

# ANDRÉ JACQUE

STATE REPRESENTATIVE • 2<sup>nd</sup> ASSEMBLY DISTRICT

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TO: Members of the Assembly Committee on Criminal Justice  
FROM: Representative André Jacque  
DATE: November 7, 2013  
RE: Assembly Bill 273

Chairman Kleefisch and Colleagues:

Thank you for the opportunity to testify before you today as the author of Assembly Bill 273.

I drafted this legislation at the request of my local law enforcement and community leaders. This bill will allow law enforcement to obtain a search warrant to draw blood for a first OWI offense. The Supreme Court recently ruled in *Missouri v. McNeely* that law enforcement must obtain a search warrant to forcibly draw blood from an individual arrested for operating a vehicle while intoxicated, unless there is an exigency which would allow for a forced blood draw without a warrant (the *McNeely* cases states that dissipation of alcohol in the blood stream by itself is not an exigency).

As you know, Wisconsin is the only state in the country that does not regard the first incident of OWI a crime. As our law sits right now, a search warrant can only be obtained for the seizure of contraband or evidence of a crime/fruit of a crime. Because a first OWI is not a crime in Wisconsin and it is unclear if the blood of a person arrested for OWI is “contraband,” officers have been advised against getting a search warrant for a forced blood draw for a first OWI offense. Under AB 273, in standard OWI incidents that occur in Wisconsin, an officer would still have to get a search warrant prior to a forced blood draw upon the individual’s refusal to voluntarily submit to a chemical test if it is the individual’s first offense.

This in turn often denies prosecutors their best evidence - a blood alcohol concentration level - and impedes their ability to vigorously prosecute OWI offenses. To remedy this, AB 273 incorporates violations of s. 346.63 (or a local ordinance in conformity therewith) into our current law outlining the items for which a search warrant may be authorized. A further affirmation of this bill’s constitutionality is provided in the leg council memo attached to my testimony.

Thank you again for your time and for your consideration of Assembly Bill 273.



Law Department

"BETTER BY THE BAY"

Anthony S. Wachewicz III  
City Attorney

November 6, 2013

Rep. Andre Jacque  
Room 123 West  
State Capitol  
PO Box 8952  
Madison, WI 53709

**RE: Assembly Bill 273**

Dear Esteemed Members of the Committee on Criminal Justice:

I am writing this letter in support of Assembly Bill 273. As Prosecutor for the City of Green Bay, I believe this Bill will correct a major problem with our current OWI-1<sup>st</sup> laws. Green Bay Municipal Court processes roughly five hundred OWI-1<sup>st</sup> offenses per year, and the inability to get a warrant to seize a subject's blood has deprived our justice system of critical evidence and created substantial problems with my office's ability to prosecute such cases.

More specifically, recent changes in OWI laws have forced law enforcement officers to take the additional step of obtaining a search warrant prior to conducting a forced blood draw. However, due to the non-criminal nature of OWI-1<sup>st</sup> and the interpretation of our current search warrant statute, I am compelled to advise officers that they cannot obtain search warrants in cases where the suspect has refused the voluntary blood draw. While this refusal is a law violation, there is no monetary penalty associated with it. Therefore, it is not a proper alternative for an OWI conviction. The refusal to submit to a blood draw in turn denies prosecutors the best evidence for seeking convictions of OWI violations: a blood alcohol concentration level. From my experience, the lack of a blood alcohol concentration level has led to an increase in litigation and has made obtaining convictions more difficult than if the blood alcohol concentration were available. This comes at a time when judicial and prosecutorial resources are already limited. Additionally, the State's prohibited alcohol concentration law becomes unenforceable any time a person refuses a blood draw in an OWI-1<sup>st</sup> case.

