



Wisconsin State Public Defender

17 S. Fairchild St. - 5th Floor
PO Box 7923 Madison, WI 53707-7923
Office Number: 608-266-0087 / Fax Number: 608-267-0584
www.wispd.org

Kelli S. Thompson
State Public Defender

Jon Padgham
Deputy State
Public Defender

January 4, 2022

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

Re: Rule Petition 21-03, In the Matter of Amending Wis. Stat. §§ 753.24, 753.26, 757.12, 757.14, and 757.70 relating to the location of court.

Honorable Members of the Supreme Court,

Thank you for the opportunity to submit comments on Supreme Court Rule Petition 21-03, relating to the location of court proceedings.

The State Public Defender's Office (SPD) appreciated the opportunity to provide information on these provisions when the court considered the original petition in February 2021. Petition 21-03 focuses on the location of court items only from that petition, separating out the provisions related to videoconferencing. Despite the expansion of the use of videoconferencing, a significant number of proceedings will continue to take place in person. Having a fixed courthouse location in the municipality designated as the county seat is important to ensure that constitutional provisions related to a public trial and statutory and supreme court rule language carefully crafted to account for those constitutional provisions can be carried out. Conducting in-person court appearances at a location other than the designated courthouse must be because of exceptional circumstances and used only in times of true emergency.

The SPD appreciates that some of the concerns related to the original location of court petition were taken into account in the drafting of petition 21-03. That said, there remain several concerns with the language that appears in both versions of this petition.

The original committee convened to draft petition 20-09 incorporated many changes suggested by the State Public Defender's Office into the proposed modifications linked to the location of court and court records. While our agency appreciates this consideration and acknowledges a good faith effort by the committee to address concerns raised by our agency, we still have concerns in three important areas.

First, vesting each judge with the authority to determine the location of court could result in varying modes of court from jurisdiction to jurisdiction, or even within a single jurisdiction from courtroom to courtroom. Disparate results for defendants in turn generates equal protection concerns. The original committee responded to these concerns by making clear that the chief judge retained authority to determine the location of court. Petition 21-03 in part addresses our original concern but adds a new concern by no longer requiring Chief Judge approval to move the location of court. The new language also relies on current videoconferencing statutes ss. 885.50-64 but as that language may be the subject of a future rules petition, it is difficult to respond to the protections the current statute may offer if it is soon to be changed. In particular, the mechanism by which a defendant would challenge a court's decision to hold remote court is not clear.

If a criminal defendant challenges a court’s decision to hold video court in a felony case for plea or sentencing, it would appear that the modified Wis. Stat. §753.24(2m) would direct us to Wis. Stat. § 885.60. In turn, Wis. Stat. § 885.60 (if modified) does not make clear how the court should handle the objection. The proposed modification of Wis. Stat. § 885.60[1] sets forth two standards, one applying to a defendant’s remote appearance and a second applying to a witness’s remote appearance. But, Wis. Stat. § 885.60 does not set forth guidance regarding a *judge’s* remote appearance. Of course, the law is clear: a judge cannot appear by videoconferencing during plea and sentencing when the defendant objects. *See e.g. State v. Anderson*, 2017 WI App 17, ¶ 29, 374 Wis. 2d 372, 394, 896 N.W.2d 364, 374 (“Thus pursuant to § 971.04 and *Soto*, Anderson had a statutory right to be present in person for his plea hearing, in the same courtroom as the presiding judge.”); *State v. Soto*, 2012 WI 93, ¶ 34, 343 Wis. 2d 43, 61-62, 817 N.W.2d 848, 857 (“we conclude that Soto had a statutory right to be present in the same courtroom as the presiding judge when he pled guilty and the judge accepted his plea”). As it is written now, the amendment does not make this clear.

Additionally, if a judge decides to appear remotely, and that decision is later overturned, the proposed modification fails to outline the applicable remedy.

Turning to our second concern, an outright repeal of Wis. Stat. § 753.26 (Office and records to be kept at county seat) goes too far. The committee agreed to modify Wis. Stat. § 753.26, requiring that records be *available* at the county seat. Modification of outdated language is appropriate. Repeal is not. There is value to retaining Wis. Stat. § 753.26 in a modified form, rather than repealing it altogether, because it is important to protect local access to circuit court records at the county seat.

Finally, the judge’s authority to adjourn court to another location must be strictly curtailed. The proposed amendment states:

SECTION 5. Section 757.12 of the statutes is amended to read:

757.12 Adjournment to another location place. Whenever it is deemed unsafe or inexpedient, by reason of war, pestilence, public calamity, or other factors limiting or preventing access to the courthouse to hold any court at the time and place appointed therefor the justices or judges of the court may appoint any other place within the same county and any other time for holding court, the judge may order court to be held at an alternative location in Wisconsin, including in another county, on a temporary basis. Every such order shall be made in writing. Notice of such orders shall be provided by email to the Chief Justice, the Chief Judge of the judicial district, the Director of State Courts Office, the State Bar of Wisconsin, and the local bar association. Any such orders shall be placed on the Wisconsin State Courts website, the county website, and the door of the courthouse if practicable. All court proceedings moved to another location shall have the same force and effect as if held at the original location. Bench warrants shall not be issued for failure to appear without a finding that the party received notice of the date, time and location of the proceeding. All proceedings in the court may be continued at adjourned times and places and be of the same force and effect as if the court had continued its sessions at 3 the place it was held before the adjournment. Every such appointment shall be made by an order in writing, signed by the justices or judges making the appointment, and shall be published as a class 1 notice, under ch. 985, or in such other manner as is required in the order.

The Public Defender’s Office appreciates the requirement that the adjournment must be temporary, and that a court must find that the defendant received notice of the adjourned location, prior to issuing a

bench warrant. However, the proposal allows for temporary locations based on “other factors limiting or preventing access to the courthouse.” Disparate results, even within the same county, may result when each individual judge is permitted to change the location of court, and approval of the chief judge is not necessary. The 21-03 petition language would create the possibility that in the middle of a courthouse renovation in a multiple judge county, that one judge may feel they can remain in the courthouse while another feels they must move to an alternative location. For a party that may have appearances in multiple courtrooms in one day, this presents a logistical challenge that effectively bars access to the courthouse.

Assuming that Public Defender clients would be expected to appear in an alternate location after having received notice of the same, the reality is that many indigent defendants lack the means to travel out-of-county or otherwise access technology necessary to appear remotely. If a calamity—such as civil unrest or a flood—affects an area to the extent that the courthouse must be closed, one may logically conclude that a client who lives in and around the courthouse would likewise be affected. That same client may not have the means to pack up and relocate, as a judge would.

We appreciate that some of our concerns related to the original petition have been addressed in petition 21-03 but respectfully request that the issues above be taken into account as the honorable members of this court consider the petition.

Sincerely,

/s/

Kelli Thompson
State Public Defender