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Clerk of the Supreme Court
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Honorable Justices of the Supreme Court,

Thank you for the opportunity to submit comments on Supreme Court Rule Petition 20-09, regarding the use of videoconferencing technology in court proceedings.

The State Public Defender's Office (SPD) appreciated the opportunity to participate on the Director of State Courts' workgroup on this issue. In general, SPD sees value in the expanded use of videoconferencing technology. However, that expanded use must be accompanied by strict limitations based on the defendant's federal and state constitutional rights ensuring the rights to confront witnesses, to a public trial, to due process, equal protection and the right to effective assistance of counsel. Specifically, the Sixth Amendment to the United States Constitution provides confrontation rights, generally, but that right is made even more clear2 in our Wisconsin Constitution, Article 1, Section 7, stating that the accused shall have the right to "...to meet the witnesses face to face...".

As we all know, the constitution has not been paused during the pandemic. The judicial system has made accommodations to allow cases to move forward while attempting to protect the health of litigants, counsel, and court personnel. We tested the usefulness of videoconferencing in court proceedings in a way that has not been done before. One significant concern we have is that access to technology and reliable telecommunications such as broadband is not equal statewide at either the individual or county level. From the SPD perspective, the value of videoconferencing is in allowing virtual court hearings for ministerial tasks such as scheduling and status conferences. And while it has been used beyond that for more critical proceedings in the course of the pandemic, this is not a practice which should continue in a post-pandemic world when the defendant objects.

In general, any expansion on the use of videoconferencing technology in critical proceedings must be accompanied with a provision allowing the defendant the unqualified right to demand that the proceeding be held in person. The proposed modification falls short, eliminating the unqualified right of a defendant to opt-out of the use of videoconferencing during critical proceedings, even at a jury trial in a felony case. At a minimum the proposed modification creates confusion and at its worst could be interpreted in ways that would run afoul of a defendant's constitutionally-protected rights: two-way video conferencing is in no way

constitutionally equivalent to the face-to-face confrontation envisioned by our federal and state constitutions.

Following are specific comments on language in the petition:

A. Location of court and court records.

The committee 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 committee responded to these concerns by making clear that the chief judge retained authority to determine the location of court, but stronger safeguards are needed. In particular, the mechanism by which a defendant would challenge a court's decision to hold remote court is not clear. Consider the text of the proposed changes:

> **SECTION 1.** SCR 70.19 (3) (c) is amended to read:
> 70.19 (3) (c) Where necessary, establishment of location, days and hours for court operation.
> **SECTION 2.** 753.24 (2m) of the statutes is created to read:
> 753.24 (2m) Court may be held with the judge and any participants appearing from a remote location using telephone or videoconferencing technology subject to Wis. Stat. 885.50-64.
> **SECTION 3.** Comment to 753.24 (2m) of the statutes is created to read:
> Comment, 2020: This does not hinder the ability of the chief judge to determine location pursuant to SCR 70.19(3).

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.

[1] Objections to modification of Chapter 885 are outlined in greater detail below, in subsection B.

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 or other public calamity, ~~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 alternate location, including in another county, on a temporary basis. Every such order shall be made in writing and shall be subject to chief judge approval. Notice of such orders shall be provided by email to 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 does not set any limitation regarding the proximity of the adjourned location to the county seat, such as a requirement that court must be held within a reasonable distance or even within the State of Wisconsin.

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. Finally, permitting the issuance of bench warrants if the client has notice seems to undermine the requirement that the adjournment would be "temporary."

B. Chapter 885 videoconferencing.

The modified text of WIS. CHP. 885 creates a misleading impression that video court is an adequate substitute for in-person hearings, over the objection of the defendant. The following constitutional, statutory, and ethical considerations make clear that a defendant must be permitted to opt out of videoconferencing during critical proceedings.