It is my opinion that approval of this Bill will strengthen Wisconsin's OWI laws which will deter individuals from drinking and driving. This will make Wisconsin a safer place to live, work, and visit. I would like to thank this committee for taking the time to look into such an important



Law Department

"BETTER BY THE BAY"

Anthony S. Wachewicz III  
City Attorney

issue. I have been authorized by the following individuals to include their names in support of this legislation:

Green Bay Mayor James Schmitt  
Green Bay City Attorney Anthony Wachewicz  
Green Bay Police Chief Thomas Molitor  
Brown County District Attorney David Lasee  
Brown County Sheriff John Gossage  
Ashwaubenon Public Safety Chief Eric Dunning  
The Brown County Police Chiefs Association

Respectfully,

James L. Mueller  
Assistant City Attorney  
City of Green Bay



**Frank Harris  
State Legislative Affairs Manager  
Mothers Against Drunk Driving  
Assembly Criminal Justice Committee  
Testimony in Support of Assembly Bill 273  
7 November 2013**

Chairman Kleefisch, and distinguished members of the Committee, thank you for allowing me submit written testimony in support of Assembly Bill 273 allowing for law enforcement to obtain search warrants for first-time offenders who refuse a chemical test. My name is Frank Harris, State Legislative Affairs Manager for Mothers Against Drunk Driving (MADD).

AB 273 is needed because currently arrested first-time OWI offenders are able to refuse a chemical test and law enforcement is unable to obtain a search warrant to conduct the test as a first OWI offense is a civil infraction. MADD supports AB 273 as we believe that first-time arrested suspected drunk drivers should not have free range to refuse a chemical test.

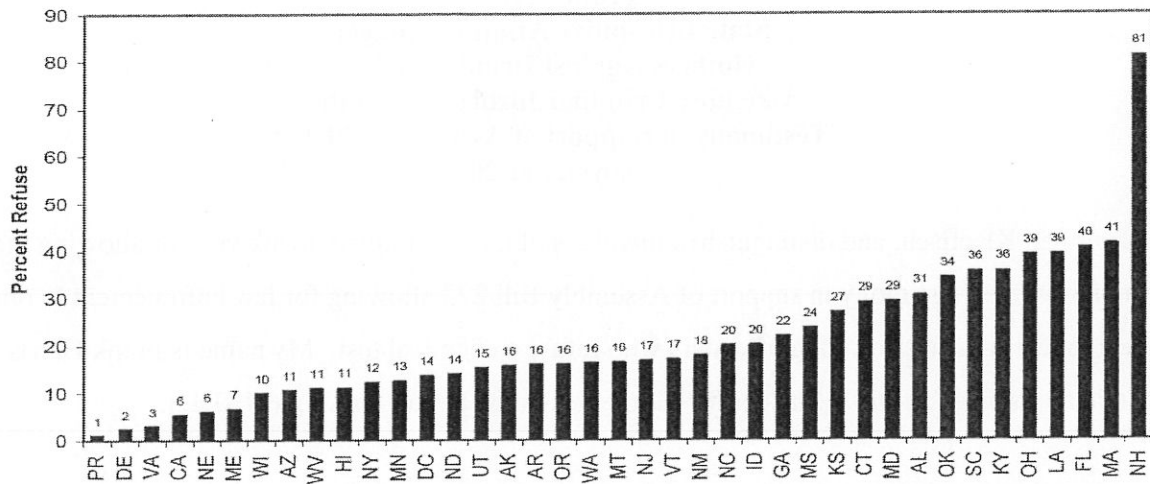
Conservative estimates show OWI offenders have driven drunk at least 80 times before they are first arrested. In Wisconsin, the majority of drunk driving deaths and injuries are caused by drunk driving offenders with no prior convictions.<sup>1</sup> AB 273 will help enforce Wisconsin's drunk driving law while also holding drunk drivers accountable for the potentially deadly choice to drive drunk.

Wisconsin's fight against drunk driving is not over. According to the Wisconsin Department of Transportation, in 2012, 223 people were killed and 2,907 injured in alcohol related traffic crashes. Additionally, there are 46,539 drunk drivers with three or more OWI convictions and 8,088 with five or more convictions. And, there are 413,754 Wisconsin residents with at least one OWI conviction. MADD supports AB 273 as this measures give law enforcement and prosecutors the necessary tools to hold suspected drunk drivers accountable for their careless choice. Significantly, AB 273 closes a loophole which was created as a result of the recent *Missouri v. McNeely* Supreme Court decision which found a blood draw without a warrant violates the Fourth amendment. Previously, law enforcement was able to obtain a chemical test without a search warrant of a suspected drunk driver who refused a test.

