

**1343D POSSESSION OF A FIREARM [OTHER CIRCUMSTANCES]¹ — §
941.29(1m)(bm) – (em)**

Statutory Definition of the Crime

Section 941.29(1m) of the Criminal Code of Wisconsin is violated by a person who possesses a firearm if that person [CHOOSE ONE OF THE FOLLOWING]²

[has been adjudicated delinquent for an act that, if committed by an adult in Wisconsin, would be a felony.]

[has been found not guilty of a felony in Wisconsin by reason of mental disease or defect.]

[has been found (not guilty of) (not responsible for) a crime elsewhere that would be a felony in Wisconsin by reason of (insanity) (mental disease, defect, or illness).]

[has been committed for treatment under Wis. Stat. § 51.20 (13) (a) and is subject to an order not to possess a firearm under § 51.20 (13) (cv) 1.]

[is subject to an order not to possess a firearm under § (51.20 (13) (cv) 1.) (51.45(13) (i) 1.) (54.10 (3) (f) 1.) (55.12 (10) (a)).]³

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 two elements were present.

Elements of the Crime That the State Must Prove

1. The defendant possessed a firearm.

“Firearm” means a weapon which acts by the force of gunpowder.⁴

[It is not necessary that the firearm was loaded or capable of being fired.]⁵

“Possess” means that the defendant knowingly⁶ had actual physical control of a firearm.⁷

Deciding About Knowledge⁸

You cannot look into a person’s mind to find knowledge. Knowledge must be found, if found at all, from the defendant’s acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge.

ADD THE FOLLOWING PARAGRAPHS THAT ARE SUPPORTED BY THE EVIDENCE.

[An item is (also) in a person’s possession if it is in an area over which the person has control and the person intends to exercise control over the item.]

[It is not required that a person own an item in order to possess it. What is required is that the person exercise control over the item.]

[Possession may be shared with another person. If a person exercises control over an item, that item is in their possession, even though another person may also have similar control.]

2. The defendant, [CHOOSE ONE OF THE FOLLOWING].⁹

[before (date of offense), had been adjudicated delinquent for an act that would

be a felony in Wisconsin if committed by an adult.¹⁰

(Name of act), if committed by an adult in this state, would be a felony.)]

[before (date of offense), had been found not guilty of a felony in Wisconsin due to mental disease or defect.]¹¹

[before (date of offense), had been found (not guilty of) (not responsible for) a crime elsewhere, which would be a felony in Wisconsin, due to (insanity) (mental disease, defect, or illness).¹²

(Name of felony) is a felony in Wisconsin.]¹³

[had been committed for treatment under Wis. Stat. § 51.20 (13) (a) and was subject to an order not to possess a firearm under § 51.20 (13) (cv) 1. on (date of offense)]¹⁴

[was subject to an order not to possess a firearm under § (51.20 (13) (cv) 1.) (51.45(13) (i) 1.) (54.10 (3) (f) 1.) (55.12 (10) (a)) on (date of offense)]¹⁵

[The parties have agreed that [CHOOSE ONE OF THE FOLLOWING], and you must accept this as conclusively proved.]¹⁶

[before (date of offense), the defendant was adjudicated delinquent for an act that would be a felony in Wisconsin if committed by an adult]

[before (date of offense), the defendant was found not guilty of a felony in Wisconsin due to mental disease or defect]

[before (date of offense), the defendant was found (not guilty of) (not

responsible for) a crime elsewhere, which would be a felony in Wisconsin, due to (insanity) (mental disease, defect, or illness)]

[on (date of offense), the defendant was committed for treatment under s. 51.20 (13) (a) and was subject to an order not to possess a firearm]

[on (date of offense), the defendant was subject to an order not to possess a firearm under § 51.20 (13) (cv) 1., 51.45(13) (i) 1., 54.10 (3) (f) 1., or 55.12 (10) (a).]

Jury's Decision

If you are satisfied beyond a reasonable doubt that both 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.

COMMENT

Wis JI Criminal 1343D was approved by the Committee in August 2023.