The defendant's right to effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and art. I, § 7 of the Wisconsin Constitution must permit the defendant to opt out of a videoconferencing appearance, and, must unequivocally allow the defendant to demand that a witness appear personally at an evidentiary hearing. The use of video rather than in-person appearances can negatively affect attorney performance; detract from the lawyer's ability to observe non-verbal cues of the defendant indicating that the defendant had a question or concern; impair communication, in particular, discrete communication between counsel and the defendant; and hinder counsel's ability to adequately cross-examine witnesses.

The defendant's confrontation rights, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and art. art. I, § 7 of the Wisconsin Constitution ("shall enjoy the right . . . to meet the witnesses face to face") must permit the defendant to opt-out of a videoconferencing appearance, and, must permit the defendant to require that a witness appear personally at an evidentiary hearing. Although two-way video conferencing more closely approximates face-to-face confrontation, it is in no way the constitutional equivalent to the confrontation right envisioned by the constitution.

The defendant's due process rights, guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and art. I, § 8 of the Wisconsin Constitution require in-person appearances at any stage in the criminal proceeding that is critical to the outcome if the defendant's presence would influence the fairness of the proceeding. ***United States v. Gagnon***, 470 U.S. 522 (1985).

There are statutory rights[2] guaranteeing the physical presence of a defendant, as well as case law.[3] This much is clear: during a critical proceeding, a defendant retains unqualified authority to opt out of videoconferencing. An amendment suggesting that the decision falls within a judge's discretion misstates the law, and invites confusion.

The ethical requirements of defense counsel, including communication SCR 20:1.4, confidentiality SCR 20:1.6, and competence SCR 20:1.1 may prohibit videoconferencing

[2] One example is WIS. STAT. § 971.04 which is addressed in greater detail below. Also consider WIS. STAT. § 55.10 ("the petitioner shall ensure that the individual sought to be protected attends the hearing on the petition unless, after a personal interview, the guardian ad litem waives the attendance").
[3] ***State v. Anderson***, 2017 WI App 17, ¶ 29, 374 Wis. 2d 372, 394, 896 N.W.2d 364, 374; ***State v. Soto***, 2012 WI 93, ¶ 34, 343 Wis. 2d 43, 61-62, 817 N.W.2d 848, 857

appearances for critical proceedings in some cases. Consider the following example. Assume a judge creates a breakout room for an attorney and her incarcerated client to discuss a confidential matter during a motion hearing. If the incarcerated client is appearing from jail or prison, there is no guarantee that the client's location will facilitate confidential communication. Rather, it is possible that another inmate in an adjoining booth or a correctional officer may be privy to the attorney-client communication by videoconferencing. Even if the attorney travels to the jail to meet with a client in a visiting booth, there is no guarantee to confidentiality. An in-person attorney-client conversation taking place in a visiting booth adjacent to the jail Zoom room could be (and has been) captured by video cameras and transmitted into a public courtroom.

Finally, holding evidentiary hearings by videoconferencing may complicate enforcement of sequestration orders. For example, when witnesses appear remotely, there are no assurances regarding the environment from which the witness testifies. Other people, even other witnesses, may be present unbeknownst to the judge or the parties. Unlike in-person hearings, there is no way to monitor compliance with a sequestration order, especially in a time where court proceedings are broadcast by livestream with no meaningful way to monitor those who view them in real time.

1. A remote appearance of a victim, where the identity of a victim is hidden, does not closely approximate an in-person hearing.

Two statutes make clear that videoconferencing must closely approximate in-person court. The first, WIS. STAT. § 757.14, regarding public sittings, requires a court to allow the public the ability to hear and see all proceedings in a manner as similar as practicable to being present in the courtroom. The second, WIS. STAT. § 885.54, requires videoconferencing technology to allow that remote participants observe other persons present and activities taking place during the proceedings.

