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Justices of the Michigan Supreme Court
Supreme Court Clerk
P.O. Box 30052
Lansing, MI 48909

November 1, 2021

Re: ADM File No. 2020-8

Dear Justices,

In March of 2020, our society was abruptly changed by a worldwide pandemic. The way citizens conducted their lives and business changed on nearly every level. From grocery shopping, dining, gathering with friends or working in an office, life as we knew it halted almost entirely. This included the criminal justice system. Out of necessity to protect public health, court hearings were suspended, trials were adjourned, and cases put on hold. Though everyone hoped this would be a temporary situation, it became clear that Covid would continue to interrupt our normal processes and procedures, necessitating novel and creative solutions for the court system to continue to function. Accordingly, this court issued several emergency administrative orders permitting courts to use remote proceedings to avoid a complete and continuous shutdown of the court system. These orders dramatically changed the way courts had operated for hundreds of years by largely suspending in-person proceedings.

During the time the emergency administrative orders remained in effect, courts conducted hundreds, if not thousands, of remote proceedings from oral arguments to bench trials, arraignments to preliminary examinations. For some court proceedings, use of remote attendance technology has been efficient, decreasing travel time and increasing convenience for the parties and participants. However, not all aspects of remote proceedings have been positive. In criminal cases, use of live-streamed proceedings and video recordings has led to decreased privacy for victims and a lack of recognition of the rights they are guaranteed under the Michigan Constitution and Crime Victim's Rights Act.

Despite the fact that use of remote proceedings was a dramatic departure from the way courts have operated for centuries, on July 26, 2021, a divided Court amended *fourteen* court rules and an Administrative Order, and rescinded seven additional Administrative Orders. These changes not only gave immediate effect to permanently enshrine changes implemented in response to the pandemic, they also *require* courts to "use remote participation technology (videoconferencing under this rule or telephone conferencing under MCR 2.406) MCR 2.407(G) to the greatest extent possible." Justice is not "one size fits all", either in civil or criminal cases. We suggest that the default method of accessing our court system in this state should not be remote participation.

Unfortunately, the changes made do not adequately protect crime victims' constitutional and statutory rights, nor do they ensure the decorum and respect we accord to our court proceedings. Additionally, the Court's decision to give immediate effect to these court rules without allowing time for public comment, and prior to the recommendations of two workgroups formed by the State Court Administrator's Office, is concerning. There is no current emergency that required the rules be given immediate effect, nor was one posited in the order amending the court rules.

Michigan Crime Victims Have A Constitutional Right To Dignity and Respect

Michigan's Constitution vests crime victims with certain rights in criminal cases. It guarantees a crime victim's "right to attend trial and all other court proceedings the accused has the right to attend" as well as the "right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process." Michigan Const 1963, art 1, § 24. As this Court has recognized, "The notion of crime victim's rights is of such importance that it is mandated by the Michigan Constitution. Const. 1963, art 1, § 24." *People v Earl*, 495 Mich. 33, 46 (2014).

Unfortunately, the use of remote proceedings, whether they are live-streamed via Zoom, YouTube, video recording or other technology, has eroded these constitutional rights placing some victims in danger and subjecting others to needless unwanted publicity and harassment. Perhaps the most well-known incident in Michigan is one that made national news when an astute assistant prosecutor raised concerns during a Zoom court proceeding that a domestic violence victim and her abuser were appearing from the same location. Her fears were confirmed by police and the incident went viral resulting in uncontrolled and unwanted media attention for the victim.[1]

Prosecutors across the state have reported incidents of victim harassment. Examples have included comments on victim credibility through use of YouTube comments, videos remaining accessible to the public after proceedings have ended, and even victims refusing to participate in the criminal process once knowing their testimony would be available online. In Alcona County alone, there were two troubling incidents in which victim privacy was not adequately protected. During family court proceedings on a criminal sexual conduct case that involved an underage victim and respondent, the court did not delete the YouTube video of the hearing during which the victim's name was stated. That hearing was reportedly accessed 148 times in one week until the victim notified the prosecutor, and it was taken down at the prosecutor's request. In another incident, again involving a criminal sexual conduct case, witnesses were

