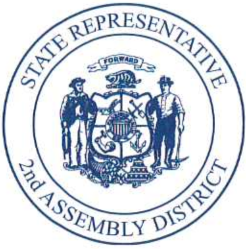

ANDRÉ JACQUE

STATE REPRESENTATIVE • 2nd ASSEMBLY DISTRICT

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Rep.Jacque@legis.wi.gov

P.O. Box 8952
Madison, WI 53708-8952

TO: **Members of the Judiciary and Public Safety Committee**

FROM: **Representative André Jacque**

DATE: **March 24, 2015**

RE: **Senate Bill 29**

Chairman Wanggaard and Colleagues:

Thank you for holding this hearing on Senate Bill 29 and the opportunity to testify before you today.

Sen. Roth and I drafted this legislation at the request of local law enforcement and community leaders to allow law enforcement to obtain a search warrant to draw blood for a first OWI offense. During the previous legislative session, the U.S. Supreme Court 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* case states that dissipation of alcohol in the blood stream by itself is not an exigency).

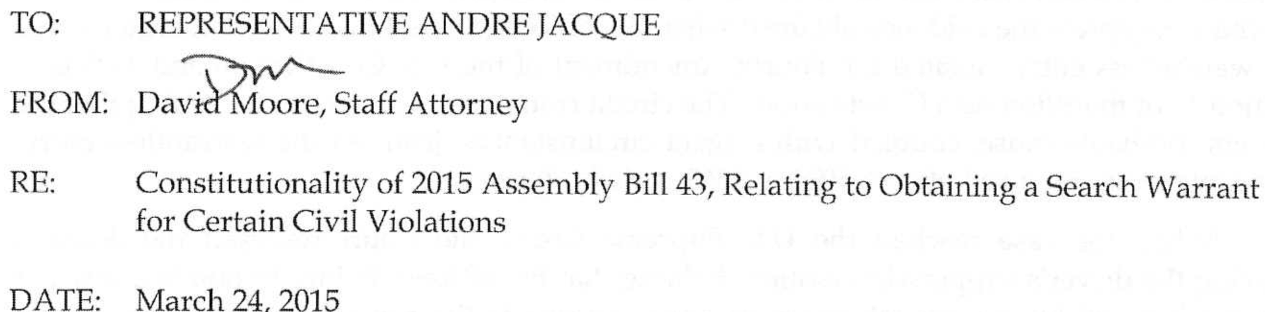
As you know, Wisconsin is the only state in the country that does not regard the first incident of OWI as a crime. As our law sits right now, a search warrant can only be obtained for the seizure of contraband or evidence of a crime. Because a first OWI is not a crime in Wisconsin and it is unclear if 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 SB 29, 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. In fact, law enforcement officers and prosecutors throughout the state have reported to me that they are seeing a noticeable increase in the number of blood draw refusals for OWI in the wake of *Missouri v. McNeely*, in one case representing approximately one quarter of that jurisdiction's OWI stops. OWI prosecutions in those instances are often more lengthy, complicated and costly, because the most reliable evidence for indicating the actual level of intoxication is unavailable. To remedy this, SB 29 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 Senate Bill 29.

WISCONSIN LEGISLATIVE COUNCIL

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



TO: REPRESENTATIVE ANDRE JACQUE

FROM: David Moore, Staff Attorney

RE: Constitutionality of 2015 Assembly Bill 43, Relating to Obtaining a Search Warrant for Certain Civil Violations

DATE: March 24, 2015

This memorandum addresses your question about whether 2015 Assembly Bill 43, 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...."[1]

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

[1]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).][2]

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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[2] *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.

Law Department

James L. Mueller
City Attorney

March 23, 2015

Rep. Andre Jacque
Room 212 North
State Capitol
PO Box 8952
Madison, WI 53709

RE: Assembly Bill 43/Senate Bill 29

Dear Esteemed Members of the Judiciary and Public Safety Committee:

I am writing this letter in support of AB 43/SB 29. As the former Green Bay City Prosecutor and current City Attorney, I believe this legislation will correct a major problem with our current law regarding first offense Operating While Intoxicated. Green Bay Municipal Court processes roughly five hundred OWI-1st 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-1st 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 for an OWI-1st. While this refusal is a law violation itself, 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-1st 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-1st case.

It is my opinion that approval of this legislation will strengthen Wisconsin's OWI-1st 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

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important 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 Prosecutor Patrick Leigl

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
City Attorney
City of Green Bay

Frank Harris
Director of State Government Affairs
Mothers Against Drunk Driving
Senate Judiciary and Public Safety Committee
Testimony in Support of Senate Bill 29
March 24, 2015

Chairman Wanggaard, and distinguished members of the Committee, thank you for allowing me submit written testimony in support of Senate Bill 29 allowing for law enforcement the option to obtain search warrants for first-time arrested OWI offenders who refuse a chemical test. My name is Frank Harris, Director of State Government Affairs for Mothers Against Drunk Driving (MADD).

