**Municipal Court**
**Village of Pleasant Prairie**

Richard Alan Ginkowski, Judge
Brian M. Sheffler, Clerk of the Municipal Court

9915 39th Avenue
Pleasant Prairie, Wisconsin 53158
(262) 705-3252
FAX: (262) 694-1401

October 15, 2015 (via E-mail)

State Representative Samantha Kerkman
State Representative Jim Ott
State Representative James Edming
State Capitol
Madison, Wisconsin 53702

Re: AB 352 (hearing before Assembly Judiciary Committee today)

Dear Samantha, Jim and Jimmy:

I'm writing because you are sponsors of AB 352 which is scheduled for a hearing this morning before the Assembly Judiciary Committee. Regrettably I am unable to appear at this hearing.

AB352 seeks to require mandatory court appearances appearances by defendants are charged with first offense operating under the influence (OWI). The bill is a noble concept but the logistics are costly, ineffective and may actually lead to fewer impaired drivers being held fully accountable for their actions. That said, I believe the bill can be reworked and not only achieve its goals but actually come out a much better and more effective piece of legislation.

First, I should point out that I have a lengthy history of taking a strong stand on impaired driving. In over 30 years as a prosecutor my conviction rate on the original charge was over 95%. As a judge I have incurred the occasional wrath of defense attorneys because I will not sign off on unlawful plea bargains contrary to the public interest (and this is one of the loopholes that needs additional closure). I prosecuted Clarence William Busch who is the reason Mothers Against Drunk Drivers was founded. I worked with countless victims. I taught prosecutors and police officers on the apprehension and prosecution of impaired drivers. And, on a personal level, my mother was severely crippled and her husband killed by a drunken driver. I've not only "talked the talk" but "walked the walk" and understand this problem far better than most people.

Second, it is no secret that Wisconsin has been criticized – sometimes fairly, sometimes not – for being "too lenient" on impaired drivers. I've spoken with Representative Ott and offered assistance in working on meaningful legislation to close existing loopholes but cannot support this bill in its present form because it actually creates more problems than it solves. However,

we need to understand the Wisconsin approach to OWI to appreciate where improvements are needed.

The main criticism is that first offense OWI in Wisconsin is not a crime which is somehow equated with leniency. The truth is that our approach is centered on making it easy and expedient to convict and hold first offenders accountable as well as to get them into assessment and required treatment sooner rather than later. The hope – which has largely been successful – is that we want to keep as many people as possible from becoming repeat offenders. Making a first offense a crime would sound tough but actually may weaken our ability to keep impaired drivers off the road.

As it stands, when someone is accused of OWI in Wisconsin as a first offense they are not automatically entitled to a jury trial, not entitled to publicly compensated counsel if indigent (though they are able to be represented by self-retained counsel), not entitled to full discovery and the burden of proof upon conviction is clear, satisfactory and convincing evidence – less than proof beyond a reasonable doubt required in a criminal prosecution. Because it's a noncriminal prosecution a defendant may be compelled to testify and, if there is a jury trial, a directed verdict can be ordered. The goal is to make resolution of the case easy and expedient – exactly the opposite of a criminal case.

In a criminal prosecution the traffic cases usually are at the bottom of the jury trial calendar where they compete with everything from murders to sexual assaults and burglary and drug crimes for precious court time. The public pays for jury trials, district attorneys and public defenders. Criminal cases take longer and are more difficult to prove thus making it more difficult to intervene to keep impaired drivers from being a continued threat.

A person convicted of first offense OWI in Wisconsin must pay a forfeiture of $150-300 plus costs and assessments (roughly $700-$1000) and his or her driving privilege is revoked from six to nine months (one year if they refused to submit to a breath, blood or urine test). How does this stack up to neighboring states where the first offense is a crime?

·Illinois: First offenders can avoid "conviction" by being granted supervision. They rarely serve any jail time and may qualify for a monitored device driving permit while allows unrestricted driving after a conviction as long as an ignition interlock device is installed and used. As a practical matter this is more lenient in Wisconsin.

·Iowa: First offenders may spend a couple of days in the county jail but upon conviction the license or driving privilege is suspended (not revoked) for 180 days. Iowa's first offense fines are higher: $625-1250.

·Minnesota: No mandatory jail time if the alcohol level is below .20. •First time offenders who have an alcohol levellunder .16 will receive 90 days of no driving privileges. The driver has a choice of the following: (1) 15 days of no driving privileges and a limited license for remaining 90-day period or (2) full driving privileges for 90-day period with use of ignition interlock. The maximum fine is $1,000 (under .20).

