

SUPREME COURT OF WISCONSIN

No. 23-01

**In the Matter of Amending Wis. Stat. § 809.12,
Relating to Appellate Review of Motions for
Relief Pending Appeal**

FILED

JUL. 5, 2024

Samuel A. Christensen
Clerk of Supreme Court
Madison, WI

On January 23, 2023, Attorney Caleb R. Gerbitz and Attorney James M. Sosnoski filed a rule petition asking the court to amend Wis. Stat. § (Rule) 809.12 to clarify the standard of review for a decision on a motion for stay pending appeal.

The court voted to seek written comments and schedule a public hearing. A letter soliciting comments was sent to interested persons on May 26, 2023, and the same day, the court submitted written questions to the petitioners. On June 22, 2023, the petitioners responded to the court's questions and submitted amended language for the petition. The court received comments from the following persons: Attorneys Elizabeth M. Pierson and Daniel S. Lenz of Law Forward, Inc., and Attorney Jeffrey A. Mandell of Stafford Rosenbaum, LLP; Attorney Scott E. Rosenow on behalf of Wisconsin Manufacturers & Commerce Litigation Center; and Attorneys Matthew S. Pinix, James E. Goldschmidt, Joseph S. Diedrich, and Douglas M. Raines, on behalf of the State Bar of Wisconsin, Appellate Practice Section.

The court issued a public hearing notice on October 18, 2023, and held a public hearing on December 11, 2023. Attorneys Caleb R. Gerbitz and James M. Sosnoski presented the petition to the court. Attorney James E. Goldschmidt from the State Bar of Wisconsin, Appellate Practice Section, spoke in opposition to the petition.

Following discussion at open administrative conference, the court voted 6-0 (Justice Rebecca Grassl Bradley abstaining) to deny the petition.

Therefore,

IT IS ORDERED that the petition is denied.

Samuel A. Christensen
Clerk of Supreme Court

¶1 REBECCA GRASSL BRADLEY, J. (*concurring*). I concur with the court's denial of this rule petition. I write to explain why I abstained from voting at the open "administrative" conference during which the court discussed the petition, and to highlight the imprudence of the court's return to conducting deliberations publicly.

¶2 This petition asks the court to amend Wis. Stat. § (Rule) 809.12 to clarify the standard of review for a decision on a motion for stay pending appeal. This standard of review was most recently addressed by the court in Waity v. LeMahieu, 2022 WI 6, 400 Wis. 2d 356, 969 N.W.2d 263. If the standard of review requires revision, it should be done through our case deciding process, with the benefit of full adversarial briefing and argument. Earlier this term, I dissented from the court's decision to establish, via rule, an automatic stay and expedited appellate procedure for pretrial competency and involuntary medication orders in criminal cases. In granting that rule petition, the court overruled a recent precedent of this court, State v. Green, 2022 WI 30, ¶36, 401 Wis. 2d 542, 973 N.W.2d 770, and adopted the dissent's position in that case. S. Ct. Order 23-05, 2024 WI 20 (issued May, 2, 2024, eff. July, 1, 2024). Abrogating or modifying this court's precedent by rule imprudently bypasses proper judicial decisionmaking. Id., ¶13 (Rebecca Grassl Bradley, J., dissenting).

¶3 As part of the new majority's extreme makeover of the court's procedures—to which the newest justice acceded before she had spent even one week on the court—the members of the new

majority decided to resume the aberrational practice of conducting in public whatever portion of our customarily confidential conferences they would like the public to see. Speaking on behalf of the four, Justice Rebecca Frank Dallet said they "want to mak[e] our court more accessible to the people of Wisconsin." Statement of Supreme Court Justice Rebecca Dallet Regarding Transparency and Accountability Measures, Wisconsin Court System (Aug. 4, 2023), <https://www.wicourts.gov/news/view.jsp?id=1579>. That sounds nice, but the court's public proceedings have been fully accessible to the people of Wisconsin for decades; the doors to the hearing room are open, and WisconsinEye has broadcast and recorded public proceedings for years.

¶4 The new majority marketed this change with the mantra of "transparency"—a hollow promise in practice. The court's publicly available discussion of this rule petition, for example, totaled two-and-a-half minutes. The meager substantive comments certain justices choose to share during "open" conferences in front of a camera offer the public little insight into the discussions occurring behind closed doors. In violation of universal judicial norms governing "collegial" courts, the new majority frequently excludes three members of the court from these conversations. So much for "inclusivity"—another buzz word the new majority preaches but does not practice.

¶5 There are good reasons why at least 47 state supreme courts do not conduct administrative deliberations in public. The subject matter of rule petitions sometimes involves issues the court has been called upon to decide in the past and will likely

be called upon to decide in the future. Our ethics rules prohibit judges from making public statements on such matters. Open "administrative" conferences exist in tension with the code of judicial conduct by facilitating commentary—in public—on questions likely to come before the court in cases.

¶6 Court deliberations should remain confidential. On legal matters presented to the court for resolution, judges speak through their decisions, whether delivered orally or in writing. This is how American judges have always operated. Resurrecting the failed experiment of conducting deliberations on rule petitions in public is just another example among many of the same four justices attempting to refashion this court as a political body rather than a judicial one.