

**1191 HOMICIDE BY OPERATION OR HANDLING OF FIREARM OR  
AIRGUN WITH AN ALCOHOL CONCENTRATION OF 0.08 OR MORE  
— § 940.09(1g)(b)**

**Statutory Definition of the Crime**

Section 940.09(1g)(b) of the Criminal Code of Wisconsin is violated by one who causes the death of another by the operation or handling of a firearm<sup>1</sup> while that person has an alcohol concentration of 0.08 or more.<sup>2</sup>

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant handled<sup>3</sup> a firearm.<sup>4</sup>
2. The defendant's handling of a firearm caused the death of (name of victim).

"Cause" means that the defendant's handling of a firearm was a substantial factor<sup>5</sup> in producing the death.

3. The defendant had an alcohol concentration of 0.08 or more at the time the defendant handled a firearm.

**How to Use the Test Result Evidence**

The law states that the alcohol concentration in a defendant's (breath) (blood) (urine) sample taken within three hours of an incident is evidence of the defendant's alcohol concentration at the time of the incident.<sup>6</sup>

WHERE TEST RESULTS SHOWING 0.08 GRAMS OR MORE HAVE BEEN ADMITTED<sup>7</sup> AND THERE IS NO ISSUE RELATING TO THE DEFENDANT'S POSITION ON THE "BLOOD-ALCOHOL CURVE,"<sup>8</sup> THE JURY SHOULD BE INSTRUCTED AS FOLLOWS:

[If you are satisfied beyond a reasonable doubt that there was [.08 grams or more of alcohol in 100 milliliters of the defendant's blood] [.08 grams or more of alcohol in 210 liters of the defendant's breath] at the time the test was taken, you may find from that fact alone that the defendant had an alcohol concentration of .08 or more at the time of the alleged incident, but you are not required to do so. You the jury are here to decide this question on the basis of all the evidence in this case, and you should not find that the defendant had an alcohol concentration of .08 or more at the time of the alleged incident, unless you are satisfied of that fact beyond a reasonable doubt.]

IF AN APPROVED TESTING DEVICE IS INVOLVED, THE FOLLOWING MAY BE ADDED:<sup>9</sup>

[The law recognizes that the testing device used in this case uses a scientifically sound method of measuring the alcohol concentration of an individual. The State is not required to prove the underlying scientific reliability of the method used by the testing device. However, the State is required to establish that the testing device was in proper working order and that it was correctly operated by a qualified person.]

IF THERE IS NO EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.09(2), USE THE FOLLOWING CLOSING:<sup>10</sup>

**[Jury's Decision]**

[If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.]

IF THERE IS EVIDENCE OF THE DEFENSE DEFINED BY SECTION 940.09(2),<sup>11</sup> USE THE FOLLOWING:

**[Consider Whether the Defense is Proved]**

[Wisconsin law provides that it is a defense to this crime if the death would have occurred even if the defendant had been exercising due care and had not had an alcohol concentration of .08 or more.

The burden is on the defendant to prove by evidence which satisfies you to a reasonable certainty by the greater weight of the credible evidence<sup>12</sup> that this defense is established.

"By the greater weight of the evidence" is meant evidence which, when weighed against that opposed to it, has more convincing power. "Credible evidence" is evidence which in the light of reason and common sense is worthy of belief.]

ADD THE FOLLOWING IF REQUESTED AND IF EVIDENCE OF THE CONDUCT OF THE VICTIM HAS BEEN INTRODUCED AS RELEVANT TO THE AFFIRMATIVE DEFENSE. DO NOT GIVE WITHOUT CLEAR JUSTIFICATION.<sup>13</sup>

[Evidence has been received relating to the conduct of (name of victim) at the time of the alleged crime. Any failure by (name of victim) to exercise due care<sup>14</sup> does not by itself provide a defense to the crime charged against the defendant.<sup>15</sup> Consider evidence of the conduct of (name of victim) in deciding whether the defendant has established that the death

would have occurred even if the defendant had not had an alcohol concentration of .08 or more and had been exercising due care.]

### **Jury's Decision**

[If you are satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved, you must find the defendant not guilty.

If you are not satisfied to a reasonable certainty by the greater weight of the credible evidence that this defense is proved and you are satisfied beyond a reasonable doubt that all elements of this offense have been proved, you should find the defendant guilty.

If you are not satisfied beyond a reasonable doubt that all elements of this offense have been proved, you must find the defendant not guilty.<sup>16]</sup>

### **COMMENT**

Wis JI-Criminal 1191 was originally published in 1982 and revised in 1985, 1986, 1992, and 2004. This revision was approved by the Committee in June 2005.

This instruction is drafted for violations of § 940.09(1g)(b) involving an alcohol concentration of 0.08 or more. The 2004 revision reflected the change in the prohibited alcohol concentration level from 0.10 to 0.08 made by 2003 Wisconsin Act 30. The change applies to all offenses committed on or after September 30, 2003. The prohibited level does not change for this offense where a defendant has prior convictions.

The 2006 revision reflected the correction made in § 885.235 by 2005 Wisconsin Act 8. That correction restored statutory authority for giving prima facie effect to test results in cases where the defendant has three or more priors. See Wis JI-Criminal 2600 Introductory Comment, sec. VII.

