

**999A UNBORN CHILD IN THE VEHICLE — §§ 940.09(1b) and 940.25(1b)**

CAUTION: THIS INSTRUCTION IS TO BE USED ONLY FOR OFFENSES COMMITTED BEFORE FEBRUARY 1, 2003.

THE FOLLOWING INSTRUCTION SHOULD BE GIVEN IMMEDIATELY AFTER THE INSTRUCTION ON THE OFFENSE CHARGED.

The information alleges not only that the defendant committed the offense of (specify the offense charged) but also that there was an unborn child in the motor vehicle at the time.

If you find the defendant guilty, you must answer the following question:

"Was there an unborn child in the motor vehicle at the time?"

"Unborn child" means any individual of the human species from fertilization until birth that is gestating inside a woman.<sup>1</sup>

If you are satisfied beyond a reasonable doubt that there was unborn child in the motor vehicle at the time, you should answer the question "yes."

If you are not so satisfied, you must answer the question "no."

**COMMENT**

Wis JI-Criminal 999A was approved by the Committee in March 1999.

Sections 940.09(1b) and 940.25(1b) were repealed by 2001 Wisconsin Act 109, effective February 1, 2003. This instruction is to be used only for charges based on conduct occurring before that date. The facts formerly addressed by §§ 940.09(1b) and 940.25(1b) have been recast as an aggravating factor to be considered in imposing a sentence. See § 973.017(7).

1995 Wisconsin Act 425 (effective date June 21, 1996), created several statutes that double the maximum penalty for operating while intoxicated offenses that occur while a child under the age of 16 is a passenger in the defendant's vehicle. [See Wis JI-Criminal 999.] 1997 Wisconsin Act 295 amended two of those penalty provisions – §§ 940.09(1b) and 940.25(1b) – to apply when there is unborn child in the vehicle. [Effective date: July 1, 1998.]

Section 940.09(1b) is applicable to violations of § 940.09, Homicide by intoxicated use of a vehicle; section 940.25(1b) is applicable to violations of § 940.25, Injury [great bodily harm] by intoxicated use of a vehicle. Both of those statutes were amended by 1997 Wisconsin Act 295 to apply to causing the death of (§ 940.09) or great bodily harm to (§ 940.25) an unborn child. The penalty provisions addressed by this instruction apply to violations of those two statutes where the death of or great bodily harm to another person is caused when an unborn child is in the motor vehicle.

NOTE: The 1997-98 Wisconsin Statutes do not reflect the change made in § 940.25(1b) by 1997 Wisconsin Act 295 to include "unborn child." This was an inadvertent omission made in the course of preparing the printed statutes. The original act controls; see § 990.07. Therefore this instruction was drafted to apply to § 940.25(1b) as well as to § 940.09(1b).

As with similar provisions that expand the maximum penalty for a criminal offense, the Committee concluded that this penalty-increasing factor should be submitted to the jury as a special question.

The following form is suggested for the verdict:

We, the jury, find the defendant guilty of \_\_\_\_\_ under Wis. Stat. § \_\_\_\_\_ at the time and place charged in the information.

We, the jury, find the defendant not guilty.

If you find the defendant guilty, answer the following question "yes" or "no":

"Was there an unborn child in the motor vehicle at the time?"

1. This is the definition provided in § 939.75(1).