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April 12, 2022

Clerk of the Supreme Court  
PO Box 1688  
Madison, WI 53701  
[clerk@wicourts.gov](mailto:clerk@wicourts.gov)

Re: Supreme Court Rule Petition 20-09A

Dear Honorable Justices of the Supreme Court:

We write to share our concerns about Supreme Court Rule Petition 20-09A, regarding videoconferencing in the Wisconsin State Courts. The concerns that we voiced with respect to Petition 20-09 continue to apply today.

Many of the changes proposed in Petition 20-09A are still 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).

In particular, we are concerned with the amendments to WIS. STAT. §§ 885.56 and 885.60 that are proposed in sections 12, 15, 18, 19, 20, 21, and 22 of Petition 20-09A. As we previously noted, under the existing statutory scheme, these statutes protect a criminal defendant's right to confront and cross-examine witnesses in open court. They preserve 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. The statutes require the court to exercise its discretion when ruling on an objection to the remote appearance of a witness during other, noncritical hearings, and they require 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

April 12, 2022

Page 2

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, the right to an impartial jury, and the right to a fair trial.

The proposed amendments to these statutes 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, even over the defendant's objection. The Videoconferencing Subcommittee of the Planning and Policy Advisory Committee, in its memorandum supporting Petition 20-09A, acknowledges the conflict between the proposed amendments and the Wisconsin and U.S. Constitutions. Sections 20, 21, and 23 add in references to constitutional rights and requirements, but these additions do little more than explicitly recognize the conflict between what the proposed statute allows and what the Constitution requires.

In sum, these proposed amendments would replace an easy-to-apply, bright-line rule—requiring courts to sustain objections to videoconferencing in some situations and directing court to apply the same criteria applicable in civil proceedings in other situations—with a confusing, vague direction to weigh the civil criteria; the potentially conflicting constitutional rights of defendants, respondents, and victims; and any other applicable state and federal legal requirements; and in some situations, to top it all off with a five-factor test. Not only are these proposed amendments confusing and potentially contradictory; they are also unconstitutional.

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

Cordially,

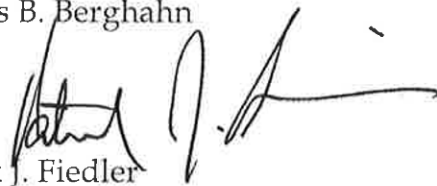
HURLEY BURISH, S.C.

Jonas B. Bednarek

A handwritten signature in black ink, appearing to read "Marcus B. Berghahn". The signature is written in a cursive style with a large, sweeping initial "M".

Marcus B. Berghahn

Patrick J. Fiedler

A handwritten signature in black ink, appearing to read "Patrick J. Fiedler". The signature is written in a cursive style with a large, sweeping initial "P".

April 12, 2022

Page 3



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