For cases involving the death of an unborn child, see Wis JI-Criminal 1185A which identifies the changes that should be made in the instructions.

See Wis JI-Criminal 1190 for the related offense of causing death by handling a firearm while under the influence, as defined in § 940.09(1g)(a). For cases with two charges – under the influence and an alcohol concentration of .08 or more – Wis JI-Criminal 1189 can be used as a model.

Section 940.09(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and he or she . . . did not have an alcohol concentration described under sub. . . . (1g)(b) . . ." The defense is addressed in the instruction by using an alternative ending, see text at footnote 11 and following. Regarding the defense, see Wis JI-Criminal 2600, Sec. X.

The 2004 revision adopted a new format for footnotes. Although this offense involves firearms or airguns, the structure of the statute and its terms are the same as apply to motor vehicle offenses. Footnotes common to motor vehicle offenses are collected in the Introductory Comment that precedes Wis JI-Criminal 2600. They are cross-referenced by paragraph number in the footnotes for the individual instructions to which they apply. Footnotes unique to individual instructions are included in full in those instructions.

1. Section 940.09(1g) applies to operation or handling of a "firearm" or "airgun." This instruction is drafted for cases involving a "firearm." "Airgun" is defined by § 939.22(2) as follows:

'Airgun' means a weapon which expels a missile by the expansion of compressed air or other gas.

2. Section 940.09(1g)(b) defines this offense as causing death by operation or handling a vehicle "while the person has an alcohol concentration of 0.08 or more." Unlike motor vehicle offenses, the prohibited level does not change if the defendant has prior convictions.

3. The statute applies to the "operation or handling" of a firearm or airgun. The instruction uses "handles" throughout, on the assumption that it is the term that fits best with instrumentalities like firearms and airguns.

4. "Firearm" has been defined as a weapon that acts by force of gunpowder. Rafferty v. State, 29 Wis.2d 470, 478, 138 N.W.2d 741 (1966).

5. The Committee concluded that the simple "substantial factor" definition of cause should be sufficient for most cases. If additional definition is necessary, see note 5, Wis JI-Criminal 1185, and Wis JI-Criminal 901, Cause.

The statute does provide the defendant with an affirmative defense in certain situations, see footnote 10, below.

6. This statement is supported by the general rule stated in § 885.235(1g) that the results of properly conducted alcohol tests are admissible. However, the rest of that statute does not accord test results of defendants with 3 or more priors any prima facie effect. So there is no statutory authority for the typical statement that discusses the evidentiary value of test results.

7. Regarding the evidentiary significance of test results, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.

8. Regarding the "blood alcohol curve," see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.
9. Regarding the reliability of the testing device, see Wis JI-Criminal 2600 Introductory Comment, Sec. VII.
10. Section 940.09(2) provides that the defendant "has a defense if he or she proves by a preponderance of the evidence that the death would have occurred even if he or she had been exercising due care and he or she . . . did not have a prohibited alcohol concentration . . ." When there is not "some evidence" of the defense in the case, this set of closing paragraphs should be used.
11. See note 10, supra. When there is "some evidence" of the defense in the case, the second set of closing paragraphs should be used.
12. Section 940.09(2) expressly places the burden on the defendant to prove the defense "by a preponderance of the evidence." The instruction describes the standard as "to a reasonable certainty, by the greater weight of the credible evidence," because the Committee concluded that "the greater weight" will be more easily understood by the jury than "preponderance."
13. The material that follows was drafted to respond to the recommendations made by the Wisconsin Supreme Court in State v. Lohmeier, 205 Wis.2d 182, 556 N.W.2d 90 (1996). The court recommended that an instruction be drafted to articulate the rule in § 939.14, **Criminal conduct or contributory negligence of victim no defense**. See Wis JI-Criminal 2600 Introductory Comment, Sec. X.
14. The phrase "failure to exercise due care" is intended to refer to what might be characterized as "negligence" on the part of the victim. The Committee concluded that the term "negligence" should not be used because that highlights the conflict with the rule of § 939.14. The usual substitute for "negligence" would be a reference to the failure to exercise "ordinary care." The instruction uses "due care" instead because that is the term used in the statutory affirmative defense applicable to violations of §§ 940.09, 940.25 and 346.63. In cases involving the defense, it would be confusing to refer to "ordinary care" when referring to the victim's conduct and to "due care" when referring to the defendant's conduct. Because "due care" is used in the statute, the term is adopted for both references in this instruction. The Committee does not believe that there is a substantive difference between the two terms.
15. The instruction attempts to articulate a very fine distinction which, in the abstract, may be difficult to understand. "Defense" is used here to refer to a special rule of law providing a defense to the crime. However, in plain language, negligence on the part of the victim can be a reason why the defendant is not guilty of the charge. It could prevent the defendant's conduct from being the cause of the harm, or it could satisfy the requirements of the affirmative defense under § 940.09(2). The third sentence in the bracketed material is intended to address the recommendations in Lohmeier that a "bridging" instruction be drafted. See note 13, supra, and Wis JI-Criminal 2600 Introductory Comment, Sec. X.
16. This statement is included to assure that both options for a not guilty verdict are clearly presented:
  - 1) not guilty because the elements have not been proved [regardless of the conclusion about the defense]; and
  - 2) not guilty even though the elements have been proved, because the defense has been established.