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PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

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1 AN ACT *to renumber and amend* 346.63 (2) (b), 940.09 (1m), 940.09 (2), 940.25
2 (1m) and 940.25 (2); *to amend* 343.305 (5) (d), 343.305 (7) (a), 343.305 (8) (b)
3 2. bm. and d., 343.305 (9) (a) 5. a., 343.307 (3), 343.31 (1) (am), 343.315 (2) (a)
4 2., 344.576 (2) (b), 346.63 (1) (c), 346.63 (2) (am), 346.65 (2m) (a), 346.65 (6) (a)
5 1., 346.65 (6) (c), 346.65 (6) (d), 885.235 (4), 939.75 (1), 939.75 (2) (b), 939.75 (3)
6 (intro.), 940.09 (1d) (a) 1., 940.09 (1d) (a) 2., 940.09 (1d) (b), 940.25 (1d) (a) 1.,
7 940.25 (1d) (a) 2., 940.25 (1d) (b), 949.08 (2) (e), 949.08 (2) (em), 967.055 (1) (a)
8 and 967.055 (2) (a); and *to create* 346.63 (1) (am), 346.63 (1) (d), 346.63 (2) (a)
9 3., 346.63 (2) (b) 2., 940.09 (1) (am), 940.09 (1) (cm), 940.09 (1g) (am), 940.09 (1g)
10 (cm), 940.09 (2) (b), 940.25 (1) (am), 940.25 (1) (cm), 940.25 (2) (b) and 941.20
11 (1) (bm) of the statutes; **relating to:** operating a vehicle or operating or going

1 armed with a firearm after the unauthorized use of a controlled substance and
2 providing penalties.

Analysis by the Legislative Reference Bureau

This is a preliminary draft. An analysis will be provided in a later version.

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Insert A → *The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

3 SECTION 1. 343.305 (5) (d) of the statutes is amended to read:

4 343.305 (5) (d) At the trial of any civil or criminal action or proceeding arising
5 out of the acts committed by a person alleged to have been driving or operating a
6 motor vehicle while under the influence of an intoxicant, a controlled substance, a
7 controlled substance analog or any other drug, or under the influence of any
8 combination of alcohol, a controlled substance, a controlled substance analog and
9 any other drug, to a degree which renders him or her incapable of safely driving, or
10 under the combined influence of an intoxicant and any other drug to a degree which
11 renders him or her incapable of safely driving, having any amount of a controlled
12 substance or a controlled substance analog in his or her blood or urine, or having a
13 prohibited alcohol concentration, or alleged to have been driving or operating or on
14 duty time with respect to a commercial motor vehicle while having an alcohol
15 concentration above 0.0 or possessing an intoxicating beverage, regardless of its
16 alcohol content, or within 4 hours of having consumed or having been under the
17 influence of an intoxicating beverage, regardless of its alcohol content, or of having
18 an alcohol concentration of 0.04 or more, the results of a test administered in
19 accordance with this section are admissible on the issue of whether the person was
20 under the influence of an intoxicant, a controlled substance, a controlled substance

1 analog or any other drug, or under the influence of any combination of alcohol, a
2 controlled substance, a controlled substance analog and any other drug, to a degree
3 which renders him or her incapable of safely driving or under the combined influence
4 of an intoxicant and any other drug to a degree which renders him or her incapable
5 of safely driving, or any issue relating to the presence of any amount of a controlled
6 substance or a controlled substance analog in the person's blood or urine or to the
7 person's alcohol concentration. Test results shall be given the effect required under
8 s. 885.235.

9 SECTION 2. 343.305 (7) (a) of the statutes is amended to read:

10 343.305 (7) (a) If a person submits to chemical testing administered in
11 accordance with this section and any test results indicate the presence of a controlled
12 substance or a controlled substance analog or a prohibited alcohol concentration, the
13 law enforcement officer shall report the results to the department and take
14 possession of the person's license and forward it to the department. The person's
15 operating privilege is administratively suspended for 6 months.

16 SECTION 3. 343.305 (8) (b) 2. bm. and d. of the statutes are amended to read:

17 343.305 (8) (b) 2. bm. Whether the person had a prohibited alcohol
18 concentration or any amount of a controlled substance or a controlled substance
19 analog in his or her blood or urine at the time the offense allegedly occurred.

20 d. If one or more tests were administered in accordance with this section,
21 whether each of the test results for those tests indicate the person had a prohibited
22 alcohol concentration or any amount of a controlled substance or a controlled
23 substance analog in his or her blood or urine.

24 SECTION 4. 343.305 (9) (a) 5. a. of the statutes is amended to read:

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Insert B

1 343.305 (9) (a) 5. a. Whether the officer had probable cause to believe the
2 person was driving or operating a motor vehicle while under the influence of alcohol,
3 a controlled substance or a controlled substance analog or any combination of
4 alcohol, a controlled substance and a controlled substance analog, under the
5 influence of any other drug to a degree which renders the person incapable of safely
6 driving, or under the combined influence of alcohol and any other drug to a degree
7 which renders the person incapable of safely driving, having a controlled substance
8 or a controlled substance analog in his or her urine or blood, or having a prohibited
9 alcohol concentration or, if the person was driving or operating a commercial motor
10 vehicle, an alcohol concentration of 0.04 or more and whether the person was
11 lawfully placed under arrest for violation of s. 346.63 (1), (2m) or (5) or a local
12 ordinance in conformity therewith or s. 346.63 (2) or (6), 940.09 (1) or 940.25.

13 **SECTION 5.** 343.307 (3) of the statutes is amended to read:

14 343.307 (3) If the same elements of the offense must be proven under a local
15 ordinance or under a law of a federally recognized American Indian tribe or band in
16 this state as under ~~s. 346.63 (1) (a) or (b) or both (am), or (b), or~~ any combination of
17 s. 346.63 (1) (a), (am), or (b), or s. 346.63 (5), the local ordinance or the law of a
18 federally recognized American Indian tribe or band in this state shall be considered
19 to be in conformity with ~~s. 346.63 (1) (a) or (b) or both (am), or (b), or~~ any combination
20 of s. 346.63 (1) (a), (am), or (b), or s. 346.63 (5), for purposes of ss. 343.30 (1q) (b) 1.,
21 343.305 (10) (b) 1. and 346.65 (2) and (2j).

22 **SECTION 6.** 343.31 (1) (am) of the statutes is amended to read:

23 343.31 (1) (am) Injury by the operation of a vehicle while under the influence
24 of an intoxicant, a controlled substance or a controlled substance analog, or any
25 combination of an intoxicant, a controlled substance and a controlled substance

1 analog, under the influence of any other drug to a degree which renders him or her
2 incapable of safely driving, or under the combined influence of an intoxicant and any
3 other drug to a degree which renders him or her incapable of safely driving or while
4 the person has any amount of a controlled substance or a controlled substance analog
5 in his or her blood or urine or has a prohibited alcohol concentration and which is
6 criminal under s. 346.63 (2).

7 **SECTION 7.** 343.315 (2) (a) 2. of the statutes is amended to read:

8 343.315 (2) (a) 2. Section 346.63 (1) (am) or (b) or (5) (a) or a local ordinance in
9 conformity therewith or a law of a federally recognized American Indian tribe or
10 band in this state in conformity with s. 346.63 (1) (am) or (b) or (5) (a) or the law of
11 another jurisdiction prohibiting driving or operating a commercial motor vehicle
12 while the person's alcohol concentration is 0.04 or more or with an excess or specified
13 range of alcohol concentration, as those or substantially similar terms are used in
14 that jurisdiction's laws.

15 **SECTION 8.** 344.576 (2) (b) of the statutes is amended to read:

16 344.576 (2) (b) The damage occurs while the renter or authorized driver
17 operates the private passenger vehicle in this state while under the influence of an
18 intoxicant or other drug, as described under s. 346.63 (1) (a), (am), or (b) or (2m).

19 **SECTION 9.** 346.63 (1) (am) of the statutes is created to read:

20 346.63 (1) (am) The person has any amount of a controlled substance or a
21 controlled substance analog in his or her blood or urine.