Section 941.29 was revised by 2015 Wisconsin Act 109. The offense definition did not change but is now found in sub. (1m). In addition, Act 109 repealed former sub. (2) and created sub. (4m) to require a minimum sentence for cases involving persons with a prior record relating to a “violent felony” or a “violent misdemeanor.” Those terms are defined in the new sub. (1g). [The effective date of Act 109 is November 13, 2015, but § 941.29(4m)(b) states: “This subsection does not apply to sentences imposed after July 1, 2020.”]

See Wis JI-Criminal 1343 for violations § 941.29(1m) possession of a firearm by a person convicted of a felony.

See Wis JI-Criminal 1343A for material to add to this instruction in cases where the narrow defense of privilege recognized in State v. Coleman, 206 Wis.2d 198, 556 N.W.2d 701 (1996) is raised.

See Wis JI-Criminal 1343B for violations of § 941.29(4), furnishing a firearm to a felon.

See Wis JI-Criminal 1344 for violations of § 941.29(1m)(f) and (g), possession of a firearm by a person subject to an injunction.

The state has jurisdiction to enforce § 941.29 on tribal reservations. State v. Jacobs, 2007 WI App 155, 302 Wis.2d 675, 735 N.W.2d 535.

The right to bear arms amendment to the state constitution did not invalidate § 941.29. State v. Thomas, 2004 WI App 115, 274 Wis.2d 513, 683 N.W.2d 497. The statute is not unconstitutionally vague or overbroad, and it does not deny the equal protection of the laws. Id.

Wisconsin's possession of a firearm by a felon law is not unconstitutional as applied to a defendant convicted of a non-violent felony. The Wisconsin Supreme Court has held that prohibiting all felons from possessing firearms under § 941.29, even those convicted of non-violent offenses is substantially related to the important governmental objectives of public safety and the prevention of gun violence. State v. Roundtree, 2021 WI 1, 395 Wis.2d 94, 952 N.W.2d 765. Accordingly, § 941.29 is constitutional as applied to all felons, regardless of the nature or age of the underlying felony conviction. Id.

Section 2 of Chapter 141, Laws of 1981, is related to the applicability of the law. However, it was not printed in the statutes. It provided: "This act applies to persons regardless of the date the crime specified under § 941.29(1) of the statutes, as created by this act, is committed." However, for the statute to apply, the possession of the firearm would have had to occur after the statute's effective date, which was March 31, 1982.

Section 973.033, effective March 31, 1990, requires that whenever a defendant is sentenced for a felony, "the court shall inform the defendant of the requirements and penalties under s. 941.29." This does not add a requirement to a charge under § 941.29 that the required advice was given. State v. Phillips, 172 Wis.2d 391, 493 N.W.2d 238 (Ct. App. 1992). Phillips confirmed that the offense has two elements: being a convicted felon and possessing a firearm. 172 Wis.2d 391, 354.

In State v. Thiel, 188 Wis.2d 695, 524 N.W.2d 641 (1994), the court upheld the application of § 941.29 to a person whose felony conviction occurred in 1970, eleven years before § 941.29 was enacted. The court concluded that "the statute was not enacted with the intent to punish convicted felons and as such is not an ex post facto law as applied to [Thiel]." 188 Wis.2d 695, 697.

1. A trial judge has the authority to determine whether to include, exclude, or modify the title of an instruction when submitting it to the jury. The title of § 941.29 addresses "Possession of a firearm." However, this instruction only applies to individuals who are prohibited from possessing firearms because they were adjudicated delinquent or found not guilty of a felony by reason of mental illness or defect. The bracketed language "other circumstances" is optional and can be included to distinguish between those individuals restricted from firearm possession under § 941.29(1m)(bm) - (em) and other types of individuals who are also banned from possessing firearms, such as adult felons or persons subject to an injunction at the time of the offense.

2. The applicable term should be selected. The alternatives are those provided in sub. (1m)(bm) – (em) of § 941.29.

3. This instruction is drafted to address cases concerning the possession of a firearm by an individual falling under one of the categories provided in subs. 941.29(1m)(bm) through (em). [Subsection (1m)(em)

was created by 2009 Wisconsin Act 258.] It is important to note that the statute extends to other categories of individuals as well. See § 941.29(1m)(a) through (g). For cases involving possession of a firearm by a person convicted of a felony, see Wis JI-Criminal 1343. That instruction is also suitable for use in cases involving subs. (1m)(a) and (b). For cases involving subs. (1m)(f) and (g), see Wis JI-Criminal 1344.