[1] "I'm extremely scared for her safety," the prosecutor said ***in a clip viewed more than 1 million times on YouTube*** before it was taken down." https://www.washingtonpost.com/dc-md-va/2021/03/12/mary-lindsey-coby-harris-zoom-hearing/. ""I know everybody thinks I'm an idiot for staying in the relationship," said Lindsey, 31, tearful and struggling to speak at times in a Wednesday interview after her night shift as a waitress. She said she had looked through the comments on news articles: "A lot of people are saying, well, it's her fault." "It was just really frustrating to me that everyone was watching," she said. The video even has her home address — "they made me say it twice."" Id. The presiding judge made a comment on the situation. "Middleton chalked up the episode to another oddity of life in a pandemic. "It's the first time I ever had anybody sitting in the next room, potentially intimidating a witness," Middleton said. "This is an issue we didn't have when we had live court."" https://www.nbcnews.com/news/us-news/virtual-court-hearing-takes-turn-after-prosecutor-spots-assault-suspect-n1260698.

supposed to be sequestered during the course of the trial. However, those witnesses accessed the victim's testimony despite being directed by the court not to do so.

All of these instances demonstrate the *lack* of dignity and respect afforded victims during remote proceedings. Unfortunately, the court rule amendments adopted by this court do little to remedy that issue and fail to recognize the role of the courts in ensuring these rights.

When remote proceedings are conducted, MCR 2.407(g)(4) requires courts to video stream those proceedings or provide a video recording immediately after, unless the proceeding is closed or "access would otherwise be limited by statute or rule." Closure of a courtroom is rare, as are circumstances in which a statute or other rule would limit access. Because of that, the majority of crimes involving victims are required to be video recorded or live streamed. Such a requirement fails to recognize the difference between the controlled courtroom setting and the lack of control a court has over testimony that is streamed or recorded. It is without doubt that streaming a crime victim's traumatic testimony over the internet and/or releasing that testimony via videorecording is *fundamentally different* than that same victim testifying in a public and open courtroom. Once something is on the web, it is there to stay. Live-streamed videos can easily be recorded and reshared, despite court rules to the contrary. Likewise, recorded videos provided online are easily copied and reshared in efforts to offer online entertainment at the expense of court participants.[2] This affords a victim of criminal sexual conduct, intimate partner violence, nervous victims who misspeak, child victims who may face bullying by their peers, or victims or witnesses who share traumatic personal information no guarantee that the testimony provided in court will not become the subject of the next viral video.

The requirement imposed by MCR 2.407(G)(4) that courts "Provide access to the public either during the proceeding or immediately after via access to a video recording of the proceeding." is a dramatic and unnecessary departure from our justice system's long-standing requirement of in-person proceedings. When an in-person proceeding is held in the courtroom, the proceedings are only accessible after conclusion of the proceeding via transcript, or in some courts, via video retained by the court. The court controls the access to the video and what happens with it. A transcript does not show a victim's face and while capable of being shared, does not carry the same risk of harassment and abuse if shared. Few people will take the time to read a transcript. There are protections for victims' and witnesses' privacy inherent with in-person proceedings that simply cannot be replicated when those proceedings are live-streamed or posted online. Courts have neither the capacity, nor the wherewithal to police possible violations of their orders prohibiting duplication or other misuse of video recordings of remote court proceedings. Again, the result is that crime victims' constitutional and statutory rights are violated.

"Even commentators who support expansion of videoconferencing technologies in judicial proceedings advise proceeding with caution before adopting radical changes that risk

[2] See "Videos of Crazy Zoom Court vides", https://www.reddit.com/r/ZoomCourt/ (accessed on 10/27/21). *See also*, "Zoom Court Videos Are Making People's Darkest Hours Go Viral", https://www.vice.com/en/article/z3va9x/zoom-court-videos-are-making-peoples-darkest-hours-go-viral (accessed on 10/27/21); *and* "A Zoom hearing for her domestic violence case went viral. Now people are blaming her, she says.", https://www.washingtonpost.com/dc-md-va/2021/03/12/mary-lindsey-coby-harris-zoom-hearing/ (accessed on 10/27/21)

impinging on litigants' rights and access to justice more broadly. Indeed, the benefits of remote proceedings are often more apparent than their costs, but there is a risk that judges, and judicial policymakers may 'face pressure to overemphasize values such as speed, cost savings, and reduced workloads at the cost of fair proceedings.'" ADM File No. 2020-08, July 26, 2021, Viviano, J and Bernstein, J concurring in part and dissenting in part (footnotes omitted).