22 **SECTION 10.** 346.63 (1) (c) of the statutes is amended to read:

23 346.63 (1) (c) A person may be charged with and a prosecutor may proceed upon
24 a complaint based upon a violation of ~~par. (a) or (b) or both~~ (am), or (b), or any
25 combination of par. (a), (am), or (b) for acts arising out of the same incident or

1 occurrence. If the person is charged with violating ~~both pars. (a) and (b)~~ any
2 combination of par. (a), (am), or (b), the offenses shall be joined. If the person is found
3 guilty of ~~both pars. (a) and (b)~~ (am), or (b), or any combination of par. (a), (am),
4 or (b) for acts arising out of the same incident or occurrence, there shall be a single
5 conviction for purposes of sentencing and for purposes of counting convictions under
6 ss. 343.30 (1q) and 343.305. Paragraphs (a), (am),[✓] and (b) each require proof of a fact
7 for conviction which the ~~other does~~ others do not require.

8 **SECTION 11.** 346.63 (1) (d) of the statutes is created to read:

9 346.63 (1) (d) In an action under par. (am), the defendant has a defense if he
10 or she proves by a preponderance of the evidence that ^gat the time of the incident or
11 occurrence ^gone of the following applied:

12 1. He or she had a valid prescription for the controlled substance or controlled
13 substance analog that was present in his or her blood or urine and the amount of
14 controlled substance or controlled substance analog found in his or her blood or urine
15 was consistent with the controlled substance or controlled substance analog being
16 used as prescribed.

17 2. He or she had complied with s. 961.23 in obtaining the controlled substance
18 that was present in his or her blood or urine and the amount of controlled substance
19 found in his or her blood or urine was consistent with the controlled substance being
20 used as directed.

21 **SECTION 12.** 346.63 (2) (a) 3. of the statutes is created to read:

22 346.63 (2) (a) 3. The person has any amount of a controlled substance or a
23 controlled substance analog in his or her blood or urine.

24 **SECTION 13.** 346.63 (2) (am) of the statutes is amended to read:

1 346.63 (2) (am) A person may be charged with and a prosecutor may proceed
 2 upon a complaint based upon a violation of ~~par. (a) 1. or 2. or both~~ 2., or 3., or any
 3 combination of par. (a) 1., 2., or 3. for acts arising out of the same incident or
 4 occurrence. If the person is charged with violating ~~par. (a) 1. and 2.~~ any combination
 5 of par. (a) 1., 2., or 3. in the complaint, the crimes shall be joined under s. 971.12. If
 6 the person is found guilty of ~~par. (a) 1. and 2.~~ 2., or 3., or any combination of par. (a)
 7 1., 2., or 3. for acts arising out of the same incident or occurrence, there shall be a
 8 single conviction for purposes of sentencing and for purposes of counting convictions
 9 under ss. 343.30 (1q) and 343.305. Paragraph (a) 1. ~~and 2.~~ and 3. each require proof
 10 of a fact for conviction which the ~~other does~~ others do not require.

11 **SECTION 14.** 346.63 (2) (b) of the statutes is renumbered 346.63 (2) (b) 1.
 12 amended to read:

13 346.63 (2) (b) 1. In an action under this subsection, the defendant has a defense
 14 if he or she proves by a preponderance of the evidence that the injury would have
 15 occurred even if he or she had been exercising due care and he or she had not been
 16 under the influence of an intoxicant, a controlled substance, a controlled substance
 17 analog or a combination thereof, under the influence of any other drug to a degree
 18 which renders him or her incapable of safely driving, or under the combined
 19 influence of an intoxicant and any other drug to a degree which renders him or her
 20 incapable of safely driving ~~or~~ or did not have a prohibited alcohol concentration
 21 described under par. (a) 2. ^{plain period} or did not have any amount of a controlled substance or
 22 a controlled substance analog in his or her blood or urine.

23 **SECTION 15.** 346.63 (2) (b) 2. of the statutes is ^{score} created to read:

1 346.63 (2) (b) 2. In an action under par. (am), the defendant has a defense if he
2 or she proves by a preponderance of the evidence that ^Jat the time of the incident or
3 occurrence ^Jone of the following applied:

4 a. He or she had a valid prescription for the controlled substance or controlled
5 substance analog that was present in his or her blood or urine and the amount of
6 controlled substance or controlled substance analog found in his or her blood or urine
7 was consistent with the controlled substance or controlled substance analog being
8 used as prescribed.

9 b. He or she had complied with s. 961.23 in obtaining the controlled substance
10 that was present in his or her blood or urine and the amount of controlled substance
11 found in his or her blood or urine was consistent with the controlled substance being
12 used as directed.

13 **SECTION 16.** 346.65 (2m) (a) of the statutes is amended to read:

14 346.65 (2m) (a) In imposing a sentence under sub. (2) for a violation of s. 346.63
15 (1) (am) or (b) or (5) or a local ordinance in conformity therewith, the court shall
16 review the record and consider the aggravating and mitigating factors in the matter.
17 If the ~~level of the person's blood alcohol level~~ amount of alcohol or controlled
18 substance or controlled substance analog in the person's blood or urine is known, the
19 court shall consider that level amount as a factor in sentencing. The chief judge of
20 each judicial administrative district shall adopt guidelines, under the chief judge's
21 authority to adopt local rules under SCR 70.34, for the consideration of aggravating
22 and mitigating factors.

23 **SECTION 17.** 346.65 (6) (a) 1. of the statutes is amended to read:

24 346.65 (6) (a) 1. The court may order a law enforcement officer to seize the
25 motor vehicle used in the violation or improper refusal and owned by the person

1 whose operating privilege is revoked under s. 343.305 (10) or who committed a
2 violation of s. 346.63 (1) (a), (am), or (b) or (2) (a) 1. ~~or~~, 2., or 3., 940.09 (1) (a), (am),
3 (b), (c), (cm), or (d), or 940.25 (1) (a), (am), (b), (c), (cm), or (d) if the person whose
4 operating privilege is revoked under s. 343.305 (10) or who is convicted of the
5 violation has 2 or more prior suspensions, revocations, or convictions, counting
6 convictions under ss. 940.09 (1) and 940.25 in the person's lifetime, plus other
7 convictions, suspensions, or revocations counted under s. 343.307 (1). The court may
8 not order a motor vehicle seized if the court enters an order under s. 343.301 to
9 immobilize the motor vehicle or equip the motor vehicle with an ignition interlock
10 device or if seizure would result in undue hardship or extreme inconvenience or
11 would endanger the health and safety of a person.

12 **SECTION 18.** 346.65 (6) (c) of the statutes is amended to read:

13 346.65 (6) (c) The district attorney of the county where the motor vehicle was
14 seized, or where the owner improperly refused to take the test under s. 343.305 or
15 violated s. 346.63 (1) (a), (am), or (b) or (2) (a) 1. ~~or~~, 2., or 3., 940.09 (1) (a), (am), (b),
16 (c), (cm), or (d) or 940.25 (1) (a), (am), (b), (c), (cm), or (d), shall commence an action
17 to forfeit the motor vehicle within 30 days after the motor vehicle is seized. The
18 action shall name the owner of the motor vehicle and all lienholders of record as
19 parties. The forfeiture action shall be commenced by filing a summons, complaint
20 and affidavit of the law enforcement agency with the clerk of circuit court. Upon
21 service of an answer, the action shall be set for hearing within 60 days after the
22 service of the answer. If no answer is served or no issue of law or fact joined and the
23 time for that service or joining of issues has expired, the court may render a default
24 judgment as provided in s. 806.02.

