

603 PRELIMINARY INSTRUCTION AFTER FINDING OF GUILT AND BEFORE CONSIDERATION OF WHETHER THE DEFENDANT SUFFERED FROM A MENTAL DISEASE OR DEFECT AT THE TIME OF THE OFFENSE

The defendant has been found guilty¹ of (offense).

IF THE FIRST PHASE WAS RESOLVED WITH A PLEA OF GUILTY OR NO CONTEST, ADD THE FOLLOWING:

[The elements of (offense) are:

SPECIFY THE ELEMENTS OF THE CRIME BY REFERRING TO THOSE LISTED IN THE APPLICABLE JURY INSTRUCTION.²]

We will now proceed with the second phase of this trial. During the second phase, you will be asked to determine whether the defendant is not responsible by reason of mental disease or defect.³

The Defendant's Burden of Proof

Before you may find that the defendant is not responsible for the criminal conduct, the defendant must satisfy you to a reasonable certainty by the greater weight of the credible evidence⁴ that at the time the crime was committed, the defendant had a mental disease or defect and as a result lacked substantial capacity either to appreciate the wrongfulness of the conduct or to conform that conduct to the requirements of law.

Two Questions

This issue will be presented to you in the form of two questions.⁵

1. At the time the crime was committed, did the defendant have a mental disease or defect?

2. As a result of the mental disease or defect, did the defendant lack substantial capacity either to appreciate the wrongfulness of the conduct or to conform that conduct to the requirements of law?

You will be asked to answer the second question only if you answer the first question "yes."

If you find that the defendant is not responsible for the criminal conduct, the defendant will be committed to the custody of the Department of Health Services and will be placed in an appropriate institution unless the court determines that the defendant would not pose a danger to (himself) (herself) or to others if released under conditions ordered by the court.⁶ The only issue at this second phase of the trial is the defendant's mental condition at the time of the offense.

**PROCEED WITH EVIDENCE ON THE DEFENDANT'S MENTAL CONDITION
AT THE TIME OF THE OFFENSE.**

COMMENT

Wis JI-Criminal 603 is part of a series of instructions which replaces the instructions formerly numbered 600-CPC through 655-CPC. Wis JI-Criminal 603 and comment were originally published in 1980 and revised in 1982, 1984, 1988, 1990, 2002, and 2005. This revision was approved by the Committee in December 2010 and involved minor editorial changes.

This instruction is for the second stage of the trial held upon the defendant's special plea of not guilty by reason of mental disease or defect. The second stage is to be held before the same jury that found that the defendant committed the crime, except that a new jury may be drawn if the jury has been discharged before reaching a verdict on the second plea or if an appellate court has reversed the judgment as to the second plea but not the first. § 971.165(1)(c)2. and 3. Also see *State v. Sarinske*, 91 Wis.2d 14, 280 N.W.2d 725 (1979); *State v. Grennier*, 70 Wis.2d 204, 234 N.W.2d 316 (1975). If the defendant coupled a guilty plea with the special plea, a jury would have to be convened if one is requested on the issue of criminal responsibility. The usual procedures for accepting a guilty plea should have been followed to assure that the plea was voluntarily entered and that a factual basis for the plea exists. *State v. Duychak*, 133 Wis.2d 307, 395 N.W.2d 795 (Ct. App. 1986).

Appropriate general instructions, such as those on credibility of witnesses, expert testimony, arguments and objections of counsel, etc., should also be given as required.

The Wisconsin statutes relating to mental responsibility were modeled after Section 4.01 of the ALI Model Penal Code. The Commentary to Section 4.01 is found in Tentative Draft No. 4, beginning at page 156.

1. This instruction is drafted for use before the second phase of the trial begins. It may be used not only where the first phase was tried to the jury but also where the judge sitting without a jury heard the first phase and where the defendant coupled a plea of guilty or no contest with the plea of not guilty by reason of mental disease or defect. See note 2, below.

2. The committee recommends advising the jury of the elements of the crime that were established at the first phase by a plea of guilty or no contest. This will put the jury in a position similar to that of a jury that made the decision in a case where the first phase was tried to a jury. Just listing the elements as they appear in the applicable instruction is sufficient.

3. If a case involves a claim that the combined effect of a "mental disease" and a "mental defect" is involved, the term "mental disease and defect" should be used throughout. State v. Duychak, 133 Wis.2d 307, 395 N.W.2d 795 (Ct. App. 1986), dealt with that situation. The court held that it was not error to phrase the jury instructions in the conjunctive – mental disease and defect – since the theory of defense was that the defendant suffered from both a disease and a defect, the combined effect of which was the lack of substantial capacity to appreciate the wrongfulness of his conduct. The court noted that to use "or" would have frustrated the proffered defense. And to use "and/or" would not have been desirable.

4. This burden of proof is required by § 971.15(3).

5. The Committee determined that separating the issue into two questions would make the requirements clearer for the jury. Presenting the issue in the form of two questions is intended to make clear that not only must a mental disease or defect be present at the time of the offense but also that the mental disease or defect must have had the required effect on the defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.

6. The instruction's description of what will happen to the defendant if found not responsible is based on § 971.165(2) which directs that the result be described to the jury and reads as follows:

(2) If the plea of not guilty by reason of mental disease or defect is tried to a jury, the court shall inform the jury that the effect of a verdict of not guilty by reason of mental disease or defect is that, in lieu of criminal sentence or probation, the defendant will be committed to the custody of the department of health services and will be placed in an appropriate institution unless the court determines that the defendant would not pose a danger to himself or herself or to others if released under conditions ordered by the court.