

605 INSTRUCTION ON THE ISSUE OF THE DEFENDANT'S CRIMINAL RESPONSIBILITY — MENTAL DISEASE OR DEFECT¹

You have just heard testimony about the defendant's mental condition at the time of the offense. You will now be asked to determine whether the defendant is not responsible by reason of mental disease or defect.²

Two Questions

This issue will be presented to you in the form of two questions.³

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."

The Defendant's Burden of Proof

Before you may answer a question "yes," the defendant must satisfy you to a reasonable certainty by the greater weight of the credible evidence⁴ that the answer to that question should be "yes."

Evidence has greater weight when it has more convincing power than the evidence opposed to it. Credible evidence is evidence which in the light of reason and common sense is worthy of belief.⁵

The First Question

The first question is: At the time the crime was committed, did the defendant have a mental disease or defect?

Meaning of "Mental Disease or Defect"

Mental disease or defect is an abnormal condition of the mind which substantially affects mental or emotional processes.⁶

The term "mental disease or defect" identifies a legal standard that may not exactly match the medical terms used by mental health professionals. You are not bound by medical labels, definitions, or conclusions as to what is or is not a mental disease or defect to which the witnesses may have referred.⁷

You should not find that a person is suffering from a mental disease or defect merely because the person committed a criminal act, or because of the unnaturalness or enormity of the act, or because a motive for the act may be lacking.⁸

ADD THE FOLLOWING IF SUPPORTED BY THE EVIDENCE

[Temporary passion or frenzy prompted by revenge, hatred, jealousy, envy, or the like does not constitute a mental disease or defect.]⁹

[An abnormality manifested only by repeated criminal or otherwise antisocial conduct does not constitute a mental disease or defect.]¹⁰

[A voluntarily induced state of intoxication by drugs or alcohol or both does not constitute a mental disease or defect.]¹¹

[A temporary mental state which is brought into existence by the voluntary taking of drugs or alcohol does not constitute a mental disease or defect.]¹²

[Chronic use of drugs or alcohol may produce a condition that can constitute a mental disease or defect if the condition has become permanent.]¹³

Jury Decision on the First Question

If you answer the first question "yes," you must go on to answer the second question. If you answer the first question "no," you should not consider the second question.

The Second Question

The second question is: 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?¹⁴

If You Answer Both Questions "Yes"

If you answer both of these questions "yes," the defendant will be found to be not responsible for the offense, and will be committed to 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.¹⁵ In deciding whether the defendant is responsible for the criminal conduct, you are to consider only the issue of the defendant's mental condition at the time the offense was committed.

Verdict

Agreement by ten or more jurors is sufficient to become the verdict of the jury.¹⁶ Jurors have a duty to consult with one another and to deliberate for the purpose of reaching agreement. At least the same ten jurors should agree in all the answers made. I ask you to be unanimous if you can.

At the bottom of the verdict, you will find a place provided where dissenting jurors, if any, will sign their names and state the answer or answers with which they do not agree. Either the blank lines or the space below them may be used for that purpose.

COMMENT

Wis JI-Criminal 605 is part of a series of instructions which replaces the instructions formerly numbered 600-CPC through 655-CPC. Wis JI-Criminal 605 and comment were originally published in 1980 and revised in 1982, 1984, 1988, 1990, and 2003. The 2003 revision involved combining both mental disease and mental defect in a single instruction, adoption of the new format and changes to the text. 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 must 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).

In State v. Leach, 124 Wis.2d 648, 370 N.W.2d 240 (1985), reversing (as to this issue) 122 Wis.2d 339, 363 N.W.2d 234 (Ct. App. 1984), the Wisconsin Supreme Court held that the defendant may be held to a burden of producing sufficient evidence on the responsibility issue before it need be submitted to the jury. See page 5 of the Introductory Comment that precedes Wis JI-Criminal 601.

1987 Wisconsin Act 86 (effective date: November 28, 1987) created § 971.165(2) which provides that a five-sixths verdict applies at the second phase.

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

See Wis JI-Criminal 605B for a suggested verdict form.