25 **SECTION 19.** 346.65 (6) (d) of the statutes is amended to read:

1 346.65 (6) (d) At the hearing set under par. (c), the state has the burden of
2 proving to a reasonable certainty by the greater weight of the credible evidence that
3 the motor vehicle seized under par. (a) 1. is a motor vehicle used in the violation or
4 the improper refusal and owned by a person who committed a violation of s. 346.63
5 (1) (a), (am), or (b) or (2) (a) 1. ~~or 2., or 3.,~~ 940.09 (1) (a), (am), (b), (c), (cm), or (d) or
6 940.25 (1) (a), (am), (b), (c), (cm), or (d) and that the person had 2 or more prior
7 convictions, suspensions or revocations, counting convictions under ss. 940.09 (1)
8 and 940.25 in the person's lifetime, plus other convictions, suspensions or
9 revocations counted under s. 343.307 (1). If the state fails to meet the burden of proof
10 required under this paragraph, the motor vehicle shall be returned to the owner upon
11 the payment of storage costs.

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12 **SECTION 20.** 885.235 (4) of the statutes is amended to read:
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14 885.235 (4) The provisions of this section relating to the admissibility of
15 chemical tests for alcohol concentration or intoxication shall not be construed as
16 limiting the introduction of any other competent evidence bearing on the question
17 of whether or not a person was under the influence of an intoxicant, had any amount
18 of a controlled substance or a controlled substance analog in his or her blood or urine,
19 had a specified alcohol concentration, or had an alcohol concentration in the range
20 specified in s. 23.33 (4c) (a) 3., 30.681 (1) (bn), 346.63 (2m) or 350.101 (1) (c).

21 **SECTION 21.** 939.75 (1) of the statutes, as affected by 2001 Wisconsin Act 109,
22 is amended to read:

23 939.75 (1) In this section and ss. 939.24 (1), 939.25 (1), 940.01 (1) (b), 940.02
24 (1m), 940.05 (2g) and (2h), 940.06 (2), 940.08 (2), 940.09 (1) (c) to (e) and (1g) (c), (cm),
 and (d), 940.10 (2), 940.195, 940.23 (1) (b) and (2) (b), 940.24 (2) and 940.25 (1) (c) to

1 (e), “unborn child” means any individual of the human species from fertilization until
2 birth that is gestating inside a woman.

3 **SECTION 22.** 939.75 (2) (b) of the statutes is amended to read:

4 939.75 (2) (b) Sections 940.01 (1) (b), 940.02 (1m), 940.05 (2g) and (2h), 940.06
5 (2), 940.08 (2), 940.09 (1) (c) to (e) and (1g) (c), (cm), and (d), 940.10 (2), 940.195,
6 940.23 (1) (b) and (2) (b), 940.24 (2) and 940.25 (1) (c) to (e) do not apply to any of the
7 following:

8 **SECTION 23.** 939.75 (3) (intro.) of the statutes is amended to read:

9 939.75 (3) (intro.) When the existence of an exception under sub. (2) has been
10 placed in issue by the trial evidence, the state must prove beyond a reasonable doubt
11 that the facts constituting the exception do not exist in order to sustain a finding of
12 guilt under s. 940.01 (1) (b), 940.02 (1m), 940.05 (2g), 940.06 (2), 940.08 (2), 940.09
13 (1) (c) to (e) or (1g) (c), (cm), or (d), 940.10 (2), 940.195, 940.23 (1) (b) or (2) (b), 940.24
14 (2) or 940.25 (1) (c) to (e).

15 **SECTION 24.** 940.09 (1) (am) of the statutes is created to read:

16 940.09 (1) (am) Causes the death of another by the operation or handling of a
17 vehicle while the person has any amount of a controlled substance or a controlled
18 substance analog in his or her blood or urine.

19 **SECTION 25.** 940.09 (1) (cm) of the statutes is created to read:

20 940.09 (1) (cm) Causes the death of an unborn child by the operation or
21 handling of a vehicle while the person has any amount of a controlled substance or
22 a controlled substance analog in his or her blood or urine.

23 **SECTION 26.** 940.09 (1d) (a) 1. of the statutes is amended to read:

24 940.09 (1d) (a) 1. Except as provided in subd. 2., if the person who committed
25 an offense under sub. (1) (a), (am), (b), (c), (cm), or (d) has 2 or more prior convictions,

1 suspensions, or revocations, counting convictions under sub. (1) and s. 940.25 in the
2 person's lifetime, plus other convictions, suspensions, or revocations counted under
3 s. 343.307 (1), the procedure under s. 343.301 shall be followed if the court enters an
4 order regarding operating privilege restriction or enters an order regarding
5 immobilization.

6 **SECTION 27.** 940.09 (1d) (a) 2. of the statutes is amended to read:

7 940.09 (1d) (a) 2. Notwithstanding par. (b), if the person who committed an
8 offense under sub. (1) (a), (am), (b), (c), (cm), or (d) has 2 or more convictions,
9 suspensions, or revocations counted under s. 343.307 (1) within any 5-year period,
10 the procedure under s. 343.301 shall be followed if the court enters an order
11 regarding operating privilege restriction and the installation of an ignition interlock
12 device or enters an order regarding immobilization.

13 **SECTION 28.** 940.09 (1d) (b) of the statutes is amended to read:

14 940.09 (1d) (b) If the person who committed an offense under sub. (1) (a), (am),
15 (b), (c), (cm), or (d) has 2 or more prior convictions, suspensions, or revocations,
16 counting convictions under sub. (1) and s. 940.25 in the person's lifetime, plus other
17 convictions, suspensions, or revocations counted under s. 343.307 (1), the procedure
18 under s. 346.65 (6) shall be followed if the court orders the seizure and forfeiture of
19 the motor vehicle owned by the person and used in the violation.

20 **SECTION 29.** 940.09 (1g) (am) of the statutes is created to read:

21 940.09 (1g) (am) Causes the death of another by the operation or handling of
22 a firearm or airgun while the person has any amount of a controlled substance or a
23 controlled substance analog in his or her blood or urine.

24 **SECTION 30.** 940.09 (1g) (cm) of the statutes is created to read:

1 940.09 (1g) (cm) Causes the death of an unborn child by the operation or
2 handling of a firearm or airgun while the person has any amount of a controlled
3 substance or a controlled substance analog in his or her blood or urine.

4 SECTION 31. 940.09 (1m) of the statutes is renumbered 940.09 (1m) (a) and
5 amended to read:

6 940.09 (1m) (a) A person may be charged with and a prosecutor may proceed
7 upon an information based upon a violation of sub. (1) (a), (am), or (b) or ~~both~~, any
8 combination thereof; sub. (1) (a), (am), or (bm) or ~~both~~, any combination thereof; sub.
9 (1) (c), (cm), or (d) or ~~both~~, any combination thereof; sub. (1) (c), (cm), or (e) or ~~both~~,
10 any combination thereof; sub. (1g) (a), (am), or (b) or ~~both~~ any combination thereof;
11 or sub. (1g) (c), (cm), or (d) or ~~both~~ any combination thereof for acts arising out of the
12 same incident or occurrence.

13 (b) If ~~the a~~ person is charged with ~~violating both sub. (1) (a) and (b), both sub.~~
14 ~~(1) (a) and (bm), both sub. (1) (c) and (d), both sub. (1) (c) and (e), both sub. (1g) (a)~~
15 ~~and (b) or both sub. (1g) (c) and (d) in the an information with any combination of~~
16 crimes referred to in par. (a), the crimes shall be joined under s. 971.12. If the person
17 is found guilty of both sub. (1) (a) and (b), both sub. (1) (a) and (bm), both sub. (1) (c)
18 and (d), both sub. (1) (c) and (e), both sub. (1g) (a) and (b) or both sub. (1g) (c) and (d)
19 more than one of the crimes so charged for acts arising out of the same incident or
20 occurrence, there shall be a single conviction for purposes of sentencing and for
21 purposes of counting convictions under s. 23.33 (13) (b) 2. and 3., under s. 30.80 (6)
22 (a) 2. and 3., under s. 343.307 (1) or under s. 350.11 (3) (a) 2. and 3. Subsection (1)
23 (a), (am), (b), (bm), (c), (cm), (d) and (e), and sub. (1g) (a), (am), (b), (c), (cm) and (d),
24 each require proof of a fact for conviction which the other does not require.

others do

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(Signature)

1 **SECTION 32.** 940.09 (2) of the statutes is renumbered 940.09 (2) (a) and
2 amended to read:

3 940.09 (2) (a) ~~The~~ In any action under this section, the defendant has a defense
4 if he or she proves by a preponderance of the evidence that the death would have
5 occurred even if he or she had been exercising due care and he or she had not been
6 under the influence of an intoxicant, did not have any amount of a controlled
7 substance or a controlled substance analog in his or her blood or urine, or did not have
8 an alcohol concentration described under sub. (1) (b), (bm), (d) or (e) or (1g) (b) or (d).