Across Wisconsin, some victims have elected to participate in hearings using videoconferencing without identifying themselves or turning on a video camera. The Supporting Memorandum argues that the proposed changes may "alleviate some safety concerns of victims" (p. 4); and may in some ways, enhance the rights of victims (p. 3). To the extent that the changes would permit a victim to appear in this manner for a critical proceeding, the Public Defender's Office opposes this practice. Participants who hide their identities do not appear in a manner that closely approximates an in-person appearance, and violate both WIS. STAT. § 757.14 and WIS. STAT. § 885.54.

2. The proposed modification to WIS. STAT. § 885.60 impermissibly removes the defendant's unqualified right to opt out of videoconferencing, creating confusion.

Under the existing statutory scheme, WIS. STAT. § 885.60(2)(d) requires a court to sustain an objection by a defendant (or respondent in a civil case where a liberty interest is at stake) regarding the use of videoconferencing during any proceeding where the defendant has a right to be physically present, such as a jury trial, an evidentiary hearing, or a motion hearing:

> (d) 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.

The mandatory opt-out provision that exists in WIS. STAT. § 885.60(2)(d) applies when a defendant seeks to appear from a remote location, and, when a defendant objects to the remote appearance of a witness in a trial, evidentiary hearing or sentencing hearing, pursuant to WIS. STAT. §§ 885.60(2)(b), 971.04. The existing rule accurately reflects federal and constitutional law, as well as statutory authority outlining the defendant's right to confrontation and to be physically present. In the end, this is a simple concept backed by longstanding tradition and common sense: during critical proceedings—unless the court accepts a waiver or finds forfeiture by wrongdoing—the defendant has the unqualified right to be in the same physical space as the judge, his counsel and the witnesses.

Further, the Comment to the 2008 rule makes clear that the mandatory opt-out provision was created to preserve these essential rights:

> This section is also intended to preserve constitutional and other rights to confront and effectively cross-examine witnesses. It provides the right to prevent the use of videoconferencing technology to present such adverse witnesses, but rather require that such witnesses be physically produced in the courtroom. In requiring a defendant's objection to the use of videoconferencing to be sustained, this section also preserves the defendant's speedy trial rights intact.

The Supporting Memorandum in support of the Petition proposes that other changes in the subsection preserve the defendant's rights as they once were, and therefore subsection WIS. STAT. § 885.60(2)(d) is either confusing or no longer necessary (p. 13). We do not feel that reflects current practice.

As discussed above, the requirement that a court sustain an objection raised to videoconferencing by a defendant applies to two potential objections: regarding the defendant's remote appearance, and, regarding a proposed witness's remote appearance at a critical proceeding.

Requiring a court to affirmatively find waiver before permitting the remote appearance of a defendant at a critical proceeding adequately protects the first prong of the dual protections envisioned by WIS. STAT. § 885.60(2)(d). However, no similar provision exists to require the court to take a waiver regarding a witness's remote appearance at a critical proceeding. Rather, the proposed modified scheme suggests that the determination of whether a witness appears at a critical hearing is subject to the discretionary factors outlined in WIS. STAT. § 885.56(1). Of course, at a critical proceeding, the defendant's constitutionally-vested confrontation rights must overcome any balancing test. Confrontation requires face to face interaction, not face to screen. The proposed modification invites a court to determine that convenience offered to the witnesses and litigants through videoconferencing could outweigh the defendant's federal and state constitutional rights. This cannot be the case. WIS. STAT. § 885.60(2)(d)'s mandatory opt-out provision must survive.

3. WIS. STAT. § 885.56(1)(b) should not be repealed.

Section 885.56(1) sets forth twelve criteria that a court may consider when determining whether videoconferencing would be appropriate. One such factor, set forth in WIS. STAT. § 885.56(1)(b) is whether "the proponent of the use of videoconferencing technology has been unable, after a diligent effort, to procure the physical presence of a witness." The Supporting Memorandum argues that this provision "currently allows a witness to appear using videoconferencing technology *only* when the physical presence of witness cannot be procured after diligent effort" (p. 12)(emphasis added). That argument misses the mark. WIS. STAT. § 885.56(1)(b) is merely one factor out of twelve that a judge may consider when determining whether to permit videoconferencing for witness testimony.