The statement of the elements in the instruction is a substantial shortening of the full statutory definition. Note that there are exceptions to the coverage of the statute in subsections (5) through (9) of § 941.29. The exception in subsection (5)(b) was added by 1985 Wisconsin Act 259. The cited provision, 18 U.S.C. § 925(c), allows the secretary of the treasury to grant relief from the disabilities relating to possession of firearms if the person's conviction did not involve a firearm offense and the secretary is satisfied "that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief will not be contrary to the public interest." However, § 925(c), and by extension (5)(b), no longer provide a functional mechanism for relief from the firearms disability imposed on felons in Wisconsin. This is because "since 1992, Congress has provided in each ATF appropriations bill that none of the appropriated funds are to be used to investigate or act upon applications for relief from federal firearms disabilities." Moran v. Wisconsin Department of Justice, 2019 WI App 206, ¶19, 388 Wis. 2d 193, 932 N.W.2d 430.

Subsection (5)(a) contains two prerequisites for lawful possession of a firearm by a felon: the individual must have received a pardon, and they must have been expressly authorized to possess a firearm under 18 U.S.C. app 1203. However, it is important to note that the latter requirement was repealed in 1986. Moran, 388 Wis. 2d 193, ¶17. Wisconsin law distinguishes between a pardon and a restoration of rights. A pardon alone will restore a felon's firearm rights. Id. ¶¶ 23-26. Where the removal of a felon's political disabilities imposed as a result of an out-of-state conviction restores the felon's right to possess a firearm in that state, a pardon is still required for the felon to possess firearms in Wisconsin. Moran v. Wisconsin Department of Justice, 2019 WI App 38, 388 Wis.2d 193, 932 N.W.2d 430.

An individual who has been adjudicated delinquent for a felony, as defined in Wis. Stat. § 941.29(1m)(bm), has the option to petition for the restoration of their firearm possession rights under Wis. Stat. § 941.29(8). That section provides the following:

This section does not apply to any person specified in sub. (1m)(bm) if a court subsequently determines that the person is not likely to act in a manner dangerous to public safety. In any action or proceeding regarding this determination, the person has the burden of proving by a preponderance of the evidence that he or she is not likely to act in a manner dangerous to public safety.

To initiate this process, individuals can make use of a specific court form called the "Petition for Removal of Firearm Restriction" (JD-1771).

4. The term "firearm" is considered to mean a weapon that acts by the force of gunpowder. See, for example, Harris v. Cameron, 81 Wis. 239, 51 N.W. 437 (1892).

5. Possession of a disassembled and inoperable firearm is a violation of § 941.29. The "term 'firearm' is appropriately defined as a weapon that acts by force of gunpowder to fire a projectile irrespective of whether it is inoperable due to disassembly." State v. Rardon, 185 Wis.2d 701, 706, 518 N.W.2d 330 (Ct. App. 1994), citing Wis JI-Criminal 1343 with approval. Also see State v. Johnson, 171 Wis.2d 175, 491 N.W.2d 110 (Ct. App. 1992), reaching a similar conclusion with respect to the definition of "shotgun" under § 941.28.

6. Inherent in the legal definition of “possession” is the concept of knowing or conscious possession. See Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927), Doscher v. State, 194 Wis. 67, 69, 214 N.W. 359 (1927).

7. The definition of “possess” is the one provided in Wis JI-Criminal 920. The first sentence should be given in all cases. The bracketed optional paragraphs are intended for use where the evidence shows that the object is not in the physical possession of the defendant or that possession is shared with another.

See the Comment to Wis JI-Criminal 920 for a discussion of various issues relating to “possession” in criminal cases, including so-called constructive possession.

In State v. Black, 2001 WI 31, 242 Wis.2d 126, 624 N.W.2d 363, the court suggested that “handling” a firearm was sufficient to satisfy the “possession” element. The court concluded that a criminal complaint alleging that the defendant handled a firearm provided a sufficient factual basis to support a guilty plea to violating § 941.29.