9 **SECTION 33.** 940.09 (2) (b) of the statutes is created to read:

10 940.09 (2) (b) In any action under sub. (1) (am) or (cm) or (1g) (am) or (cm), the
11 defendant has a defense if he or she proves by a preponderance of the evidence that
12 at the time of the incident or occurrence, ~~g~~ one of the following applied:

13 1. He or she had a valid prescription for the controlled substance or controlled
14 substance analog that was present in his or her blood or urine and the amount of
15 controlled substance or controlled substance analog found in his or her blood or urine
16 was consistent with the controlled substance or controlled substance analog being
17 used as prescribed.

18 2. He or she had complied with s. 961.23 in obtaining the controlled substance
19 that was present in his or her blood or urine and the amount of controlled substance
20 found in his or her blood or urine was consistent with the controlled substance being
21 used as directed.

22 **SECTION 34.** 940.25 (1) (am) of the statutes is created to read:

23 940.25 (1) (am) Causes great bodily harm to another human being by the
24 operation of a vehicle while the person has any amount of a controlled substance or
25 a controlled substance analog in his or her blood or urine.

1 **SECTION 35.** 940.25 (1) (cm) of the statutes is created to read:

2 940.25 (1) (cm) Causes great bodily harm to an unborn child by the operation
3 of a vehicle while the person has any amount of a controlled substance or a controlled
4 substance analog in his or her blood or urine.

5 **SECTION 36.** 940.25 (1d) (a) 1. of the statutes is amended to read:

6 940.25 (1d) (a) 1. Except as provided in subd. 2., if the person who committed
7 an offense under sub. (1) (a), (am), (b), (c), (cm), or (d) has 2 or more prior convictions,
8 suspensions, or revocations, counting convictions under sub. (1) and s. 940.09 (1) in
9 the person's lifetime, plus other convictions, suspensions, or revocations counted
10 under s. 343.307 (1), the procedure under s. 343.301 shall be followed if the court
11 enters an order regarding operating privilege restriction or enters an order
12 regarding immobilization.

13 **SECTION 37.** 940.25 (1d) (a) 2. of the statutes is amended to read:

14 940.25 (1d) (a) 2. Notwithstanding par. (b), if the person who committed an
15 offense under sub. (1) (a), (am), (b), (c), (cm), or (d) has 2 or more convictions,
16 suspensions, or revocations counted under s. 343.307 (1) within any 5-year period,
17 the procedure under s. 343.301 shall be followed if the court enters an order
18 regarding operating privilege restriction and the installation of an ignition interlock
19 device or enters an order regarding immobilization.

20 **SECTION 38.** 940.25 (1d) (b) of the statutes is amended to read:

21 940.25 (1d) (b) If the person who committed an offense under sub. (1) (a), (am),
22 (b), (c), (cm), or (d) has 2 or more prior convictions, suspensions, or revocations,
23 counting convictions under sub. (1) and s. 940.09 (1) in the person's lifetime, plus
24 other convictions, suspensions, or revocations counted under s. 343.307 (1), the

1 procedure under s. 346.65 (6) shall be followed if the court orders the seizure and
2 forfeiture of the motor vehicle owned by the person and used in the violation.

3 **SECTION 39.** 940.25 (1m) of the statutes is renumbered 940.25 (1m) (a) and
4 amended to read:

5 940.25 (1m) (a) A person may be charged with and a prosecutor may proceed
6 upon an information based upon a violation of sub. (1) (a), (am), or (b) or ~~both~~, any
7 combination thereof; sub. (1) (a), (am), or (bm) or ~~both~~, any combination thereof; sub.
8 (1) (c), (cm), or (d) or ~~both~~ any combination thereof; or sub. (1) (c), (cm), or (e) or ~~both~~
9 any combination thereof for acts arising out of the same incident or occurrence.

10 (b) ~~If the a person is charged with violating both sub. (1) (a) and (b), both sub.~~
11 ~~(1) (a) and (bm), both sub. (1) (c) and (d) or both sub. (1) (c) and (e) in the an~~
12 ~~information with any combination of crimes referred to in par. (a), the crimes shall~~
13 ~~be joined under s. 971.12. If the person is found guilty of both sub. (1) (a) and (b), both~~
14 ~~sub. (1) (a) and (bm), both sub. (1) (c) and (d) or both sub. (1) (c) and (e) more than one~~
15 ~~of the crimes so charged for acts arising out of the same incident or occurrence, there~~
16 ~~shall be a single conviction for purposes of sentencing and for purposes of counting~~
17 ~~convictions under s. 23.33 (13) (b) 2. and 3., under s. 30.80 (6) (a) 2. or 3., under ss.~~
18 ~~343.30 (1q) and 343.305 or under s. 350.11 (3) (a) 2. and 3. Subsection (1) (a), (am),~~
19 ~~(b), (bm), (c), (cm), (d), and (e) each require proof of a fact for conviction which the~~
20 ~~other does~~ not require. others do ✓

21 **SECTION 40.** 940.25 (2) of the statutes is renumbered 940.25 (2) (a) and
22 amended to read:

23 940.25 (2) (a) The defendant has a defense if he or she proves by a
24 preponderance of the evidence that the great bodily harm would have occurred even
25 if he or she had been exercising due care and he or she had not been under the

1 influence of an intoxicant, did not have any amount of a controlled substance or a
2 controlled substance analog in his or her blood or urine, or did not have an alcohol
3 concentration described under sub. (1) (b), (bm), (d) or (e).

4 SECTION 41. 940.25 (2) (b) of the statutes is created to read:

5 940.25 (2) (b) In any action under this section, the defendant has a defense if
6 he or she proves by a preponderance of the evidence that, at the time of the incident
7 or occurrence, one of the following applied:

8 1. He or she had a valid prescription for the controlled substance or controlled
9 substance analog that was present in his or her blood or urine and the amount of
10 controlled substance or controlled substance analog found in his or her blood or urine
11 was consistent with the controlled substance or controlled substance analog being
12 used as prescribed.

13 2. He or she had complied with s. 961.23 in obtaining the controlled substance
14 that was present in his or her blood or urine and the amount of controlled substance
15 found in his or her blood or urine was consistent with the controlled substance being
16 used as directed.

17 SECTION 42. 941.20 (1) (bm) of the statutes is created to read:

18 941.20 (1) (bm) Operates or goes armed with a firearm while he or she has any
19 amount of a controlled substance in his or her blood or urine. A defendant has a
20 defense to any action under this paragraph if he or she proves by a preponderance
21 of the evidence that, at the time of the incident or occurrence, one of the following
22 applied:

23 1. He or she had a valid prescription for the controlled substance or controlled
24 substance analog that was present in his or her blood or urine and the amount of
25 controlled substance or controlled substance analog found in his or her blood or urine

1 was consistent with the controlled substance or controlled substance analog being
2 used as prescribed.

3 2. He or she had complied with s. 961.23 in obtaining the controlled substance
4 that was present in his or her blood or urine and the amount of controlled substance
5 found in his or her blood or urine was consistent with the controlled substance being
6 used as directed.

7 **SECTION 43.** 949.08 (2) (e) of the statutes is amended to read:

8 949.08 (2) (e) Is an adult passenger in the offender's vehicle and, the crime
9 involved is specified in s. 346.63 (2) or 940.25, and the passenger knew the offender
10 was ~~under the influence of an intoxicant, a controlled substance, a controlled~~
11 ~~substance analog or any combination of an intoxicant, controlled substance and~~
12 ~~controlled substance analog, or had a prohibited alcohol concentration, as defined in~~
13 ~~s. 340.01 (46m) committing that offense.~~ This paragraph does not apply if the victim
14 is also a victim of a crime specified in s. 940.30, 940.305, 940.31 or 948.30.

