *Id.* at *12 (quoting *Brown v. Plata*, 563 U.S. 493, 511 (2011)).

15. *Id.* at *14–15.

16. *United States v. Davis*, 449 F. Supp. 3d 532, 541 (D. Md. 2020).

17. *Id.* at 541.

Remedies

Defense attorneys who believe that they face unreasonable obstacles to conferring with a client in jail should begin by bringing their concerns to jail officials. They might also bring their concerns to the district attorney. While district attorneys do not have direct authority over jails, they have an interest in ensuring that defendants receive due process, which is jeopardized when a defendant is denied an opportunity to see and confer with counsel while in pretrial detention.[18]

If these informal efforts are insufficient, defense counsel can file a motion with the presiding judge in the case to obtain meaningful access to their client. G.S. 15A-952(a) permits a motion for "[a]ny . . . request which is capable of being determined without trial of the general issue." Trial judges in North Carolina have at times exercised their authority to ensure a defendant's access to counsel while in custody.[19]

If access remains inadequate, the resulting situation may provide additional grounds to seek the defendant's pretrial release from custody.[20] Such arguments can be brought before the court by way of a motion to unsecure or modify the bond or through state habeas proceedings.[21]

If the obstacles to access affect multiple detainees in a facility, a public defender's office may be able to file a motion with the superior court on behalf of the office's clients, asking the court to address policies or practices that unreasonably interfere with attorneys' ability to engage in meaningful, private, and effective communication with their clients.[22]

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18. *See* cases cited *supra* note 3.

19. *See, e.g.*, *State v. Eason*, 328 N.C. 409, 423 (1991) (noting that "the trial court specifically ordered the sheriff to give the defendant's attorneys free access to the defendant 'to allow him to assist them in the preparation of their case'"); *see also State v. Douglas*, No. 44538, 2018 WL 330142, at *1–4 (Idaho Ct. App. Jan. 9, 2018) (unpublished) (discussing defendant's "motion to compel access to counsel," in which he moved for permission to call attorneys outside his one hour of free time; appellate court found no violation of right by trial court's denial of motion where record showed defendant regularly called attorney and also had time to make 408 calls to people other than his attorneys during free time).

20. *See Davis*, 449 F. Supp. 3d 532 (denying government's request for pretrial detention and ordering release of defendant from custody subject to conditions in order, including that defendant reside and remain at girlfriend's home except for approved activities such as court appearances and meetings with counsel; court relied on, among other reasons, pandemic's deleterious effect on defendant's access to counsel while in pretrial detention); G.S. 15A-534(c) (permitting court to consider "any other evidence relevant to the issue of pretrial release"); *see also* Ian A. Mance, *COVID-19 and Bond Modifications* (forthcoming 2020).

21. *See* G.S. 15A-547 (stating that "[n]othing in this Article [Art. 26, Bail] is intended to abridge the right of habeas corpus"); *State v. McCloud*, 276 N.C. 518, 532 (1970) (noting ability of defendant to have challenged bail determination through a "motion to reduce bond or exercise [of the] remedy of habeas corpus"); *see also* Ian A. Mance, *Securing the Release of People in Custody in North Carolina During the COVID-19 Pandemic*, Administration of Justice Bulletin No. 2020/02 at 5–6 (June 2020) (discussing state habeas as a mechanism for relief for people in custody affected by COVID-19).

22. *See, e.g.*, *Banks v. Booth*, No. CV 20-849(CKK), 2020 WL 1914896, at *10, *14–15 (D.D.C. Apr. 19, 2020) (granting temporary injunction in case brought by public defender service on behalf of inmates in Washington, D.C. detention facilities in response to motion alleging that the COVID-19 pandemic interfered with detainees' ability to access and confer confidentially with counsel); *Brown v. Incarcerated Pub. Def. Clients Div. 3*, 655 S.E.2d 704, 705–06 (Ga. App. 2007) (affirming such an order and holding public defender had standing to file motion to compel sheriff to provide meaningful access to counsel, and court had inherent authority to enter order, where it was undisputed that the public defender represented people in the jail with pending proceedings before the court and the sheriff did "not dispute that the superior court had personal jurisdiction over him" and was "given adequate notice

These concerns are more likely to result in a remedy if they are brought to the court's attention as they arise.[23] After a defendant has been convicted, a court analyzing preconviction access-to-counsel issues will require a demonstration of prejudice, which can be a difficult standard to meet.[24]

and opportunity to be heard"); *see also Criswell v. Boudreaux*, No. 1:20-cv-01048-DAD-SAB, 2020 WL 5235675, at *26–27 (E.D. Cal. Sept. 2, 2020) (granting provisional class certification and temporary restraining order assuring confidential video communication with counsel, among other relief).

23. *Benjamin v. Fraser*, 264 F.3d 175, 186 & n.9 (2d Cir. 2001) (stating that an incarcerated person does not need to show an actual injury to have standing to challenge policies interfering with access to counsel when "the remedy sought is the removal of unjustifiable interference with attorney-client communication"); *see also Covino v. Vermont Dep't of Corr.*, 933 F.2d 128, 130 (2d Cir. 1991) (remanding to the district court to determine whether pretrial detainee's transfer to segregation unit "unconstitutionally impaired [his] sixth amendment right of access to his trial counsel," citing detainee's status as a pretrial detainee).

24. *Ervin v. Busby*, 992 F.2d 147, 150 (8th Cir. 1993) (applying standard); *see also State v. Tunstall*, 334 N.C. 320, 329 (1993) ("This Court has held that the constitutional requirement of a 'reasonable time' to prepare mandates 'no set length of time for . . . preparation'" (quoting *State v. Harris*, 290 N.C. 681, 687 (1976)). A prisoner's complaint about not having adequate access to, and time to meet with, their attorney to meaningfully prepare for their defense is distinguishable from an actual or constructive denial of counsel. *See Perry v. Leeke*, 488 U.S. 272, 280 (1989) (stating that "[a]ctual or constructive denial of the assistance of counsel altogether . . . is not subject to . . . prejudice analysis" (citation and quotation omitted)).