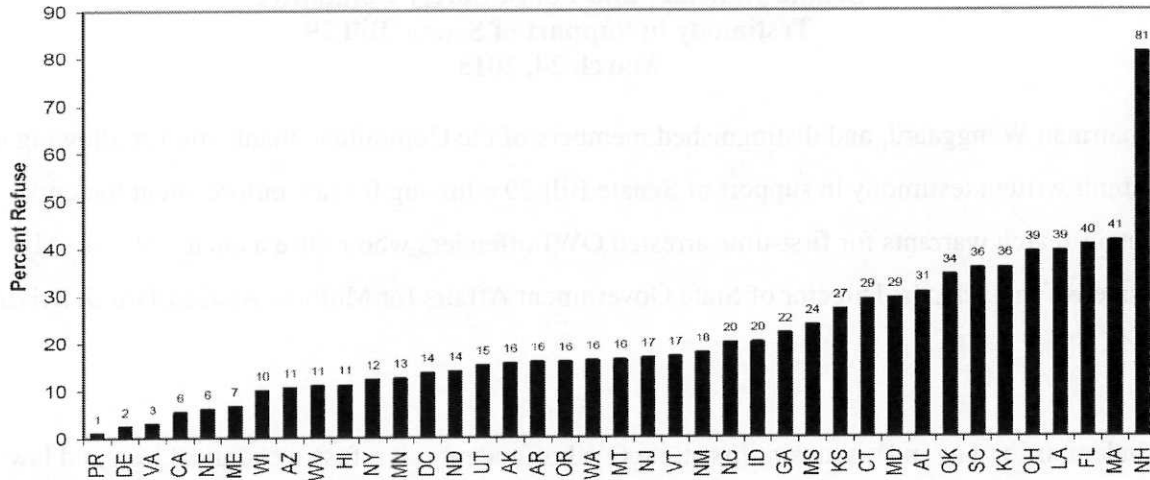
Under current law in Wisconsin, first-time OWI offenders can refuse a chemical test, and law enforcement cannot obtain a search warrant to conduct the test because a first OWI offense is a civil infraction. MADD supports SB 29 because suspected drunk drivers should not be allowed to refuse a chemical 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.[1] SB 29 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 National Highway Transportation Safety Administration (NHTSA) in 2013, there were 178 people killed in crashes caused by a drunk driving representing 32 percent of all total traffic deaths. According to the Wisconsin Department of Transportation in 2013, 2,660 people were 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. MADD supports SB 29 as this measures give law enforcement and prosecutors the necessary tools to hold suspected drunk drivers accountable for their careless choice. Significantly, SB 29 closes a loophole which was created as a result of the 2013 *Missouri v. McNeely* Supreme Court decision, which found a blood draw without a warrant

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

violates the Fourth amendment. Previously, law enforcement was able to obtain a chemical test

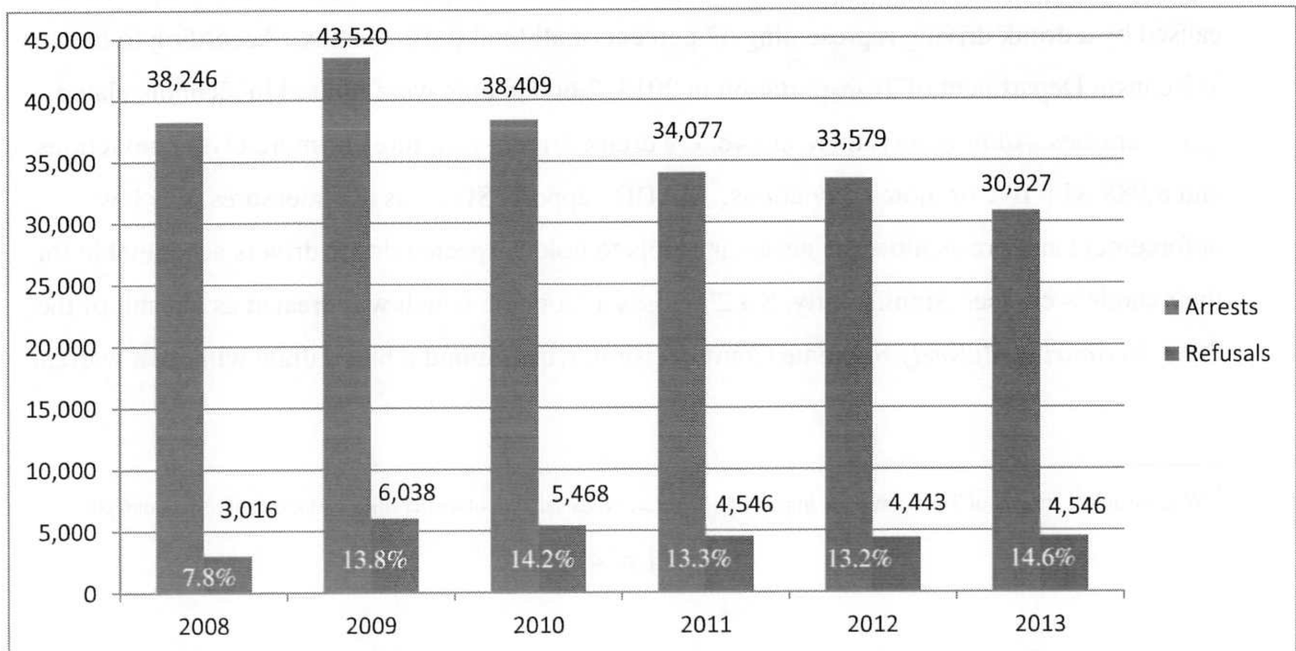
Figure 1. Breath Test Refusal Rates, 2005



without a search warrant of a suspected drunk driver who refused a test.

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's problem is not as severe, however the problem of refusals is increasing. In 2005, ten percent of suspected drunk drivers arrested in Wisconsin refused a chemical test. According to the Wisconsin Department of Transportation, the refusal rate has risen from seven percent in 2008 to 14.6 percent in 2013. 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 26,081 OWI convictions in 2012, and 63 percent or 16,432 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. SB 29 gives law enforcement and prosecutors the tools they need to hold all suspected drunk drivers accountable.

MADD believes SB 29 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 prepares 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 25 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 SB 29 is needed.

In conclusion, MADD encourages this committee to advance SB 29 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.