15 **SECTION 44.** 949.08 (2) (em) of the statutes is amended to read:

16 949.08 (2) (em) Is an adult passenger in the offender's commercial motor
17 vehicle and, the crime involved is specified in s. 346.63 (6) or 940.25, and the
18 passenger knew the offender was ~~under the influence of an intoxicant, a controlled~~
19 ~~substance, a controlled substance analog or any combination of an intoxicant,~~
20 ~~controlled substance and controlled substance analog, or had an alcohol~~
21 ~~concentration of 0.04 or more but less than 0.1 committing that offense.~~ This
22 paragraph does not apply if the victim is also a victim of a crime specified in s. 940.30,
23 940.305, 940.31 or 948.30.

24 **SECTION 45.** 967.055 (1) (a) of the statutes is amended to read:

1 967.055 (1) (a) The legislature intends to encourage the vigorous prosecution
2 of offenses concerning the operation of motor vehicles by persons under the influence
3 of an intoxicant, a controlled substance, a controlled substance analog or any
4 combination of an intoxicant, controlled substance and controlled substance analog,
5 under the influence of any other drug to a degree which renders him or her incapable
6 of safely driving, or under the combined influence of an intoxicant and any other drug
7 to a degree which renders him or her incapable of safely driving or having a
8 prohibited alcohol concentration, as defined in s. 340.01 (46m), ~~or offenses~~
9 concerning the operation of motor vehicles by persons with any amount of a
10 controlled substance or a controlled substance analog in his or her blood or urine, and
11 offenses concerning the operation of commercial motor vehicles by persons with an
12 alcohol concentration of 0.04 or more.

13 **SECTION 46.** 967.055 (2) (a) of the statutes is amended to read:

14 967.055 (2) (a) Notwithstanding s. 971.29, if the prosecutor seeks to dismiss
15 or amend a charge under s. 346.63 (1) or (5) or a local ordinance in conformity
16 therewith, or s. 346.63 (2) or (6) or 940.25, or s. 940.09 where the offense involved the
17 use of a vehicle or an improper refusal under s. 343.305, the prosecutor shall apply
18 to the court. The application shall state the reasons for the proposed amendment or
19 dismissal. The court may approve the application only if the court finds that the
20 proposed amendment or dismissal is consistent with the public's interest in deterring
21 the operation of motor vehicles by persons who are under the influence of an
22 intoxicant, a controlled substance, a controlled substance analog or any combination
23 of an intoxicant, controlled substance and controlled substance analog, under the
24 influence of any other drug to a degree which renders him or her incapable of safely
25 driving, or under the combined influence of an intoxicant and any other drug to a

1 degree which renders him or her incapable of safely driving, in deterring the
2 operation of motor vehicles by persons with any amount of a controlled substance or
3 a controlled substance analog in his or her blood or urine, or in deterring the
4 operation of commercial motor vehicles by persons with an alcohol concentration of
5 0.04 or more. The court may not approve an application to amend the vehicle
6 classification from a commercial motor vehicle to a noncommercial motor vehicle
7 unless there is evidence in the record that the motor vehicle being operated by the
8 defendant at the time of his or her arrest was not a commercial motor vehicle.

9 **SECTION 47. Effective date.**

10 (1) This act takes effect on February 1, 2003, or on the day after publication,
11 whichever is later.

12 (END)

D-note
↓

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-0465/P2dn

MGD: r:....

date

Jld

Rep. Gundrum:

As I indicated in the previous drafter's note, current s. 940.09 (1m) contains an error. Until 1989 Wisconsin Act 105 was enacted, there were only two ways in which s. 940.09 could be violated. Thus, the last sentence of s. 940.09 (1) (c) read: "Paragraphs (a) and (b) each require proof of a fact for conviction which the other does not require." When Act 105 created s. 940.09 (1) (bm) (which created a new prohibition related to the operation of a commercial motor vehicle), it also renumbered s. 940.09 (1) (c) as s. 940.09 (1m) and amended the last sentence of that provision to read: "Subsection (1) (a), (b), and (bm) each require proof of a fact for conviction which the other does not require." That change, however, should have also replaced "other does" with "others do." Act 105's enactment produced the same error in s. 940.25 (1m).

The error in s. 940.09 (1m) was then compounded by the enactment of 1991 Wisconsin Act 277. Until then, s. 940.09 treated both homicide by intoxicated use of vehicle and homicide by intoxicated use of firearm in the same subsection (sub. (1)). Act 277 removed the references to homicide by intoxicated use of firearm from sub. (1) and created a new sub. (1g) to cover that conduct. At the same time, Act 277 amended sub. (1m). As a result of that amendment, the last sentence read: "Subsection (1) (a), (b), and (bm), and sub. (1) (a) and (b), each require proof of a fact for conviction which the other does not require." Since then, additional paragraph references have been added for each of those subsections.

As a result of these changes, the last sentence of s. 940.09 (1m) could be read as merely indicating that the prohibition against homicide by intoxicated use of vehicle requires proof of a fact for conviction that the prohibition against homicide by intoxicated use of firearm does not require, and vice versa. In other words, that subsection does not clearly specify that one version of homicide by intoxicated use of vehicle (such as the version prohibited under s. 940.09 (1) (a)) requires proof of a fact that the other versions of that offense do not.

Given the history of this provision and the fact that this bill creates new paragraphs to which this provision will refer (subs. (1) (am) and (cm) and (1g) (am) and (cm)), it makes sense not to perpetuate the problems described above. Instead, this bill amends s. 940.09 (1m) so that the last sentence of it reads: "Subsection (1) (a), (am), (b), (bm), (c), (cm), (d), and (e) each require proof of a fact for conviction which the others do not

require, and sub. (1g) (a), (am), (b), (c), (cm), and (d) each require proof of a fact for conviction which the others do not require.” (This is slightly different from what I suggested in the first drafter’s note; I had not yet noticed the Act 105 error.) The bill also amends s. 940.25 (1m) to replace “other does” with “others do” in the last sentence. These changes are consistent with the changes that Peggy Hurley has made in other parts of the draft. See, e.g., s. 346.63 (1) (c). ✓

I hope this information is helpful. Please let me know if you have any questions about it.

Michael Dsida
Legislative Attorney
Phone: (608) 266-9867

1 INSERT A:

2 SECTION 1. 23.33 (4c) (a) 2m. of the statutes is created to read:

3 23.33 (4c) (a) 2m. 'Operating with a controlled substance or a controlled
4 substance analog.' No person may engage in the operation of an all-terrain vehicle
5 while the person has any amount of a controlled substance or a controlled substance
6 analog in his or her blood or urine.

7 SECTION 2. 23.33 (4c) (a) 4. of the statutes is amended to read:

8 23.33 (4c) (a) 4. 'Related charges.' A person may be charged with and a
9 prosecutor may proceed upon a complaint based upon a violation of ~~subd. 1. or 2. or~~
10 both 2., or 2m., or any combination of subd. 1., 2., or 2m. for acts arising out of the
11 same incident or occurrence. If the person is charged with violating ~~both subds. 1.~~
12 and 2. any combination of subd. 1, 2., or 2m., the offenses shall be joined. If the person
13 is found guilty of ~~both subds. 1. and 2.~~ subd. 1., 2., or 2m., or any combination of subd.
14 1, 2., or 2m. for acts arising out of the same incident or occurrence, there shall be a
15 single conviction for purposes of sentencing and for purposes of counting convictions
16 under sub. (13) (b) 2. and 3. Subdivisions 1. and ~~2.~~ 1, 2., and 2m. each require proof
17 of a fact for conviction which the ~~other does~~ others do not require.

History: 1985 a. 29; 1987 a. 200, 353, 399, 403; 1989 a. 31, 275, 359; 1991 a. 39, 303, 315; 1993 a. 16, 105, 119, 405; 1995 a. 27 ss. 1350 to 1351, 9126 (19); 1995 a. 436, 448; 1997 a. 27, 248, 283; 1999 a. 9; 2001 a. 16, 90, 106, 109.