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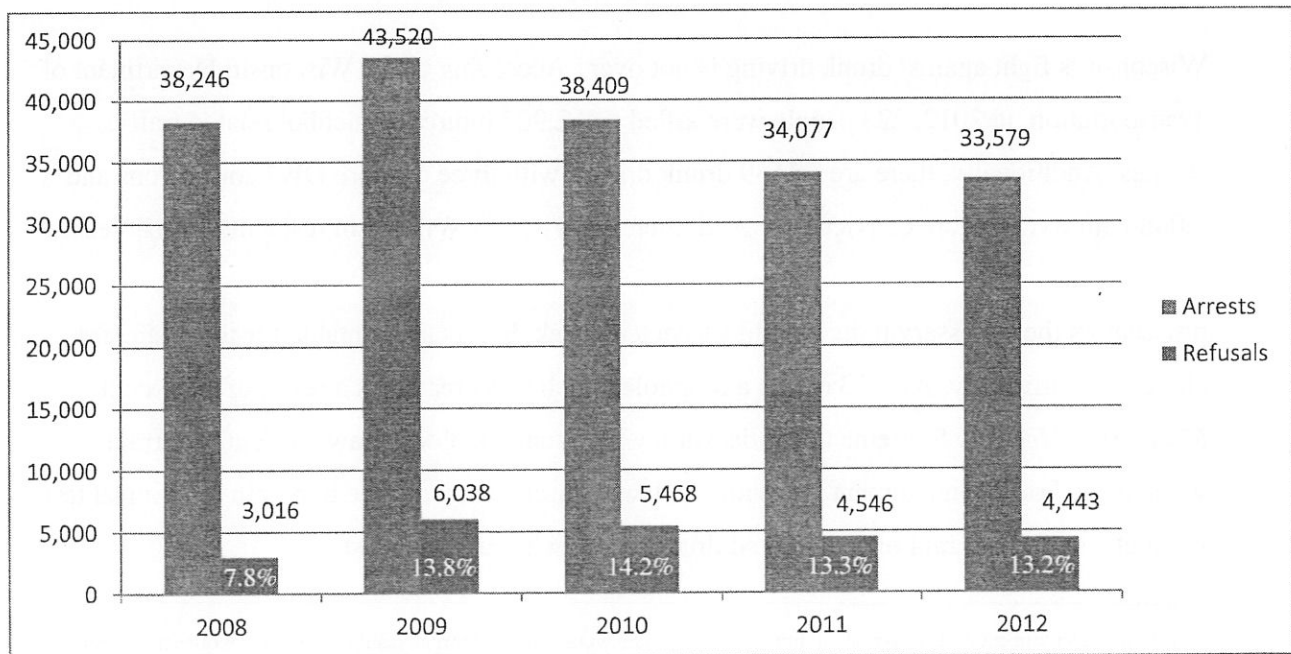
<sup>1</sup> Wisconsin Department of Transportation. <http://www.dot.state.wi.us/safety/motorist/crashfacts/docs/alcohol-section6.pdf>

Figure 1. Breath Test Refusal Rates, 2005



Refusals to submit a chemical test is a problem in the United States. The chart above is from an enclosed 2009 report to Congress entitled “Refusal of Intoxication Testing” which shows that typically one out of every five arrested drunk drivers will refuse a chemical test. Compared to other states, Wisconsin problem is not as severe, however the problem of refusals is increasing. In 2005, ten percent of arrested suspected drunk drivers in Wisconsin refused. According to the Wisconsin Department of Transportation, the refusal rate has risen from seven percent in 2008 to over 13 percent in 2012. The chart below notes refusals, their percentage to arrests and the increase of percentage of refusals to overall arrests in Wisconsin since 2008.