8. The knowledge requirement described here relates to the knowledge inherent in the concept of possession. See note 6, supra. The Committee concluded that subsections (1m)(bm) through (em) do not require proof that defendants know their enumerated status or know of the prohibition against possessing a firearm. This conclusion is based on sec. 939.23(1).

This conclusion is based on Section 939.23(1), which states, “When criminal intent is an element of a crime in chapters 939 to 951, such intent is indicated by the term ‘intentionally,’ the phrase ‘with intent to,’ the phrase ‘with intent that,’ or some form of the verbs ‘know’ or ‘believe.’” Therefore, the Committee determined that proof of intent is not mandated unless one of these terms is present within the statute. In the context of Wis. Stat. § 941.29(1m), the absence of intent word “knowingly” is particularly significant, indicating that proof of intent is not required. See also, State v. Phillips, 172 Wis.2d 391, 451 N.W.2d 238 (Ct. App. 1989), which concluded that the statute requiring sentencing courts to inform defendants convicted of felonies about the prohibition on firearm possession did not create an extra element for the crime of illegal firearm possession by a felon.

9. The applicable term should be selected. The alternatives are those provided in sub. (1m)(bm) – (em) of § 941.29.

10. The language in brackets is an abbreviated version of the complete statutory definition. See § 941.29(1m)(bm) for the complete language.

11. See § 941.29(1m)(c)

12. The language in brackets is an abbreviated version of the complete statutory definition. See § 941.29(1m)(d) for the complete language.

13. The statute applies to persons found not guilty of a felony in Wisconsin by reason of mental disease or defect and also persons found not guilty of or not responsible for a crime by reason of insanity or mental disease, defect, or illness in another state that would be a felony in Wisconsin.

In the Committee’s judgment, the way the second element is phrased should be suitable for handling

either alternative. Where the crime committed in another state has a name not used in Wisconsin, it may be helpful to add a sentence to the effect that the offense would have been a felony if committed in this state. The Committee concluded that the statutory elements of the crime of which the defendant was convicted in the other state should be compared with the statutory elements of the comparable Wisconsin offense. One must be able to say that those elements “would be a felony if committed in this state.”

14. The language in brackets is an abbreviated version of the complete statutory definition. See § 941.29(1m)(e) for the complete language.

15. The language in brackets is an abbreviated version of the complete statutory definition. See § 941.29(1m)(em) for the complete language.

Compare § 941.29 with its federal counterpart, 18 USC 924(a)(2), which refers to one who “knowingly” violates the federal prohibition in 18 USC 922(g) on firearm possession. 18 USC 924(a)(2) was interpreted in Rehaif v. United States, 139 S.Ct. 2191 [No. 17-9560, decided June 21, 2019] to require that the defendant knew he possessed a firearm and knew that he was an alien unlawfully in the country and thus prohibited from possessing a firearm under 18 USC 922(g). Because it is a decision interpreting a federal statute and is not constitutionally based, Rehaif has no direct application to § 941.29.

When an out-of-state criminal charge is based on a statute broader than its Wisconsin equivalent, courts should determine whether the underlying conduct resulting in the adjudication or finding of not guilty due to mental disease or defect would qualify as a felony under Wisconsin law. If it would, the out-of-state criminal conduct can be the basis for the application of § 941.29. State v. Campbell, 2002 WI App 20, 250 Wis.2d 238, ¶¶7-6, 642 N.W.2d 230.

16. Defendants may offer to stipulate to the fact of their adjudication status. The bracketed statement in the instruction includes the standard statement on the effect of a stipulation found in Wis JI-Criminal 162, **AGREED FACTS**.

There is authority recognizing that defendants may offer to stipulate to the fact of a prior felony conviction when the charge is possession of a firearm by a felon under § 941.29(1m)(a). The effect of a stipulation in a prosecution for violating § 941.29(1m)(a) has been described as follows:

. . . where prior conviction of a felony is an element of the offense with which the defendant is charged and the defendant is willing to stipulate that he or she is a convicted felon, evidence of the nature of the felony is irrelevant if offered solely to establish the felony-conviction element of the offense. The trial court therefore abused its discretion in allowing the prosecutor to inform the jury as to the nature of McAllister’s crime.

State v. McAllister, 153 Wis.2d 523, 525, 451 N.W.2d 764 (Ct. App. 1989).