To be sure, some of the changes implemented may provide crime victims with additional options for participation in certain proceedings when they may not have otherwise been able to participate. For example, MCR 2.407(G)(2) permits flexibility in that it allows participants the choice to participate remotely, even when all participants cannot do so. However, this convenience is outweighed by the numerous ways in which crime victims are deprived of constitutional and statutory rights they are entitled to.

A Victim's Constitutional Right to Attend Proceedings Must Be Honored

A crime victim in Michigan has a constitutional "right to attend trial and all other court proceedings the accused has the right to attend." Michigan Const 1963, art 1, § 24. This constitutional requirement guarantees that when a defendant has the right to attend a court proceeding, *a crime victim has an equal constitutional right*. Whether the defendant in fact chooses to attend is irrelevant; the victim possesses a separate and distinct right to attend any proceeding the defendant has the right to attend. That right must be honored. However, MCR 2.407(G)(2) establishes a presumption that judicial officers be permitted to participate from a location other than the judge's courtroom "whenever the circumstances warrant, unless the court does not have and is not able to obtain any equipment or licenses necessary for the court to operate remotely."[3] Permitting judges the discretion to participate from a remote location without consideration of the victim's right to be present ignores that important right. If there is no judge in the courtroom, the proceeding cannot be held in-person.

The importance of in-person proceedings is recognized for defendants. It is recognized by the requirement that a defendant appear in-person for sentencing. *People v Heller*, 316 Mich App 314; 891 NW2d 541 (2016). It is also recognized in the Sixth Amendment's right of confrontation.

> The Sixth Amendment's guarantee of face-to-face encounter between witness and accused serves ends related both to appearances and to reality. This opinion is embellished with references to and quotations from antiquity in part to convey that there is something deep in human nature that regards face-to-face confrontation between accused and accuser as "essential to a fair trial in a criminal prosecution." *Pointer* v. *Texas*, 380 U.S. 400, 404 (1965)." *Coy v Iowa*, 487 US 1012, 1017 (1988). Noting the differences between face-to-face testimony versus even two-way video testimony, the Ninth Circuit has held that "the use of a remote video procedure must be reserved for rare cases in which it is 'necessary.' " *United States v Carter*, 907 F3d 1199, 1206 (2018),

[3] This provision of the court rules also may exacerbate the digital divide in our state, permitting wealthier courts to have more remote court proceedings because those courts are able to "obtain any equipment or licenses necessary for the court to operate remotely."

quoting *Maryland v Craig*, 497 US 836, 850 (1990). [ADM File No. 2020-08, Viviano, J and Bernstein, J, concurring in part and dissenting in part.]

Michigan's own Chief Justice has recognized the importance of the right, stating: "mere convenience, efficiency, and cost-savings interests are not important enough public-policy considerations to dispense with a defendant's constitutional right to face-to-face confrontation." *People v. Jemison*, 505 Mich 352; 952 NW2d 394 (2020).

This right is no less important for crime victims. Facing one's attacker during court proceedings can, for some, return power taken by a violent crime and provide closure to a traumatic event. Yet the newly enacted provisions in MCR 2.407 omit any recognition of the courts' obligation to ensure crime victims' rights under the state constitution. While MCR 2.407(3) requires that courts "Ensure that any such proceedings are consistent with a *party's* Constitutional rights" (emphasis added), it is silent with regard to a victim's constitutional right. Victims are not a party to the proceedings. However, they have equally important rights.

"[T]he Court 'is not authorized to enact court rules that establish, abrogate, or modify the substantive law.'" *People v Conat*, 238 Mich App 134, 162-163; 605 NW2d 49 (1999), *citing McDougall v Schanz*, 461 Mich 15, 27; 597 NW2d 148 (1999). Yet, the recent amendments are in contravention to crime victims' rights under Michigan's Constitution. Crime victims are entitled to a voice regarding whether remote participation technology is used in their case. They are entitled to have a voice as to whether they appear in person or remotely. Allowing crime victims to have some level of agency in how they participate in the criminal justice process reinforces the primacy of Michigan's constitutionally protected crime victims' rights. The current rules fail them in that regard.