18 SECTION 3. 23.33 (4c) (a) 5. of the statutes is created to read:

19 23.33 (4c) (a) 5. 'Defenses.' In an action under subd. 2m., the defendant has
20 a defense if he or she proves by a preponderance of the evidence that ~~at~~ at the time of
21 the incident or occurrence ~~one~~ one of the following applied:

22 a. He or she had a valid prescription for the controlled substance or controlled
23 substance analog that was present in his or her blood or urine and the amount of



1 controlled substance or controlled substance analog found in his or her blood or urine
2 was consistent with the controlled substance or controlled substance analog being
3 used as prescribed.

4 b. He or she had complied with s. 961.23[✓] in obtaining the controlled substance
5 that was present in his or her blood or urine and the amount of controlled substance
6 found in his or her blood or urine was consistent with the controlled substance being
7 used as directed.

8 SECTION 4. 23.33 (4c) (b) 2m.[✓] of the statutes is created to read:

9 23.33 (4c) (b) 2m. 'Causing injury while operating with a controlled substance
10 or a controlled substance analog.'[✓] No person who has any amount of a controlled
11 substance [○] _△ controlled substance analog in his or her blood or urine may cause
12 injury to another person by the operation of an all-terrain vehicle.

13 SECTION 5. 23.33 (4c) (b) 3.[✓] of the statutes is amended to read:

14 23.33 (4c) (b) 3. 'Related charges.' A person may be charged with and a
15 prosecutor may proceed upon a complaint based upon a violation of ~~subd. 1. or 2. or~~[✓]
16 ~~both . 2., or 2m., or any combination of subd. 1., 2., or 2m.~~[✓] for acts arising out of the
17 same incident or occurrence. If the person is charged with violating ~~both subds. 1.~~[✓]
18 ~~and 2., . 2., or 2m., or any combination of subd. 1., 2., or 2m.~~[✓] in the complaint, the crimes
19 shall be joined under s. 971.12. If the person is found guilty of ~~both subds. 1. and 2.~~[✓]
20 ~~. 2., or 2m., or any combination of subd. 1., 2., or 2m.~~[✓] for acts arising out of the same
21 incident or occurrence, there shall be a single conviction for purposes of sentencing
22 and for purposes of counting convictions under sub. (13) (b) 2. and 3.[✓] Subdivisions



1. and ~~2.~~ and ~~2m.~~ each require proof of a fact for conviction which the other does
 2. others do not require.

History: 1985 a. 29; 1987 a. 200, 353, 399, 403; 1989 a. 31, 275, 359; 1991 a. 39, 303, 315; 1993 a. 16, 105, 119, 405; 1995 a. 27 ss. 1350 to 1351, 9126 (19); 1995 a. 436, 448; 1997 a. 27, 248, 283; 1999 a. 9; 2001 a. 16, 90, 106, 109.

3. SECTION 6. 23.33 (4c) (b) 4. of the statutes is renumbered 23.33 (4c) (b) 4. a. and
 4. amended to read:

5. 23.33 (4c) (b) 4. a. 'Defenses.' In an action under this paragraph, the defendant
 6. has a defense if he or she proves by a preponderance of the evidence that the injury
 7. would have occurred even if he or she had been exercising due care and he or she had
 8. not been under the influence of an intoxicant or, did not have an alcohol
 9. concentration of 0.1 or more, or did not have any amount of a controlled substance
 10. or a controlled substance analog in his or her blood or urine.

History: 1985 a. 29; 1987 a. 200, 353, 399, 403; 1989 a. 31, 275, 359; 1991 a. 39, 303, 315; 1993 a. 16, 105, 119, 405; 1995 a. 27 ss. 1350 to 1351, 9126 (19); 1995 a. 436, 448; 1997 a. 27, 248, 283; 1999 a. 9; 2001 a. 16, 90, 106, 109.

11. SECTION 7. 23.33 (4c) (b) 4. b. of the statutes is created to read:

12. 23.33 (4c) (b) 4. b. In an action under subd. 2m., the defendant has a defense
 13. if he or she proves by a preponderance of the evidence that at the time of the incident
 14. or occurrence ~~one of the following applied~~

15. ~~or~~ ~~she~~ or she had a valid prescription for the controlled substance or controlled
 16. substance analog that was present in his or her blood or urine and the amount of
 17. controlled substance or controlled substance analog found in his or her blood or urine
 18. was consistent with the controlled substance or controlled substance analog being
 19. used as prescribed ~~or~~

20. ~~or~~ ~~she~~ or she had complied with s. 961.23 in obtaining the controlled substance
 21. that was present in his or her blood or urine and the amount of controlled substance
 22. found in his or her blood or urine was consistent with the controlled substance being
 23. used as directed.



1 SECTION 8. 30.681 (1) (b) (title) of the statutes is amended to read:
 2 30.681 (1) (b) (title) *Operating with controlled substance or alcohol*
 3 *concentrations at or above specified levels.*

History: 1985 a. 331; 1989 a. 275; 1995 a. 290, 436; 1997 a. 35, 198.

4 SECTION 9. 30.681 (1) (b) 1m. of the statutes is created to read:
 5 30.681 (1) (b) 1m. No person may engage in the operation of a motorboat while
 6 the person has any amount of a controlled substance or a controlled substance analog
 7 in his or her blood or urine.

8 SECTION 10. 30.681 (1) (c) of the statutes is amended to read:
 9 30.681 (1) (c) *Related charges.* A person may be charged with and a prosecutor
 10 may proceed upon a complaint based upon a violation of par. (a) or (b) or both ^{keep strikes}
 11 ~~(a) 1m. or (b) 2m.~~ ^{par.} or any combination of (a) ^{or} (b) 1., 1m., or 2. for acts arising out of the same
 12 incident or occurrence. If the person is charged with violating both ~~par. (a) and (b)~~
 13 ~~(b) 1., 1m., or 2. or any combination of (a) (b) 1., 1m., or 2.~~ ^{par.} ^{or} the offenses shall be
 14 joined. If the person is found guilty of both ~~par. (a) and (b)~~ ~~(b) 1., 1m., or 2. or any~~
 15 ~~combination of (a) (b) 1., 1m., or 2.~~ ^{par.} ^{or} for acts arising out of the same incident or
 16 occurrence, there shall be a single conviction for purposes of sentencing and for
 17 purposes of counting convictions under s. 30.80 (6) (a) 2. and 3. Paragraphs (a) ^{plain} and
 18 ~~(b)~~ ^{plain} (b) 1., 1m., and 2. each require proof of a fact for conviction which the other does
 19 others do not require.

History: 1985 a. 331; 1989 a. 275; 1995 a. 290, 436; 1997 a. 35, 198.

20 SECTION 11. 30.681 (1) (d) of the statutes is created to read:
 21 30.681 (1) (d) *Defenses.* In an action under par. (b) 1m., the defendant has a
 22 defense if he or she proves by a preponderance of the evidence that at the time of the
 23 incident or occurrence ^{one} of the following applied:



1. ^g He or she had a valid prescription for the controlled substance or controlled substance analog that was present in his or her blood or urine and the amount of controlled substance or controlled substance analog found in his or her blood or urine was consistent with the controlled substance or controlled substance analog being used as prescribed.

2. He or she had complied with s. 961.23[✓] in obtaining the controlled substance that was present in his or her blood or urine and the amount of controlled substance found in his or her blood or urine was consistent with the controlled substance being used as directed.

SECTION 12. 30.681 (2) (b) (title)[✓] of the statutes is amended to read:

30.681 (2) (b) (title) *Causing injury with controlled substance or alcohol concentrations at or above specified levels.*

History: 1985 a. 331; 1989 a. 275; 1995 a. 290, 436; 1997 a. 35, 198.