In State v. Wery, 2007 WI App 169, 304 Wis.2d 355, 737 N.W.2d 66, the court of appeals held that the regular rule against impeaching a jury's verdict applies to the verdict returned after the first phase of the trial. After the first phase, the jury was polled and each juror indicated that "guilty" was his or her verdict. After deliberations for the second phase had begun, the foreperson informed the court that one of the jurors disagreed with the guilty verdict. The court of appeals held that the defendant "fails to persuade us that the traditional rules barring impeachment of a jury verdict in instances of juror remorse do not apply in a bifurcated setting." Wery, ¶18.

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 where the plea is based on the presence of a mental disease or mental defect. Former Wis JI-Criminal 605A, which provided a separate instruction for cases involving "mental defect" has been withdrawn and combined with this instruction. 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.

2. The Committee determined that phrasing the issue in terms "responsible or not responsible" is preferable to "guilty but not guilty by reason of mental disease or defect."

3. 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.

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

5. This is a slight revision of the standard description of the civil burden of proof, intended to improve its understandability. No change in meaning is intended.

6. This definition of was arrived at after considerable discussion. The previous Wisconsin instructions had no definition of "mental disease or defect" nor does the section of the ALI Model Penal Code after which the Wisconsin statute was modeled have a definition. (See Comment to § 4.01, ALI Model Penal Code, Tent. Draft No. 4.) The 2002 revision changed the former instruction to refer to "mental disease or defect."

The definition in the instruction was adapted from the one proposed by the court in United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972). The Brawner case is the leading attempt to define "mental disease or defect" and has been the model for most other attempts to do so although relatively few states or federal courts have developed a definition.

The Committee determined that a positive definition should be attempted, in addition to the negative statements that have been retained from the prior instructions. (For example, "Temporary passion . . . does not constitute a mental disease or defect.") The only indication in Wisconsin law of what is a mental disease or defect is a decision of the Wisconsin Supreme Court holding that psychomotor epilepsy may be legally classified as a mental disease or defect. Sprague v. State, 52 Wis.2d 89, 187 N.W.2d 784 (1971).

The Committee did consider the definition of "mental illness" provided in Wis. Stat. § 51.01(13)(b) but concluded it was not well-suited for the purposes of this instruction. However, in a proper case, there may be merit in including the references to "thought, mood, perception, orientation, or memory" that are found in § 51.01(13)(b). Psychiatrists rely on symptoms affecting these mental functions to determine whether or not mental illness is present. If expert testimony is linked directly to such functions, it may be helpful to the jury to tailor an instruction to coincide with the testimony.

The "mental disease or defect" definition is intentionally broad. Disabilities may qualify under this definition that are not sufficient to relieve the defendant of responsibility. The limits are furnished by the second question in the instruction, which requires that the mental disease or defect have the effect of substantially impairing the defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.

The Committee reviewed the definition in 1984 and reaffirmed it with the exception of deleting the following phrase which formerly concluded the definition: "and can impair behavioral controls." The deleted phrase was found to serve no useful purpose. As revised, the definition closely resembles the definition set forth in the ABA Criminal Justice Mental Health Standards. Approved by the ABA in August 1984, standard 7.6.1 provides:

- (b) When used as a legal term in this standard "mental disease or defect" refers to:
 - (i) impairments of mind, whether enduring or transitory; or,
 - (ii) mental retardation,either of which substantially affected the mental or emotional processes of the defendant at the time of the alleged offense.

The definition adopted in the instruction has been criticized as too "wide-open." However, the Committee concluded that using the definition to limit the admissibility of evidence was inappropriate, especially in the absence of legislative action. Long-established Wisconsin case law holds: ". . . no evidence should be excluded which reasonably tends to show the mental condition of the defendant at the time of the offense." State v. Carlson, 5 Wis.2d 595, 607, 93 N.W.2d 354 (1958); cited with approval in Esser v. State, 16 Wis.2d 567, 593-94, 115 N.W.2d 505 (1962). These cases preceded the adoption of the ALI tests in Wisconsin but were cited in support of that adoption: Since any evidence of mental disease or defect, regardless of medical label, was admissible, it was fair to impose the burden of persuasion on the defendant. Consistent with this principle, the Committee concludes that the proper way to limit inappropriate evidence is to apply the standards for relevancy used in all other situations: Is the proffered testimony relevant to the issue of the defendant's ability to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of law? A

recent federal case has emphasized this as the proper approach, United States v. Gould, 741 F.2d 45 (4th Cir. 1984).

