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TO: Members of the Assembly Committee on Judiciary  
FROM: Rep. André Jacque  
DATE: Sept. 21, 2017  
RE: Assembly Bill 390

Colleagues on the Assembly Judiciary Committee,

Thank you for the opportunity to testify before you today as the author of Assembly Bill 390, which Sen. Wanggaard and I have introduced to correct a statutory oversight created from 2011 Act 113, enacted with broad bi-partisan support, which has unintentionally caused both operating after revocation (OAR) causing death and OAR causing great bodily harm to each simultaneously be both a misdemeanor and a felony. The legislature intended to treat an OAR causing death offense as a misdemeanor, if the operator did not know his/her license had been revoked, and as a Class H felony if the operator knew. Similarly, the legislature intended for OAR causing great bodily injury to be a misdemeanor, increased to a Class I felony if the operator was aware of their revocation. The tiered penalty structure is contained within §§343.44(2)(ar)3 and §§343.44(2)(ar)4 . The legislature, however, failed to remove the “knowledge” element from the misdemeanor language of §§ 343.44(1)(b) thus failing to provide a clear statutory differentiation of the penalties. AB 390 deletes the word “knowingly” from Wis. Stat. § 343.44(1)(b) and clearly eliminates knowledge as an element of the misdemeanor offense, while retaining the increased penalties for knowingly OAR causing great bodily harm or death in §§343.44(2)(ar)3 and §§343.44(2)(ar)4 . This bill also changes the word “shall” to “may” in Wis. Stat. § 343.44(2)(b) to ensure that it is authoritatively construed to be directory rather than mandatory, so that a circuit court may, but is not required to, consider the enumerated factors in the exercise of its sentencing discretion, just as it may, but is not required to, consider other proper sentencing factors.

This issue was brought to our attention through the case of *Wisconsin v. Lazo Villamil*, who on October 30, 2012, drove into the rear end of another vehicle, killing the operator of that vehicle. Villamil’s driver’s license was revoked at the time, and he had committed multiple prior drunk driving and operating after revocation offenses. The state charged Lazo Villamil with, and Lazo Villamil pled to, one count of violating Wis. Stat. § 343.44(1)(b) and Wis. Stat. § 343.44(2)(ar)4 for causing the death of another person while OAR, a felony. In the course of his plea, he admitted that at the time he operated the vehicle, he knew his license was revoked. Villamil has subsequently contended that while he knowingly Operated After Revocation while causing another’s death, he should have been charged for the lesser offense which contained the same provable elements. While the Wisconsin Supreme Court ultimately upheld Villamil’s felony conviction, it is noted on page 13 of the majority decision that, “If the



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legislature desires to create a misdemeanor offense for an unknowing violation, as the legislative history indicates, then the legislature may do so by future amendment of the statutory text...Thus we decline the State's invitation to rewrite the statute in order to create an offense for an "unknowing" violation and hold the application of Wis. Stat. 343.44(1)(b) and (2)(ar)4 to the language the legislature wrote."

The Wisconsin DOJ considers AB 390 to be a helpful and necessary clarification, and AB 390 is supported by the Wisconsin Chiefs of Police Association. Thank you for your consideration of Assembly Bill 390.



# Van H. Wanggaard

Wisconsin State Senator

## Testimony on Assembly Bill 390

Thank you Mr. Chairman and committee members for the hearing today on Assembly Bill 390, relating to operating a motor vehicle after revocation of the operating privilege and requirements of the court during sentencing.

Under current law, the penalties for causing death and causing great bodily harm while operating a motor vehicle with a revoked license are dependent on whether or not an individual knew their license had been revoked. Those penalties are higher if a person knowingly operated their vehicle while their license was revoked.

The crime of operating a motor vehicle while revoked requires that a person know their license was revoked. Knowledge is expressly not required for the crime of operating while suspended. The penalties for both however, make a distinction for knowledge of the individual's license status. There are lower penalties if the person does not know their license was suspended or revoked.

Because the penalties make a distinction for knowledge of license status, but the crime of operating while revoked does not, some have argued that only the lower penalty, equivalent to a misdemeanor, is applicable. This argument was made in the case of *Wisconsin v. Lazo Villamil*, who, although he admitted to knowing his license was revoked when he killed someone with his vehicle, argued he could only be punished with the lesser penalty.

This bill corrects this issue by expressly removing knowledge as an element of the crime of operating while revoked. The new language mirrors the knowledge element in crime of operating while suspended, and the penalties for both remain unchanged.

The bill also gives the judge the option to review additional factors already in statute when sentencing instead of requiring that review.

Thank you committee members for your time, and your support for this largely technical bill.

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