SECTION 13. 30.681 (2) (b) 1m.[✓] of the statutes is created to read:

30.681 (2) (b) 1m. No person who has any amount of a controlled substance or a controlled substance analog in his or her blood or urine may cause injury to another person by the operation of a motorboat.[✓]

SECTION 14. 30.681 (2) (c)[✓] of the statutes is amended to read:

30.681 (2) (c) *Related charges.* A person may be charged with and a prosecutor may proceed upon a complaint based upon a violation of ~~par. (a) or (b) or both~~ ^g (b) 1., 1m., or 2. or any combination of par. (a) ^g (b) 1., 1m., or 2. for acts arising out of the same incident or occurrence. If the person is charged with violating both ~~par. (a) and (b)~~ ^g (b) 1., 1m., or 2. or any combination of par. (a) ^g (b) 1., 1m., or 2. in the complaint, the crimes shall be joined under s. 971.12. If the person is found guilty of both ~~par. (a) and (b)~~ ^g (b) 1., 1m., or 2. or any combination of par. (a) ^g (b) 1., 1m.,



1 or 2. for acts arising out of the same incident or occurrence, there shall be a single
 2 conviction for purposes of sentencing and for purposes of counting convictions under
 3 s. 30.80 (6) (a) 2. and 3. Paragraphs (a) ^{plain} ~~and (b)~~ ^{1.} 1m., and ^{2.} 2. each require proof
 4 of a fact for conviction which the ~~other does~~ others do not require.

History: 1985 a. 331; 1989 a. 275; 1995 a. 290, 436; 1997 a. 35, 198. ✓

5 **SECTION 15.** 30.681 (2) (d) 1. of the statutes is renumbered 30.681 (2) (d) 1. a.
 6 and amended to read:

7 30.681 (2) (d) 1. a. In an action under this subsection [✓] for a violation of the
 8 intoxicated boating law where the defendant was operating a motorboat that is not
 9 a commercial motorboat, the defendant has a defense if he or she proves by a
 10 preponderance of the evidence that the injury would have occurred even if he or she
 11 had been exercising due care and he or she had not been under the influence of an
 12 intoxicant or did not have an alcohol concentration of 0.1 or more or any amount of
 13 a controlled substance or a controlled substance analog in his or her blood or urine. ✓

History: 1985 a. 331; 1989 a. 275; 1995 a. 290, 436; 1997 a. 35, 198. ✓

14 **SECTION 16.** 30.681 (2) (d) 1. b. of the statutes is created to read:

15 30.681 (2) (d) 1. b. In an action under par. (b) 1m., [✓] the defendant has a defense
 16 if he or she proves by a preponderance of the evidence that ^{at} the time of the incident
 17 or occurrence [✓] ~~one of the following applied:~~

18 ^{he} i. ~~He~~ or she had a valid prescription for the controlled substance or controlled
 19 substance analog that was present in his or her blood or urine and the amount of
 20 controlled substance or controlled substance analog found in his or her blood or urine
 21 was consistent with the controlled substance or controlled substance analog being
 22 used as prescribed [✓]

23 ^{he} ii. ~~He~~ or she had complied with s. 961.23 [✓] in obtaining the controlled substance
 24 that was present in his or her blood or urine and the amount of controlled substance



1 found in his or her blood or urine was consistent with the controlled substance being
2 used as directed. (end ins A)

3 INSERT B:

4 SECTION 17. 343.305 (8) (b) 5. [✓] of the statutes is amended to read:

5 343.305 (8) (b) 5. If the hearing examiner finds that the criteria for
6 administrative suspension have not been satisfied or that the person did not have a
7 prohibited alcohol concentration at or any amount of a controlled substance or a
8 controlled substance analog in his or her blood or urine at the time the offense
9 allegedly occurred or that the person proved an affirmative defense for ^{check Δ} the time the
10 offense allegedly occurred, the examiner shall order that the administrative
11 suspension of the person's operating privilege be rescinded without payment of the
12 fee under s. 343.21 (1) (j). If the hearing examiner finds that the criteria for
13 administrative suspension have been satisfied and that the person had a prohibited
14 alcohol concentration at or any amount of a controlled substance or a controlled
15 substance analog in his or her blood or urine at the time the offense allegedly
16 occurred or that the person did not prove an affirmative defense for [✓] the time the
17 offense allegedly occurred, the administrative suspension shall continue regardless
18 of the type of vehicle driven or operated at the time of the violation. The hearing
19 examiner shall notify the person in writing of the hearing decision, of the right to
20 judicial review and of the court's authority to issue a stay of the suspension under
21 par. (c). The administrative suspension is vacated and the person's operating
22 privilege shall be automatically reinstated under s. 343.39 if the hearing examiner



1 fails to mail this notice to the person within 30 days after the date of the notification
2 under par. (a).

(end ins B)

3 History: 1987 a. 3, 27, 399; 1989 a. 7, 31, 56, 105, 359; 1991 a. 39, 251, 277; 1993 a. 16, 105, 315, 317, 491; 1995 a. 27 ss. 6412cnL, 9126 (19); 1995 a. 113, 269, 425, 426, 436, 448; 1997 a. 35, 84, 107, 191, 237, 290; 1999 a. 9, 32, 109; 2001 a. 16 ss. 3421m to 3423j, 4060gk, 4060hw, 4060hy; 2001 a. 104.

4 INSERT C

5 SECTION 18. 350.101 (1) (bm) of the statutes is created to read:

6 350.101 (1) (bm) *Operating with a controlled substance or a controlled*
7 *substance analog.* No person may engage in the operation of a snowmobile with any
8 amount of a controlled substance or a controlled substance analog in his or her blood
9 or urine.

10 SECTION 19. 350.101 (1) (d) of the statutes is amended to read:

11 350.101 (1) (d) *Related charges.* A person may be charged with and a prosecutor
12 may proceed upon a complaint based upon a violation of ~~par. (a) or (b) or both~~ (b),
13 (bm), or any combination of ^{par.} (a), (b), or (bm) for acts arising out of the same incident
14 or occurrence. If the person is charged with violating both ~~par. (a) and (b)~~, (b), (bm),
15 or any combination of ^{par.} (a), (b), or (bm), the offenses shall be joined. If the person is
16 found guilty of both ~~par. (a) and (b)~~, (b), (bm), or any combination of ^{par.} (a), (b), or (bm)
17 for acts arising out of the same incident or occurrence, there shall be a single
18 conviction for purposes of sentencing and for purposes of counting convictions under
19 s. 350.11 (3) (a) 2. and 3. Paragraphs (a) and (b) and (bm) each require proof of
20 a fact for conviction which the other does ^{plain} others do not require.

21 History: 1987 a. 399; 1989 a. 275; 1995 a. 436.

21 SECTION 20. 350.101 (1) (e) of the statutes is created to read:

22 350.101 (1) (e) *Defenses.* In an action under par. (bm), the defendant has a
23 defense if he or she proves by a preponderance of the evidence that, at the time of the
24 incident or occurrence, one of the following applied:



1 1. He or she had a valid prescription for the controlled substance or controlled
2 substance analog that was present in his or her blood or urine and the amount of
3 controlled substance or controlled substance analog found in his or her blood or urine
4 was consistent with the controlled substance or controlled substance analog being
5 used as prescribed.

6 2. He or she had complied with s. 961.23 in obtaining the controlled substance
7 that was present in his or her blood or urine and the amount of controlled substance
8 found in his or her blood or urine was consistent with the controlled substance being
9 used as directed.

10 SECTION 21. 350.101 (2) (bm) of the statutes is created to read:

11 350.101 (2) (bm) *Causing injury while operating a snowmobile with any*
12 *amount of a controlled substance or a controlled substance analog.* No person who
13 has any amount of a controlled substance or a controlled substance analog in his or
14 her blood or urine may cause injury to another person by the operation of a
15 snowmobile.

16 SECTION 22. 350.101 (2) (c) of the statutes is amended to read:

17 350.101 (2) (c) *Related charges.* A person may be charged with and a prosecutor
18 may proceed upon a complaint based upon a violation of ~~par. (a) or (b) or both~~ (b),
19 or (bm), or any combination of par. (a), (b), or (bm) for acts arising out of the same
20 incident or occurrence. If the person is charged with violating ~~both pars. (a) and (b)~~
21 , (b), or (bm), or any combination of par. (a), (b), or (bm) in the complaint, the crimes
22 shall be joined under s. 971.12. If the person is found guilty of ~~both pars. (a) and (b)~~
23 , (b), or (bm), or any combination of par. (a), (b), or (bm) for acts arising out of the same
24 incident or occurrence, there shall be a single conviction for purposes of sentencing
25 and for purposes of counting convictions under s. 350.11 (3) (a) 2. and 3. Paragraphs



① (a) and ^②~~(b)~~ ^{plain} and (bm) each require proof of a fact for conviction which the other
 2 does others do not require.