MCR 6.006(E) Is At Odds with the Crime Victim Rights Act

In 2018, certain provisions of the "William Van Regenmorter Crime Victim's Rights Act" were amended to require a defendant's *physical presence in the courtroom* at the time a victim makes an oral impact statement. Though containing exceptions based on a defendant's behavior and the victim's wishes, the defendant's physical presence is the default. MCR 6.006(E) fails to recognize this requirement and is therefore at odds with a substantive statutory requirement.

Recommendations

Because of the concerns outlined above, the Prosecuting Attorneys Association of Michigan requests this court rescind the amendments made in July until more data and input can be gathered regarding the use of these procedures over the past 19 months. These sweeping changes require close examination of whether the changes were necessary and the impacts they had on criminal proceedings, both positive and negative. Making changes of this magnitude without allowing for public comment is unacceptable. The changes show a complete disregard for crime victims and their constitutional and statutory rights. Had the standard procedure for changing a court rule been followed, these concerns would have been brought to the Court's attention prior to any amendments.

In the event this Court retains the version of the court rules currently in effect, PAAM proposes the below amendments to help ensure that the rights of crime victims are protected.

2.407 (G) Notwithstanding any other provision in this rule, until further order of the Court, AO No. 2012-7 is suspended and trial courts may ~~are required to~~ use remote participation technology (videoconferencing under this rule or telephone conferencing under MCR 2.406) ~~to the greatest extent possible~~. In doing so, courts must:

(2) Allow some participants to participate remotely even if all participants are not able to do so. Judicial officers who wish to participate from a location other than the judge's courtroom shall do so only with the written permission of the court's chief judge. The chief judge shall grant such permission whenever the circumstances warrant, unless the court does not have and is not able to obtain any equipment or licenses necessary for the court to operate remotely. Remote participation by judicial officers shall be consistent with a party's Constitutional rights and crime victims' constitutional and statutory rights.

(3) Ensure that any such proceedings are consistent with a party's and crime victim's Constitutional right**s**, and allow confidential communication between a party and the party's counsel.

(4) Provide access to the public either during the proceeding or immediately after via access to a video recording of the proceeding, unless the proceeding is closed or access would otherwise be limited by statute or rule.

(a) A video recording of the proceeding, maintained by the court, can only be viewed, or accessed at the court clerk's office.

(1) A video recording of the proceeding, maintained by the court, must not have any advertising or chat associated with the recording.

(2) Copies of the video recording are prohibited unless ordered by the court.

(b) Courts permitting public access by livestreaming technology must:

(1) Ensure that any chat or commenting features are disabled;

(2) Ensure there is no advertising associated with the livestream;

(3) Prohibit any recording, posting, or sharing of the livestreamed proceeding;

(4) Allow a crime victim the choice of whether to have their testimony, victim impact statement, or any other statement to the court shared via live-stream. If the victim chooses not to have their testimony, victim impact statement, or any other statement to the court shared via live-stream, the court shall conduct those

proceedings in-person, in the courtroom and make a transcript of the victim's testimony or statement to the court available after the conclusion of the proceedings, upon request. Such a circumstance does not require an order under MCR 8.116(D)(3).

6.006(E) Notwithstanding any other provision in this rule, until further order of the Court, AO No. 2012-7 is suspended and trial courts may ~~are required to~~ use remote participation technology (videoconferencing under MCR 2.407 or telephone conferencing under MCR 2.406) ~~to the greatest extent possible~~. Any such proceedings shall comply with the requirements set forth in MCR 2.407(G)**,** and shall comply with the William Van Regenmorter crime victim's rights act, and with a party's and a crime victim's Constitutional rights.

