

April 24, 2020

Clerk of Supreme Court  
Attn: Deputy Clerk-Rules  
P.O. Box 1688  
Madison, WI 53701-1688

Submitted via e-mail to: [clerk@wicourts.gov](mailto:clerk@wicourts.gov)

RE: May 1 Public Hearing

We write as trial judges to express our specific concerns regarding the interim rule suspending statutory time limits for non-criminal jury trials and our general concerns regarding the judiciary's response to the COVID-19 pandemic.

We raise two specific concerns regarding the proposed interim rule, one focused on the specific liberty interests involved with civil commitment proceedings and the other focused on the withdrawal of local decision-making.

First, we are concerned that the indefinite suspension of jury trials in Chapter 51 commitment proceedings may result in certain individuals being involuntarily detained in a locked facility for months based solely on a probable cause finding. The only recourse a subject of these proceedings would have to obtain a timely resolution of the commitment proceeding would be to waive their right to a jury trial. The Supreme Court of Wisconsin has already determined that these commitment proceedings implicate significant liberty interests that require due process protection. *In re Commitment of J.W.K.*, 2019 WI 54, ¶ 16, 386 Wis. 2d 672. Yet, if the Court proceeds to adopt this interim rule, any person who feels aggrieved by facing the choice of indefinite detention or a waiver of the jury trial right would ultimately have that grievance adjudicated by the Supreme Court of Wisconsin, the very body that forced the choice. We agree with Justice Rebecca Grassl Bradley that the Court should be very cautious and circumspect about taking actions for which aggrieved citizens may have no meaningful review.

Our concern about Chapter 51 commitment proceedings is compounded by the absence of any meaningful off-ramp for a subject of the proceedings, his or her counsel, or the circuit judge assigned to the proceeding. Which brings us to our second concern – the withdrawal of local decision-making. The separate writings attached to the Court's March 31, 2020 order in this rule proceeding actually highlight the importance of maintaining local discretion. Chief Justice Roggensack raised a number of logistical questions in her concurrence, noting that jury trials are complicated, people-intensive proceedings. Those questions can only be answered on a case-by-case, judge-by-judge, venue-by-venue analysis. Justice Hagedorn noted in his concurrence that "as soon as courts are able to safely conduct jury trials, they should do so." But Justice Hagedorn will not have his way if the Court adopts the interim rule. It cannot be disputed that courts will be able to safely conduct jury trials on different timeframes. The issues that will drive whether a jury trial can safely be conducted in Bayfield or Ashland County may be very different than the issues faced in Eau Claire or Chippewa County, or Adams or Marquette County, or Racine or Kenosha County. If a judge is able to make arrangements to safely conduct a jury trial, he or she should

not be prohibited from doing so until such time as the Supreme Court of Wisconsin determines that such trials can safely be held in every court all across the state. But under the current set of COVID-19-related orders issued by this Court, that is the state of the judiciary in Wisconsin.

Which leads to our general concerns. We understand and appreciate that the Supreme Court is acting to protect the health of everyone, including judges, court staff, attorneys, litigants, witnesses, jurors and observers. We also appreciate that the temporary suspension of in-person hearings through April 30, 2020 provided cover to circuit judges who may initially have been reluctant to act individually to suspend or delay proceedings. It provided us with the opportunity to work with local stakeholders to plan for the reopening of our courtrooms by finding the appropriate balance, based on local infrastructure and conditions, between ensuring public safety and ensuring meaningful access to justice. However, we are concerned that the indefinite suspension of in-person hearings interferes with our ability to strike that balance.

We are intimately familiar with the infrastructure, unique to each court and county, in which we work everyday. We are also familiar with the existing and evolving conditions in the communities in which we work and live. We believe that we are in the best position to find the right balance.

Moreover, the indefinite extension is making it very difficult to schedule, and reschedule, hearings that are most appropriately handled in-person – such as hearings where we need to make credibility determinations and where exhibits need to be presented. We all have busy court calendars and need to schedule hearings as efficiently as possible in order to ensure timely justice and to maximize limited resources, including limited time. The suspension, and especially its indefinite duration, are adversely affecting our ability to do so.

We appreciate the Court's efforts to expand resources available during this crisis, including the use of the Zoom meeting platform. Zoom has been a valuable tool and has allowed us to conduct hearings that would otherwise need to be rescheduled. It has proven to be an efficient way to handle many, especially routine, hearings. However, it limits our ability to perform some of our most important duties: to *effectively* engage criminal defendants, ensure their rights are protected, hold them accountable at sentencing and make sure that they and their victims leave the courtroom knowing they were given the opportunity to be heard in a meaningful and respectful way. Indeed, the astute questions posed by Chief Justice Roggensack in her concurrence highlighting concerns regarding remotely-held jury trials also need to be answered for many other remote hearings. Who is to assist parties appearing remotely who are “not technologically sophisticated enough to do so” themselves? (¶13). “What of the prosecution's and the defendant's rights to meaningfully observe and participate? What about the role of the judge to so observe and ensure the integrity of all of the proceedings?” (¶14). The continued suspension of most in-person hearings and the tacit endorsement of holding them remotely presents each circuit judge with an unnecessary dilemma: Compromise our duty under the federal and state constitutions to protect rights by using remote hearings or delay justice and adjourn hearings indefinitely. There is a better way – letting us decide when and how to conduct in-person hearings.

There is no question, at all, that the Court's recent actions are rooted in a sincere desire to protect public health and we thank the Court for its leadership. All we are asking is for the Court to return authority to circuit judges so that we can plan and protect based on local realities. Like our colleagues across the state, we diligently and soberly exercise broad authority on a daily basis in cases that affect many people. We believe that we can do so during this pandemic as well.

Thank you for your consideration.

The following circuit judges have authorized their inclusion as signatories:

Dan Wood, Adams County

Steve Gibbs, Chippewa County

Paul Curran, Juneau County

Michael Screnock, Sauk County

Patricia Barrett, Sauk County

John Yackel, Sawyer County

Michael Aprahamian, Waukesha County

Paul Bugenhagen, Waukesha County

Maria Lazar, Waukesha County

Michael Maxwell, Waukesha County

Brad Schimel, Waukesha County