History: 1987 a. 399; 1989 a. 275; 1995 a. 436.

3 **SECTION 23.** 350.101 (2) (d) [✓] of the statutes is renumbered [✓] 350.101 (2) (d) 1. and
 4 amended to read:

⑤ 350.101 (2) (d) 1. Defenses In an action under this subsection, [✓] the defendant
 6 has a defense if he or she proves by a preponderance of the evidence that the injury
 7 would have occurred even if he or she had been exercising due care and he or she had
 8 not been under the influence of an intoxicant or did not have an alcohol concentration
 9 of 0.1 or more or any amount of a controlled substance or a controlled substance
 10 analog in his or her blood or urine.

History: 1987 a. 399; 1989 a. 275; 1995 a. 436.

11 **SECTION 24.** 350.101 (2) (d) 2. [✓] of the statutes is created to read:

⑫ 350.101 (2) (d) 2. In an action under par. (bm), [✓] the defendant has a ^{check} defense
 13 if he or she proves by a preponderance of the evidence that, at the time of the incident
 14 or occurrence, one of the following applied:

15 a. He or she had a valid prescription for the controlled substance or controlled
 16 substance analog that was present in his or her blood or urine and the amount of
 17 controlled substance or controlled substance analog found in his or her blood or urine
 18 was consistent with the controlled substance or controlled substance analog being
 19 used as prescribed.

20 b. He or she had complied with s. 961.23 [✓] in obtaining the controlled substance
 21 that was present in his or her blood or urine and the amount of controlled substance
 22 found in his or her blood or urine was consistent with the controlled substance being
 23 used as directed.

24 **SECTION 25.** [✓] 350.104 (4) of the statutes is amended to read:



1 350.104 (4) ADMISSIBILITY; EFFECT OF TEST RESULTS; OTHER EVIDENCE. The results
 2 of a chemical test required or administered under sub. (1), (2) or (3) are admissible
 3 in any civil or criminal action or proceeding arising out of the acts committed by a
 4 person alleged to have violated the intoxicated snowmobiling law on the issue of
 5 whether the person was under the influence of an intoxicant or the issue of whether
 6 the person had alcohol concentrations at or above specified levels [✓]or any amount of
 7 a controlled substance or a controlled substance analog in his or her blood or urine.
 8 Results of these chemical tests shall be given the effect required under s. 885.235.
 9 This section does not limit the right of a law enforcement officer to obtain evidence
 10 by any other lawful means.

History: 1987 a. 399; 1989 a. 359; 1993 a. 105; 1995 a. 27 s. 9126 (19).

11 **SECTION 26.** 885.235 (1g) (intro.) [✓]of the statutes is amended to read:

12 885.235 (1g) (intro.) In any action or proceeding in which it is material to prove
 13 that a person was under the influence of an intoxicant ^gor ^ghad a prohibited alcohol
 14 concentration ^gor ^ga specified alcohol concentration, or any amount of a controlled
 15 substance or a controlled substance analog in his or her blood or urine while
 16 operating or driving a motor vehicle or, if the vehicle is a commercial motor vehicle,
 17 on duty time, while operating a motorboat, except a sailboat operating under sail
 18 alone, while operating a snowmobile, while operating an all-terrain vehicle or while
 19 handling a firearm, evidence of the amount of alcohol ^g, controlled substance, or
 20 controlled substance analog [✓]in the person's blood or urine [✓]at the time in question, as
 21 shown by chemical analysis of a sample of the person's blood or urine [✓]or evidence of
 22 the amount of alcohol in the person's breath [✓], is admissible on the issue of whether
 23 he or she was under the influence of an intoxicant ^gor ^ghad a prohibited alcohol
 24 concentration ^gor ^ga specified alcohol concentration, or any amount of a controlled



1 substance or a controlled substance analog in his or her blood or urine ✓ if the sample
2 was taken within 3 hours after the event to be proved. The chemical analysis shall
3 be given effect as follows without requiring any expert testimony as to its effect:

History: 1971 c. 40; 1973 c. 102; 1981 c. 20, 184; 1983 a. 74, 459; 1985 a. 146 s. 8; 1985 a. 331, 337; 1987 a. 3, 399; 1989 a. 105; 1991 a. 277; 1995 a. 436, 448; 1997 a. 35, 198.

4 **SECTION 27. 885.235 (1g) (cm)** ✓ of the statutes is created to read:

5 885.235 (1g) (cm) The fact that the analysis shows that the person had any
6 amount of a controlled substance or a controlled substance analog in his or her blood
7 is ✓ prima facie evidence on the issue of having a controlled substance or a controlled
8 substance analog in his or her blood or urine.


(end ins c)

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 , and sub. (1g) (a), (am), (b), (c), (cm), and (d) each require proof of a fact for conviction which the others do not require

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-0465/P2dn
MGD:jld:cph

February 14, 2003

Rep. Gundrum:

As I indicated in the previous drafter's note, current s. 940.09 (1m) contains an error. Until 1989 Wisconsin Act 105 was enacted, there were only two ways in which s. 940.09 could be violated. Thus, the last sentence of s. 940.09 (1) (c) read: "Paragraphs (a) and (b) each require proof of a fact for conviction which the other does not require." When Act 105 created s. 940.09 (1) (bm) (which created a new prohibition related to the operation of a commercial motor vehicle), it also renumbered s. 940.09 (1) (c) as s. 940.09 (1m) and amended the last sentence of that provision to read: "Subsection (1) (a), (b), and (bm) each require proof of a fact for conviction which the other does not require." That change, however, should have also replaced "other does" with "others do." Act 105's enactment produced the same error in s. 940.25 (1m).

The error in s. 940.09 (1m) was then compounded by the enactment of 1991 Wisconsin Act 277. Until then, s. 940.09 treated both homicide by intoxicated use of vehicle and homicide by intoxicated use of firearm in the same subsection (sub. (1)). Act 277 removed the references to homicide by intoxicated use of firearm from sub. (1) and created a new sub. (1g) to cover that conduct. At the same time, Act 277 amended sub. (1m). As a result of that amendment, the last sentence read: "Subsection (1) (a), (b), and (bm), and sub. (1) (a) and (b), each require proof of a fact for conviction which the other does not require." Since then, additional paragraph references have been added for each of those subsections.

As a result of these changes, the last sentence of s. 940.09 (1m) could be read as merely indicating that the prohibition against homicide by intoxicated use of vehicle requires proof of a fact for conviction that the prohibition against homicide by intoxicated use of firearm does not require, and vice versa. In other words, that subsection does not clearly specify that one version of homicide by intoxicated use of vehicle (such as the version prohibited under s. 940.09 (1) (a)) requires proof of a fact that the other versions of that offense do not.

Given the history of this provision and the fact that this bill creates new paragraphs to which this provision will refer (subs. (1) (am) and (cm) and (1g) (am) and (cm)), it makes sense not to perpetuate the problems described above. Instead, this bill amends s. 940.09 (1m) so that the last sentence of it reads: "Subsection (1) (a), (am), (b), (bm), (c), (cm), (d), and (e) each require proof of a fact for conviction which the others do not

require, and sub. (1g) (a), (am), (b), (c), (cm), and (d) each require proof of a fact for conviction which the others do not require." (This is slightly different from what I suggested in the first drafter's note; I had not yet noticed the Act 105 error.) The bill also amends s. 940.25 (1m) to replace "other does" with "others do" in the last sentence. These changes are consistent with the changes that Peggy Hurley has made in other parts of the draft. *See, e.g.*, s. 346.63 (1) (c).

I hope this information is helpful. Please let me know if you have any questions about it.

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