The fact of felon status may still be revealed; it is the nature of the felony that is not to be disclosed. State v. Nicholson, 160 Wis.2d 803, 804, 467 N.W.2d 139 (Ct. App. 1991).

The same concerns may lead to offers to stipulate to the fact of a prior adjudication addressed by this instruction. Care must be taken where a stipulation goes to an element of a crime. A waiver should be

obtained. See Wis JI-Criminal 162A Law Note: Stipulations.

An example of a complete waiver inquiry is as follows:

TO THE DEFENDANT:

1. Do you understand that one of the elements of the crime of possession of a firearm by a person (adjudicated delinquent) (found not guilty of a felony in Wisconsin by reason of mental disease or defect) (subject to an order not to possess a firearm) is that you (have been adjudicated delinquent for an act that would be considered a felony in Wisconsin if committed by an adult) (have been found not guilty of a felony charge in Wisconsin due to mental disease or defect) (have been found (not guilty of) (not responsible for) a crime elsewhere, which would be considered a felony in Wisconsin, due to (insanity) (mental disease, defect, or illness)) (have been committed for treatment and were subject to an order not to possess a firearm) (were subject to an order not to possess a firearm) before the date of this offense?
2. Do you understand that you have the right to have a jury, that is, twelve people, decide whether or not the State has proved beyond a reasonable doubt that you (have been adjudicated delinquent for an act that would be considered a felony in Wisconsin if committed by an adult) (have been found not guilty of a felony charge in Wisconsin due to mental disease or defect) (have been found (not guilty of) (not responsible for) a crime elsewhere, which would be considered a felony in Wisconsin, due to (insanity) (mental disease, defect, or illness)) (have been committed for treatment and were subject to an order not to possess a firearm) (were subject to an order not to possess a firearm) before the date of offense?
3. Do you understand that the State has to convince each member of the jury that you (have been adjudicated delinquent for an act that would be considered a felony in Wisconsin if committed by an adult) (have been found not guilty of a felony charge in Wisconsin due to mental disease or defect) (have been found (not guilty of) (not responsible for) a crime elsewhere, which would be considered a felony in Wisconsin, due to (insanity) (mental disease, defect, or illness)) (have been committed for treatment and were subject to an order not to possess a firearm) (were subject to an order not to possess a firearm) before the date of offense?
4. With this stipulation, you are agreeing that I tell the jury that you (have been adjudicated delinquent for an act that would be considered a felony in Wisconsin if committed by an adult) (have been found not guilty of a felony charge in Wisconsin due to mental disease or defect) (have been found (not guilty of) (not responsible for) a crime elsewhere, which would be considered a felony in Wisconsin, due to (insanity) (mental disease, defect, or illness)) (have been committed for treatment and were subject to an order not to possess a firearm) (were subject to an order not to possess a firearm) before the date of offense, and that they are to accept this fact as conclusively proved?
5. Has your attorney explained the pros and cons, that is, the advantages and disadvantages of entering into this agreement?
6. Have you had enough time to talk all of this over with your attorney?
7. Has anyone pressured you or threatened you in any way or made any promises to you to get you

to enter into this agreement?

8. Are you entering into this agreement of your own free will?
9. Have you had enough time to make your decision?

TO DEFENSE COUNSEL:

1. Are you satisfied that your client thoroughly understands their right to enter into this agreement regarding their (prior adjudication for an act considered a felony) (prior finding of not guilty of a felony charge due to mental disease or defect) (previously being subjected to an order that prohibits firearm possession) or to not enter into this agreement?
2. Are you satisfied that your client is entering into this agreement freely, voluntarily, intelligently, and knowingly?

FINDING: The court is also satisfied that the defendant is entering into this agreement freely, voluntarily, intelligently, and knowingly. The court, therefore, accepts the stipulation.

Also see State v. Aldazabal, 146 Wis.2d 267, 430 N.W.2d 614 (Ct. App. 1988), where the defendant, charged with violating § 941.29, stipulated that he had been convicted of a felony. The stipulation was not formally admitted into evidence, but the court of appeals held that the mentioning of the stipulation during the prosecutor's opening statement was sufficient to support the conviction.