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| **STATE OF WISCONSIN CIRCUIT COURT**  **BRANCH** | **COUNTY** | For Official Use |
| In the Matter of the Mental Condition of:  Case No.     ME  CLIENT  Alleged to be in need of an involuntary  mental commitment. | |
| **RESPONDENT’S BRIEF IN SUPPORT OF**  **OBJECTION TO TELEPHONIC HEARING** | | |

The respondent, CLIENT, appearing specially by Atty.      ,offers the following argument in support of her objection to telephonic hearing.

A respondent in a recommitment hearing is “entitled to be physically present in the courtroom.” Wis. Stat. § 885.60(2)(a). The court may conduct a hearing by videoconference under certain circumstances. Wis. Stat. § 51.20(5)(c). Videoconferencing technology requires that “[p]articipants shall be able to see, hear and communicate with each other,” including “to observe the demeanor and non-verbal communications of other participants.” Wis. Stat. § 885.54(1)(a) and (c). Additionally, “if not in each other's physical presence, a separate private voice communication facility shall be available so that the defendant or respondent and his or her attorney are able to communicate privately during the entire proceeding.” Wis. Stat. § 885.54(1)(g).

There is no statutory support for conducting recommitment hearings telephonically. The Wisconsin Supreme Court, relying on its “administrative and superintending authority over the courts,” suspended in-person proceedings and ordered “judges . . . to utilize available technologies – including e-mail, teleconferencing, and video conferencing in lieu of in-person courtroom appearances.” *In Re the Matter of Remote Hearings during the COVID-19 Pandemic,* March 22, 2020 Order. The Wisconsin Supreme Court extended the suspension of in-person hearings, “subject to limited exceptions for certain matters if remote technology is not practicable or adequate” until the court prepares an operational plan. *In Re the Matter of the Extension of Orders and Interim Rule Concerning Continuation of Jury Trials, Suspension of Statutory Deadlines for Non-Criminal Jury Trials, and Remote Hearings during the COVID-19 Pandemic*, May 22, 2020 Order. The Supreme Court of Wisconsin Order does not require or allow the use of teleconferencing in lieu of videoconferencing.

According to the Director of State Courts Randy Koschnick, “[t]he court system has issued Zoom online videoconferencing accounts to each of the state's 249 circuit court branches and is encouraging judges to livestream their proceedings.” (*Wisconsin courts turn to livestreaming to keep courts open, accessible*; WI Courts April 10, 2020 release). Koschnick said as “courts work through previously scheduled telephone conferences[,] [t]he goal is to have all of the state's circuit court branches capable of using the technology to livestream public proceedings.” *Id.*

Recommitment hearings “shall conform to the essentials of due process and fair treatment.” Wis. Stat. § 51.20(5)(a). This includes “the right to an open hearing, . . . the right to counsel, the right to present and cross-examine witnesses, the right to remain silent.” *Id.* The Respondent is denied the right to an open hearing by the current arrangement for telephonic hearing, despite technology which would enable open hearings being available through the Zoom video accounts provided by WI Courts. Without the ability to “communicate privately during the entire proceeding,” the Respondent is not effectively provided with her right to counsel. Wis. Stat. § 885.54(1)(g). The Respondent could have confidential communications with counsel during the hearing by using Zoom’s private breakout room feature or by having a separate, private phone call in addition to the video appearance by Zoom. Further, without the ability to see and hear the participants to observe their demeanor, the Respondent is denied a meaningful opportunity to present and cross-examine witnesses, potentially including her own testimony. Videoconferencing via Zoom would allow participants to both see and hear each other, more similar to an in-person hearing.

The Respondent has a significant liberty interest that is not sufficiently protected by a telephonic hearing. The disposition of the recommitment hearing may place the Respondent outside of her home, direct who makes medical decisions for the Respondent, and authorize the involuntary administration of medication for the Respondent. The Respondent is requesting an in-person hearing or a videoconferencing hearing via Zoom.

When determining whether to use videoconferencing technology instead of an in-person proceeding, the court may consider “[w]hether a physical liberty or other fundamental interest is at stake in the proceeding.” Wis. Stat. § 885.56(1)(f). The Wisconsin Supreme Court stated that during recommitment hearings, “[w]ith such an important liberty interest at stake, the accompanying protections should mirror the serious nature of the proceeding.” *Langlade County v. D.J.W.*, 2020 WI 41, ¶43, 391 Wis. 2d 231, 942 N.W.2d 277. The United States Supreme Court, "repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas*, 441 U.S. 418, 425, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979). "Freedom from physical restraint is a fundamental right that 'has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.'" *State v. Post*, 197 Wis. 2d 279, 302, 541 N.W.2d 115 (1995) (quoting *Foucha v.Louisiana*, 504 U.S. 71, 80, 112 S.Ct. 1780; 118 L.Ed. 2d 437 (1992)). Recognizing the significant protections granted to the Respondent, this Court is permitted to use videoconferencing in lieu of an in-person hearing only under limited circumstances. Telephonic hearings are so significantly lacking in ensuring these same protections that neither statute nor caselaw provides any scenario in which they may be used to conduct a recommitment hearing.

For the above-stated reasons, the Respondent requests that the Court sustain her objection to conducting the recommitment hearing via telephone and reschedule the matter for an in-person hearing. Alternatively, if an in-person hearing cannot be arranged, the Respondent requests the Court conduct the hearing via Zoom videoconferencing.

Dated at      , Wisconsin, this       day of      , 20     .

Respectfully submitted,

Electronically signed by Attorney

Attorney, Bar No.

Attorney for Respondent

State Public Defender's Office

Address

Address

Phone