Wisconsin's penalties are in some instances more severe (particularly with respect to loss of license) although an argument can be made that the $150-300 forfeiture range needs to be revisited. There is no data supporting an argument that making a first offense a crime would

reduce the number of offenses or offenders and certainly would not make it easier and more expedient to convict them. There remain, however, impediments to doing this which need to be addressed.

First, although it would be easier to have OWI defendants in court at all appearances, for the most part it is not critical except for trials – a loophole that needs to be closed. A first offender may appear by counsel and skip showing up for his or her trial. Technically, the prosecutor could subpoena the defendant except that subpoenas can't be enforced across state lines except in felony cases. So, an out-of-state defendant – and we have a lot of them in border counties – can skip showing up for court making it more difficult in some cases for the offense to be proved (i.e., if identification of the defendant is an issue). The solution to this is simple. AB352 needs to be rewritten to provide that **all persons charged with first offense OWI must appear in person for all court appearances, even if represented by counsel, except where the personal appearance has been excused by the judge.** This accomplishes AB352's objectives – and then some by closing a major loophole – while allowing flexibility where either the personal appearance is not critical or would be a hardship.

What if the defendant does not appear? He or she could still be subject to a default finding of guilty or the judge could issue a warrant or summons. Further, under existing law, a default judgment is not appealable. AB352 could be amended to **increase the forfeiture range from $150-$300 to $250-$500 (plus costs and assessments) and a defendant who does not appear and whose appearance not been excused would be subject to the maximum forfeiture.** A defendant seeking relief from this penalty due to indigence under existing law has the opportunity ask the judge to consider his or her financial circumstances at any time. This eliminate any accusation that the poor are being unfairly targeted plus it places the burden on the defendant to come forward instead of the warrant provisions presently in AB352 where law enforcement agencies would suffer the cost and loss of manpower tracking down and bringing back defendants who failed to appear in court. This is not an insignificant consideration because not only is it costly but takes officers away from other duties – including apprehending impaired drivers – and further can only work inside Wisconsin as the warrants cannot be executed in another state.

Under AB352 a first offense OWI defendant from Kenosha arrested while deer hunting in Ladysmith who subsequently does not appear in the Ladysmith Municipal Court is named in an arrest warrant. The defendant is located at his home in Kenosha and is lodged in the Kenosha County Jail while Ladysmith must send police officers to Kenosha, a 660 mile round-trip taking two officers at least 12-hours to complete. Only Milwaukee and Madison have full-time municipal courts and only a few others, such as Kenosha, are in session every day. When the defendant gets back to Ladysmith he or she has to appear in front of a judge promptly and if the judge is not available one has to be brought in (average minimum cost of $200) from another jurisdiction for a three-to-five minute hearing. So, not only does Ladysmith have the burden of paying probably 24 hours of police overtime plus perhaps another $200 for a judge to come in, those officers have been removed from service to do the warrant return. How does this improve the ability to apprehend and hold accountable impaired drivers? The $300 surcharge in AB352 would hardly cover a fraction of this cost and the benefit, if any, is far outweighed by the reduction in available police resources. *As it stands many municipalities and counties place geographical restrictions on warrant pickups and thus many of these defendants would simply be released if law enforcement chooses not to travel and take officers off the road to make the trip.*

The above illustrates why AB352 as it stands is a logistical and costly nightmare with not only negligible benefits but also the realistic possibility of being counterproductive. The changes I suggest would not only eliminate that but also enhance and strengthen the bill's potential. Further, there is are additional loopholes that need to be addressed.

First, in 1982 the door was supposedly closed on plea bargaining in OWI cases except where approved by a judge and then only when in the public interest. Still, in the absence of transparency in many places, these plea bargains continue and one of the claimed reasons is, for example, that an out-of-state defendant may face additional penalties in his or her home state. That door needs to be closed with an amendment that collateral consequences of a conviction are not adequate grounds for the amendment or dismissal of an OWI charge.

Second, the legislature just added a $50 "safe ride program" surcharge but overlooked a bigger problem: getting timely laboratory testing results – sometimes months in a drugged driving case. Why not a $50 laboratory surcharge to facilitate faster turnaround on testing? This helps protect the innocent as well as ensnare the guilty.

Third, municipal courts trials are often devalued into a discovery device "dry run" by present statutes allowing for essentially an automatic appeal and new trial, including a jury trial, in circuit court. If a defendant charged with OWI in municipal court wants a jury trial he or she can make a timely demand and pay a jury fee and the case is transferred to the circuit court for a jury trial. Often defendants will bypass this by having a "dry run" in municipal court and then appeal. The right to appeal should remain except that it should be based on the trial record and would require the defendant to show the circuit court why the municipal court judgment should be vacated and a new trial held in the circuit court. If the circuit court grants a new trial for cause the trial will be without a jury. This preserves the right of an erroneously convicted defendant to have a new trial in a different forum while eliminating the present abuses of giving defendants an automatic "second kick at the cat." Defendants could still have a jury trial but must make that choice up front, not later. This also benefits the public interest because a bench trial in circuit court can be scheduled much quicker than a jury trial.