Amendment of MCR 6.106(4) Is Unnecessary As Recently Amended Statutes Control Pretrial Release

Lastly, PAAM expresses concern regarding the amendments to MCR 6.106(4). Many aspects of pretrial release were recently amended by the legislature. These amendments, many recommended by the Taskforce on Jail and Pretrial Release, changed the Code of Criminal Procedure. MCL 760.1 *et seq*. requiring tickets in lieu of arrest in many situations, as well as a summons instead of warrants in many circumstances. Under MCL 764.3 those failing to appear for court are given a grace period before issuance of a bench warrant. These changes, passed *after the pandemic*, were aimed at reducing jail populations and giving courts more flexibility regarding pre-trial release.

The full impact of these statutory amendments has yet to be determined. For that reason, the addition of MCR 6.106(4) is unnecessary. As written, the rule gives broad authority to the court to consider "public health factors in making pretrial release decisions, including determining any conditions of release, and in determining any conditions of probation." We remind this Court that:

> "The measure of control exercised in connection with the prevention and detection of crime and prosecution and punishment of criminals is set forth in the statutes of the State pertaining thereto, particularly the penal code and the code of criminal procedure. The powers of the courts with reference to such matters are derived from the statutes." [*People v Glass*, 464 Mich. 266, 282; 627 NW2d 261, (2001), citing *People v. Piasecki,* 333 Mich. 122, 143, 52 NW2d 626 (1952).]"

To the extent that our statutes address the subject matter of the newly amended MCR 6.106(4), those statutes and the state constitution should control. To the extent the statutes do not address these substantive issues of pretrial release, pretrial bond conditions, and probation conditions, the court rules cannot establish law. We request this portion of the court rules be rescinded.

Conclusion

In his opinion regarding the amendments at issue, Justice Zahra stated in part: "The Court, no doubt, has good intentions in implementing these emergency measures through court rules having immediate effect. But summary implementation of new court rules is rarely employed and occurs only when immediate action is required, such as when an immediate response is needed to address legislative changes in the law or our caselaw renders a rule obsolete. No such circumstances are present here." Justice Zahra (concurring in part and dissenting in part).

PAAM agrees that there was not, and is not a need for immediate action, and there was no change in the law or caselaw that needed to be addressed. The wholesale change of the way courts operated, implemented via numerous emergency-inspired administrative orders, was necessitated by the COVID 19 Pandemic. That initial emergency has passed and while there remains risk in many activities, there is also greater knowledge in mitigation measures and the ways in which many activities can be safely resumed. As a society, we are learning to navigate the changes Covid has brought. There is time to discuss, evaluate, and debate the merit of retaining the use of remote proceedings and what role they should serve going forward. Because the Court did not follow the typical procedure of allowing comment before amending these rules, the time to discuss and evaluate proposed changes was completely omitted from the process.

That comments from the state bar, the bench (excepting the Michigan Supreme Court), and the public, as well as the SCAO work group participants on the Lessons Learned work group and the Open Courts, Media, and Privacy Task Force were not considered prior to these sweeping mandated changes suggests that the changes were not at the behest of court participants. The court rule amendments implemented by ADM 2020-08 do not offer court participants and local trial courts the ability to utilize remote court proceedings. Instead, *they mandate remote court proceedings as the default method of court access*.

As noted by Chief Justice McCormack's opinion in *In re Certified Questions from the United States Dist. Court,* 506 Mich. 332, 422-423; 958 NW2d (2020), "I would not make new rules to address a once-in-a-century global pandemic, and because there are many other remedies available to curb executive overreach, I respectfully dissent in part." Regarding ADM 2020-08 as well, "there are many other remedies available" to address the continued impact of Covid on court proceedings.

We urge this Court to reconsider the amendments previously adopted. Remote court proceedings should not be the default for our criminal justice system. Making such a drastic change to our court system without substantial dialogue and input from attorneys, victims, judges, court staff and the public as a whole is a mistake. There is time to thoughtfully consider and debate the merits of these changes to ensure that they accomplish the goals of increased access and court efficiency. Additionally, there must be careful consideration of the problems that many have encountered when remote proceedings are permitted. Solutions to those problems must be considered before permanently requiring courts to use remote proceedings.

If the amendments are retained, further amendment must, at the very least, ensure that crime victims' rights are recognized and that victims have a voice in the way criminal proceedings are conducted. Unlike most other litigants, victims did not choose to be part of the justice system. They were put in that position by the actions of another. Their unique role in the criminal justice system and the rights they are afforded must be preserved.

Sincerely,

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