Wisconsin OWI Arrests and Refusals



Refusal to submit to a chemical test has the potential to be an increasing problem in Wisconsin as a result of the *McNeely* decision. Without a legislative remedy, law enforcement and prosecutors remain at an extreme disadvantage in their ability to keep Wisconsin roadways safe as almost all first-time arrested drunk drivers can refuse without repercussion. According to the Wisconsin Department of Transportation, there were 26,632 OWI convictions in 2012 and 62.4 percent or 16,619 of these were first-time offenders. As a result of *McNeely*, many of these first-time offenders can refuse a chemical test and law enforcement and prosecutors will not be able to do anything. AB 273 gives law enforcement and prosecutors the tools they need to hold all suspected drunk drivers accountable.

MADD believes AB 273 will not burden law enforcement or district attorney's offices. To the contrary, this legislation gives them the ability to reduce the refusal problem. Counties in Wisconsin currently use telephonic or email warrants to obtain a chemical test for repeat offenders only. According to an Assistant District Attorney in Milwaukee, most law enforcement departments are ready to enforce this law with fill-in-the blanks affidavits and search warrants, which the DA's in each county prepared and circulated. After completed, and sworn by a notary at the police department, the police fax the form to the judge if at night or weekends. Judges have been provided with a smartphone where they can read the affidavit and electronically sign the warrant. The judge approves and signs the warrant and sends it back electronically. A few judges have fax machines at home and use those instead. A Milwaukee District Attorney's office typical turnaround time is about 45 minutes from beginning drafting until a warrant is obtained, if all goes well. The Assistant District Attorney on duty on at night only gets involved when there is something unusual in the fact situation. Currently, Milwaukee County prepare approximately four to eight night/weekend OWI warrants each week.

Jurisdictions in states have been attacking the issue of refusals through "No Refusal" high visibility law enforcement activities. No Refusal activities allow for law enforcement to request warrants via phone from judges who are on call. This enables law enforcement to legally acquire a proper blood sample following a refusal. To combat refusals, Wisconsin may want to consider localized enforcement efforts where prosecutors and judges make themselves available to streamline the warrant process and help build solid cases that can lead to drunk driving

convictions. There may be federal grant money available to offset costs to the local municipalities in implementing a No Refusal high visibility enforcement effort. For more information on No Refusals, please visit: <http://www.nhtsa.gov/no-refusal>.

Drivers who refuse a chemical test face consequences such as administrative license suspension. Wisconsin is also one of fifteen states that requires the use of ignition interlocks for refusals. However, offenders who are allowed to refuse are able to avoid the entire consequences for their actions which is why AB 273 is needed.

In conclusion, MADD encourages this committee to advance AB 273 and give law enforcement and prosecutors the full ability to request search warrants in order to hold first-time arrested drunk drivers accountable for risking the lives of Wisconsin residents by making the choice to drive drunk. Thank you for the opportunity to submit written testimony before this distinguished committee.



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## WISCONSIN LEGISLATIVE COUNCIL

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*Terry C. Anderson, Director*  
*Laura D. Rose, Deputy Director*

TO: REPRESENTATIVE ANDRE JACQUE

FROM:  David Moore, Staff Attorney

RE: Constitutionality of 2013 Assembly Bill 273, Relating to Obtaining a Search Warrant for Certain Civil Violations

DATE: November 1, 2013

This memorandum addresses your question about whether 2013 Assembly Bill 273, relating to obtaining a search warrant for certain civil violations, complies with constitutional search and seizure requirements. As relevant here, the Fourth Amendment to the U.S. Constitution provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause....”<sup>1</sup>

Under current Wisconsin law, a court may, upon finding probable cause, issue a warrant that allows a law enforcement officer to search and seize anything which is the fruit of or has been used in the commission of any crime. [s. 968.13, Stats.] However, in Wisconsin, operating while intoxicated (OWI), first offense, is generally a civil violation. Assembly Bill 273 extends the authority, provided by s. 928.13, Stats., to issue a warrant, upon probable cause, to the search or seizure of anything that is the fruit of or has been used in the commission of an OWI offense, whether criminal or noncriminal. You asked whether the authority the bill provides to issue a warrant for the search and seizure of evidence related to a noncriminal OWI offense unconstitutionally impinges on the Fourth Amendment’s protections against unreasonable searches and seizures.