Fourth, with increasing frequency courts are confronted with defendants who were inadvertently convicted of two (or more) first offenses because the respective courts were unaware of the other pending case(s). When facing possible jail time on a criminal OWI case defendants seek to vacate the "second first offense" on jurisdictional grounds, often many years after the cases were concluded. This loophole needs closure. OWI judgments should be final one year after conviction and cannot be vacated or reopened except if a judge finds that the interests of justice (i.e., defendant a victim of identity theft) are served. This closes a loophole of a defendant with two (or more) first offenses "lying in wait" to spring the jurisdictional appeal if he or she is subsequently charged in a criminal OWI case.

Fifth, presently persons who refuse who after an OWI arrest refuse to submit to a chemical test for impairment have to request a "refusal hearing" within ten days of arrest or else the revocation for refusing the test goes into effect. It is not uncommon for defendants to request this hearing and then ultimately plead guilty or no contest to the OWI charge with the additional revocation penalty for refusal vacated. The Wisconsin Supreme Court has upheld this practice because it encourages defendants to accept responsibility and does not prejudice the prosecution. The problem is that defendants who are not represented by counsel often don't request the refusal hearing within ten days of arrest and thus technically lose the opportunity to have the refusal matter dismissed if they subsequently plead guilty or no contest to the OWI. It seems only fair and in the best interests of safer highways to clarify that judges have the discretion to grant a prosecutor's motionto dismiss a refusal matter even if a timely

demand for a hearing was not made if the defendant pleads guilty or no contest to the OWI charge.

All of this leads to this additional suggestion from a 40-year veteran of the criminal justice system. Wisconsin needs to take a hard, comprehensive look at our OWI laws instead of the piecemeal approach we've taken over the years. There are new challenges – such as an increase in drugged driving – and we need to have a comprehensive conversation on how to address this problem in an era of declining resources. Toward that end I would suggest creation of a study committee on impaired driving to make recommendations to the legislature. I volunteer to chair this committee without compensation (except reimbursement for travel/lodging) and suggest a two-year window to collect data and hold hearings around the state. I would suggest that the committee include two municipal court judges, two circuit court judges, the director of the Resource Center on Impaired Driving, a representative from the Wisconsin District Attorney's Association and the State Public Defender, the legal counsel of the Wisconsin Department of Transportation, a police chief and a sheriff, the Attorney General, a victim advocate, the treatment court coordinator of the Wisconsin Court System and the director of the Wisconsin Laboratory of Hygiene.

AB352 is well-intentioned but unworkable, costly and counterproductive. It can be rewritten to be effective but nonetheless there is a need to take a comprehensive look at the problem of impaired driving in Wisconsin and I am more than willing to be part of that process.

Sincerely,

Dick Ginkowski

Richard Alan Ginkowski
Municipal Judge

cc: Assembly Judiciary Committee Members
Rep. Peter Barca
Rep. Robin Vos

# JIM OTT

STATE REPRESENTATIVE • 23rd ASSEMBLY DISTRICT

(608) 266-0486
District: (262) 240-0808
Toll-Free: (888) 534-0023
Rep.Ottj@legis.wi.gov

P.O. Box 8953
Madison, WI 53708-8953


Good Morning Committee members and thank you for hearing my testimony on Assembly Bill 352

Under current Wisconsin law, first offense OWI is a civil forfeiture and as a result, in many counties and municipalities first time offenders are not required to make a personal appearance in court.

This bill would require all first time offenders to appear before a judge, instead of sending legal counsel. It is hoped that by actually being required to stand before a judge the offender will grasp the seriousness of their actions, and what may lie ahead for them if they continue to drive while impaired.

AB 352 was amended to stipulate that if the offender does not appear in court on the required date and time he or she will be automatically convicted. This is necessary because in some counties failure to appear results in the issuance of a bench warrant, meaning that the case will be held open for a period of time, in which the offender could be apprehended again for OWI, which could count as only a first conviction.

The amendment will also require the issuance of a bench warrant for contempt of court for failure to appear in court, even with the automatic conviction.

AB 352 will not require any significant added expense for the state, counties or municipalities, or the offender. It is a simple way to insure that offenders know Wisconsin takes drunk driving seriously and hopefully will encourage first time offenders to change their behavior before they offend a second time.