The Committee continues to place great importance on the concept that medical terms and labels are not the central issue, it is the legal conclusion that is significant: Regardless of the medical label, did the mental disease or defect have the required effect on the accused person's behavior? It is this aspect that is emphasized in the second question in the instruction.

7. This is adapted from United States v. Brawner, cited above, note 6. The intent of this sentence is to emphasize that the jury is not bound by what is considered "mental disease or defect" for medical purposes. The jury is bound by the legal definition of mental disease or defect as explained in this instruction. In a proper case, the judge may wish to emphasize this distinction.

8. This paragraph, or at least a modified version, is probably appropriate for almost all cases. The paragraphs which follow, identifying conditions which do not constitute mental disease for the purpose of determining criminal responsibility, may be read in all cases or just in those cases where the condition discussed is raised by the evidence. The reason for reading each paragraph in all cases is that a complete picture of what is not considered a mental disease may help the jury to better understand what is included in that concept.

9. Duthey v. State, 131 Wis. 178, 111 N.W. 222 (1907).

10. See § 971.15(2) and Simpson v. State, 62 Wis.2d 605, 215 N.W.2d 435 (1974). The instruction follows the words of § 971.15(2) in referring to "an abnormality manifested only by repeated criminal or otherwise antisocial conduct." (Emphasis added.) In State v. Werlein, 136 Wis.2d 445, 401 N.W.2d 848 (Ct. App. 1986), the court of appeals held that a trial judge improperly invoked the statute in excluding evidence offered by the defendant. The decision hinged on the word "only." Because the proffered testimony was based on organic brain dysfunction and delusions in addition to antisocial conduct, the court held the § 971.15(2) exception did not apply. A case-by-case analysis is required (even where, as in Werlein, the expert witness characterized the mental disease as "antisocial personality disorder").

Like the Wisconsin mental responsibility test in general, the exclusion of the "antisocial personality" from the mental disease definition is modeled after section 4.01 of the ALI Model Penal Code. The Commentary to the Model Penal Code explains this exclusion as follows:

Paragraph (2) of section 4.01 is designed to exclude from the concept of "mental disease or defect" the case of so-called "psychopathic personality." The reason for the exclusion is that, as the Royal Commission put it, psychopathy "is a statistical abnormality; that is to say, the psychopath differs from a normal person only quantitatively or in degree, not qualitatively; and the diagnosis of psychopathic personality does not carry with it any explanation of the causes of the abnormality." While it may not be feasible to formulate a definition of "disease," there is much to be said for excluding a condition that is manifested only by the behavior phenomena that must, by hypothesis, be the result of disease for irresponsibility to be established. Although British psychiatrists have agreed, on the whole, that psychopathy should not be called "disease," there is considerable difference of opinion on the point in the United States. Yet it does not seem useful to contemplate the litigation of what is essentially a matter of terminology; nor is it right to have the legal result rest upon the resolution of a dispute of this kind.

Commentary to section 4.01, ALI Model Penal Code (Tentative Draft No. 4, page 160).

11. Gibson v. State, 55 Wis.2d 110, 197 N.W.2d 813 (1972).
12. State v. Kolisnitschenko, 84 Wis.2d 492, 267 N.W.2d 321 (1978): a temporary psychotic state brought about by the interaction of a "stormy personality" and voluntary intoxication and which lasts only for the period of intoxication does not constitute a mental disease or defect.
13. State v. Kolisnitschenko, see note 12, supra.
14. It is sufficient that the mental disease or defect had either of the two specified effects on the defendant: impairment of capacity to appreciate the wrongfulness of the conduct or impairment of capacity to conform his conduct to the requirements of law.
15. 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 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.
16. Section 971.165 (created by 1987 Wisconsin Act 86 – effective date: November 28, 1987) provides that a five-sixths verdict applies. State v. Koput, 142 Wis.2d 370, 418 N.W.2d 804 (1988), held that a five-sixths verdict applied even before the statute was changed.