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Clerk of the Supreme Court
PO Box 1688
Madison, WI 53701
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Re: Supreme Court Rule Petition 20-09

Dear Honorable Justices of the Supreme Court:

We write to share our concerns about Supreme Court Rule Petition 20-09, regarding videoconferencing in the Wisconsin state courts.

The pandemic has taught that videoconferencing can make some functions of the courts more efficient for the courts and practitioners. Its use in pre-trial conferences, in both civil and criminal cases, is an example. So, too, has been its use in status conferences in criminal cases. However, its employ in some areas that affect criminal proceedings, as suggested by Petition 20-09, is problematic and untested.

Many of the changes proposed in Petition 20-09 are of questionable constitutional validity and will likely spur challenges that will require resolution by this Court and the U.S. Supreme Court. In addition, many of the proposed changes would abridge, enlarge, or modify (but mostly abridge) the substantive rights of litigants, something that cannot occur under this Court's rulemaking authority. *See* WIS. STAT. § 751.12(1). Many of these issues already have been noted by other commenters. Below, we highlight a handful of the issues that we perceive.

The right of the accused to be physically present.

Sections 28 and 29 of the Petition propose amendments to WIS. STAT. § 971.04, which protects a criminal defendant's right to be physically present during critical stages of the proceedings. The proposed amendments would deprive criminal defendants of their substantive statutory and constitutional right to be present at arraignment and at a preliminary hearing. *See, e.g., Leroux v. State*, 58 Wis. 2d 671, 689 (1973) (recognizing the right guaranteed by the Wisconsin and U.S. Constitutions "to be present at proceedings before trial at which important steps in a criminal prosecution are often taken.").

The argument might be made that one is virtually "present" at a Zoom hearing, but at the time that the statute was written, such technology wasn't extant. Telephones were, however, and the same argument could have been made with respect to them—but wasn't, and telephone arraignments have not been held for good reason. At critical stages of the proceedings, the judge must make determinations about whether the accused understands the nature of the proceedings and the charges. Critical stages also often occasion waivers of important rights for which the judge must, again, insure that the accused is acting knowingly and intelligently and is not under the influence of alcohol, drugs (prescribed or not) or people acting improperly. This requires the judge's observation and circumspection. Many is the time that a bailiff or defense counsel has alerted a judge to a litigant's impaired state. This can't occur when one is appearing remotely from the court and one's own counsel.

The right of the accused to confront witnesses.

Sections 18, 23, 24, and 25 of the Petition propose amendments to WIS. STAT. §§ 885.56(1) and 885.60(2), which protect a criminal defendant's right to confront and cross-examine witnesses in open court. The current statutory scheme preserves the right to confrontation by allowing a criminal defendant to exercise his or her right to the physical appearance of a witness in a trial, evidentiary hearing, or sentencing hearing. It requires the court to exercise its discretion when ruling on an objection to the remote appearance of a witness during other, noncritical hearings, and it requires the court to consider, among other things, whether the proponent of the witness made a diligent effort to procure the witness's physical appearance. These statutory requirements not only bestow substantive rights upon litigants, they act to protect constitutional rights, including the right to face-to-face confrontation of witnesses, the right to effective counsel, and the right to a fair trial. *See, e.g., Coy v. Iowa*, 487 U.S. 1012, 1016 (1988) ("[T]he

Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact."). The Comment to the 2008 rule confirms that § 885.60(2)(d) is intended to preserve these constitutional rights.

One might argue that Zoom is "face to face." But when the United States and the Wisconsin Constitutions were drafted and approved, "face to face" meant "in person." And there is good reason for that: the jurors' abilities to weigh the credibility of witnesses is dependent upon the ability of each to observe and assess the witness, including the witness's body language. Moreover, the witness's appearance in the courtroom provides assurance that the witness is not being coached by another, unseen, in the room or by electronic device. In-person testimony, where a witness is aware that the jury is observing him or her, also inhibits the impulse, if not plan, to lie. Too, the ability of the judge to control the unresponsive or combative witness is diminished when the witness is elsewhere.

The proposed amendments would deprive criminal defendants of these substantive statutory and constitutional rights, allowing courts the discretion to allow the remote appearance of witnesses at trial and during other critical proceedings, regardless of the defendant's objection, and regardless whether the proponent of the witness made any effort to procure the witness's physical appearance.[1] The conflict between the proposed amendments and the Wisconsin and U.S. Constitutions is clear.

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[1] The Petition and Supporting Memorandum both omit the key language from § 885.60(2)(d). That subsection currently reads in full:

> If an objection is made by the defendant or respondent in a matter listed in sub. (1), regarding any proceeding where he or she is entitled to be physically present in the courtroom, the court shall sustain the objection. For all other proceedings in a matter listed in. sub. (1), the court shall determine the objection in the exercise of its discretion under the criteria set forth in s. 885.56.

Because section 25 of the Petition proposes *repealing* § 885.60(2)(d), the proposed change would have the effect of deleting all of the language quoted above, not just the language quoted in the Petition.

The right to a public trial.

Finally, sections 2 and 6 of the Petition propose amendments to WIS. STAT. §§ 753.24 and 757.14, which provide for public court appearances. § 757.14 codifies the constitutional right to a public trial, a right held not only by the litigants but by the public itself. *See Weaver v. Massachusetts*, 137 S. Ct. 1899, 1909–10 (2017).

The proposed amendments would appear to allow courts unfettered discretion to hold proceedings using telephone or videoconferencing technology and to allow public access to court hearings solely by electronic means, even when the court proceedings are themselves occurring within the courtroom. This might be less objectionable were high-quality internet connections ubiquitous. However, there are many areas in Wisconsin where the quality of internet connection is low or non-existent; and even where quality is good, its access is not easily attainable by those of low income—the very people whose family members are too often the subject of criminal complaints. These amendments would deprive criminal defendants of the right to be physically present during critical court proceedings and the right to confront witnesses, as discussed above. They would also deprive the public of the right to observe court proceedings. In sum, these amendments would affect the basic framework of the justice system, amounting to a structural error that cannot be deemed harmless as a matter of law. *See id.* at 1907.

It appears that only one criminal defense practitioner and only one civil practitioner were part of the group that discussed and, eventually, recommended these changes. The use of the internet to hold court proceedings has been a learning experience for the entire bar, as it has been for the judiciary. But experiences have differed and two practitioners do not adequately represent those experiences. Moreover, a proposal as far reaching as this one deserves Beta testing. The use of video depositions has enlightened how witnesses can be—and have been—coached by others in the room and by electronic devices. Study must be given to whether this can be effectively prevented at trials before—not after—changes are adopted.

Thank you for the opportunity to present these comments for your consideration.

Cordially,

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