### DISCUSSION

No court in Wisconsin has directly addressed the question you asked. However, the cases described below indicate that courts would apply the general warrant requirement for seizures related to a noncriminal OWI. This suggests that the authority the bill provides to

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<sup>1</sup>Wisconsin Constitution, Article I, Section 11, provides parallel protections.



issue a warrant for the search and seizure of evidence related to a noncriminal OWI offense would comport with the Fourth Amendment.

Welsh v. Wisconsin

In *Welsh v. Wisconsin*, 466 U.S. 740 (1984), law enforcement officers entered, without a warrant, the residence of a driver who the officers believed had operated a motor vehicle while intoxicated, but had fled when he drove his car off the road and into a field. At trial, the driver moved to suppress the evidence obtained when the officers entered his residence, arguing that the warrantless entry violated the Fourth Amendment of the U.S. Constitution and Article 1, Section 11 of the Wisconsin Constitution. The circuit court denied the motion, holding that the officers' probable cause, coupled with exigent circumstances, justified the warrantless entry. The driver was convicted of first-offense OWI, a civil offense.

When the case reached the U.S. Supreme Court, the Court reversed the decision denying the driver's suppression motion, holding that the officer's failure to obtain a warrant was not justified by the exigent circumstances exception to the general warrant requirement. This exception permits law enforcement to conduct a warrantless search or seizure if probable cause exists and an urgent need to obtain evidence would make obtaining a warrant impractical. The Court, in *Welsh*, did not specifically address whether a warrant could have been issued upon probable cause of a noncriminal OWI. However, that the Court resolved the case on the basis of the exigent circumstances exception—which only applies when a warrant would otherwise be required—strongly suggests a warrant was both constitutionally necessary and permissible.

State v. Bohling

*State v. Bohling*, 173 Wis. 2d 529 (1993), corroborates the conclusion that the same constitutional considerations that apply to OWI crimes also apply to noncriminal OWI violations. In *Bohling*, the Wisconsin Supreme Court addressed the issue of whether the natural dissipation of alcohol from the bloodstream, by itself, constitutes a sufficient exigency to justify a warrantless blood draw following an arrest for OWI. The court concluded that it did and articulated a test for determining when the exception applies. The first part of this test requires that the blood draw be "taken at the direction of a law enforcement officer from a person lawfully arrested for a drunk-driving related violation or crime..." [*Bohling*, 547-48 (emphasis added).] By specifying that the test for lawfully compelling a blood draw applies to "a drunk-driving related violation or crime," the court's holding appears to mean that the same search and seizure requirements apply to noncriminal OWI violations as well as to OWI crimes.

*Bohling's* holding that the natural dissipation of alcohol from the blood stream is a *per se* exigency was recently effectively overturned by *Missouri v. McNeely*. However, the *Bohling* court's application, to noncriminal OWI violations, of the same search and seizure requirements it applied to OWI crimes is not inconsistent with *McNeely*.

State v. Rick

In *State v. Rick*, the Wisconsin Court of Appeals relied on the language in *Bohling*, quoted above, to reject the argument that a warrantless blood draw is an unreasonable search in a nonjailable civil violation, such as first offense intoxicated boating. The court acknowledged that while *Rick* presented different circumstances than *Bohling*, the “supreme court’s decision in *Bohling* plainly addresses the constitutionality of a warrantless blood draw pursuant to a lawful arrest for a nonjailable civil violation.” [2011 WI App 114, ¶ 9 (unpublished).]<sup>2</sup>

In *Rick*, as in *Bohling*, the court addressed whether the exigent circumstances exception justified a warrantless search, not whether a warrant could have been issued for a nonjailable civil offense. Nevertheless, as noted above, a court’s resolution of a case on the basis of the exigent circumstances exception strongly suggests that, under the circumstances, a warrant is both constitutionally necessary and permissible.

If you have any questions, please feel free to contact me directly at the Legislative Council staff offices.

DM:jal

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<sup>2</sup> *State v. Rick* is an unpublished opinion and therefore of no precedential value. Nevertheless, the opinion is instructive because it illustrates how a court might resolve a similar case.