The presumption that witness testimony be in person is entirely appropriate, because again, if a witness appears at a hearing, the hearing is in all likelihood evidentiary, ill-suited for videoconferencing over the objection of a party.

C. Court interpreters.

The Public Defender's office supports video appearances for court interpreters while practicable, recognizing that expanded access benefits lawyers and clients. However, an interpreter appearing remotely must be able to facilitate confidential communication between the defense attorney and the client. That will be more difficult to accomplish over videoconferencing, especially during trial. Also, an interpreter appearing over videoconferencing will have less information compared to an in-person hearing. For example, direct eye contact is not possible over videoconferencing. Body language may be either completely omitted or poorly transmitted. And, video software tends to prioritize mid-range frequencies, which makes it harder for an interpreter to pick up on expression. The Public Defender's office would oppose use of an interpreter by videoconferencing if the end result is decreased communication and understanding.

D. Right of the accused to be physically present.

In this final section, our agency responds to the invitation to modify two provisions of WIS. STAT. § 971.04(1): the first outlining the right of the defendant to be present at arraignment; the second providing the right of the defendant to be present at a preliminary hearing.

The Supporting Memorandum makes a circular argument, asserting that eliminating the right to be physically present at an arraignment would promote efficiency, because the defendant no longer has a right to be physically present at a preliminary hearing (p. 16). Of course, that argument ignores WIS. STAT. § 971.04(1)(d), providing that a defendant has a right to be physically present during any evidentiary hearing, such as a preliminary hearing. In other words, deleting the requirement that a defendant be physically present at an arraignment only becomes efficient if the Court also adopts the proposal excepting preliminary hearings from the definition of an evidentiary hearing.

Setting that logical flaw aside, the Supporting Memorandum asks the Court to find that the modification solely addresses a procedural change, not a substantive one (p. 1). But as the title

suggests, the Petition amends defendants' rights: rights that are substantive, not merely procedural. The Supporting Memorandum correctly points out that a 1986 Supreme Court order previously modified WIS. STAT. § 971.04 (p. 16, fn 15). Turning to that order, Re Order eff. 7-1-86 amended subsection (3) of § 971.04 by requiring that the defendant supply the court with a current mailing address. It did not change the defendant's right to be present in court. Then, in 1996, WIS. STAT. § 971.04(1)(c) was amended by Supreme Court order where the right for the defendant to be present "at all proceedings when the jury is being selected" was changed to "during voir dire of the trial jury." At this same time, a Judicial Council Note was added stating:

> This statute defines the proceedings at which a criminal defendant has a right to be present. The prior statute's reference to "all proceedings when the jury is being selected" was probably intended to include only those at which the jurors themselves were present, not the selection of names from the lists which occurs at several stages before the defendant is charged or the trial jury picked.

Although the Supreme Court did modify the language of WIS. STAT. § 971.04(1) in 1996, it was to clarify that the defendant's right to be present was attached to voir dire, not to the entire jury selection process that starts in the clerk's office.

This rule change petition moves beyond those prior changes by deleting both the right to be present at a preliminary hearing, as well as arraignment. The scope and breadth of the proposed amendment exceeds what has been done before.

To restate our position, the use of videoconferencing can be positive in several types of court proceedings, but for critical stages it must be strictly limited to protect the constitutional rights of defendants. We believe these changes are not, as the Supporting Memorandum suggests, "purely administrative in function." And at critical stages of the trial, using videoconferencing does not continue to "preserve the fairness, dignity, solemnity, and decorum of court proceedings." Efficiency of the court system is an admirable goal until it jeopardizes the due process rights of those appearing in court. The limitations included in the petition language are welcome, but do not go far enough to protect those due process rights.

Thank you again for the opportunity to provide these written comments. We look forward to the opportunity to appear at the hearing on this rule.

Sincerely,

Kelli Thompson
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