

**482 VERDICTS SUBMITTED FOR ONE DEFENDANT: SINGLE COUNT:  
LESSER INCLUDED OFFENSE**

The following three forms of verdict<sup>1</sup> will be submitted to you concerning the charges against the defendant, (name of defendant).

One reading: "We, the jury, find the defendant, (name of defendant), guilty of (offense charged),<sup>2</sup> as charged in the information."<sup>3</sup>

Another reading: "We, the jury, find the defendant, (name of defendant), guilty of (included offense),<sup>4</sup> in violation of § \_\_\_\_\_ of the Criminal Code of Wisconsin, at the time and place charged in the information."<sup>5</sup>

And the third reading: "We, the jury, find the defendant, (name of defendant), not guilty."

It is for you to determine which one of the forms of verdict submitted you will bring in as your verdict.

**COMMENT**

Wis JI-Criminal 482 was originally published in 1962 and revised in 1979 and 1990. It was republished without change in 2000. This revision was approved by the Committee in February 2012; it involved updating the Comment.

This instruction calls for submitting three verdicts in the single count, single lesser included offense, case: guilty of the charged crime, guilty of the lesser included crime, and not guilty. See Wis JI-Criminal 485 for a case involving two counts and lesser included offenses.

In *State v. Hansbrough*, 2011 WI App 79, 334 Wis.2d 237, 797 N.W.2d 887, the defendant was found guilty of felony murder as a lesser included offense in a case where he was charged with first degree intentional homicide. He contended that he should receive a new trial because the trial court did not include a "not guilty" verdict form for felony murder. The court of appeals held that this was error, but harmless, "not structural," error. The offense instruction for felony murder did include the usual statement that "if you are not so satisfied, you must find the defendant not guilty." The problem would have been avoided if the procedure recommended in Wis JI-Criminal 482 had been followed.

1. Additions to the verdict are required in several situations. For example, in theft, criminal damage to property, and receiving stolen property cases, findings are required for the value of the property involved. The instructions for those offenses include recommended additional questions for these findings. A number of other criminal offenses also call for additional findings relating to facts that increase the penalty. Again, individual offense instructions will provide recommended questions. Finally, there are several generally applicable "penalty enhancers" that provide for increased penalties if specified facts are found. See Wis JI-Criminal 980 through 999A for suggested additions to the verdict.

2. Here insert the short title of the offense charged. Refer to the Criminal Code titles, but in some instances these will not be appropriate, and it will be necessary to formulate a short title by synopsis.

3. This instruction refers only to the charge "in the information" rather than to the charge "in the (information) (complaint)" because the Committee concluded that lesser included offenses are submitted almost exclusively where the charged crime is a felony. There may be cases, however, where a misdemeanor offense is charged and a lesser included offense is submitted. For example, an attempt could be submitted as a lesser included offense to a charge of misdemeanor theft or battery. See §§ 939.32(1) and 939.66(4). In those cases, the reference to "information" should be changed to "complaint."

It is important that the reference, "as charged in the information," appear in the verdict. The Committee believes that this reference is sufficient to take care of the venue issue in cases where venue has not been contested. While venue is not an element of a criminal offense, it must be established beyond a reasonable doubt. State v. Dombrowski, 44 Wis.2d 486, 171 N.W.2d 349 (1969); Smazal v. State, 31 Wis.2d 360, 142 N.W.2d 808 (1960). Where venue is contested and one of the exceptions under § 971.19 applies, a separate instruction on venue may be required; see Wis JI-Criminal 267.

4. Here insert the short title of the included offense. Refer to the Criminal Code titles, but in some instances these will not be appropriate, and it will be necessary to formulate a short title by synopsis.

5. See note 3, supra.