

923B "INTENTIONALLY" AND "WITH INTENT TO": "PRACTICALLY CERTAIN"¹ — § 939.23(3) and (4)

("Intentionally") ("With intent to") means that the defendant must have had the mental purpose to _____² or was aware that his conduct was practically certain to cause that result.³

[CONTINUE WITH OTHER PARAGRAPHS FROM WIS JI-CRIMINAL 923A AS APPROPRIATE.]⁴

COMMENT

This instruction replaces Wis JI-Criminal 923.2, which was originally published in 1989. This revision, which made no substantive change, was approved by the Committee in March 2001.

Two appellate decisions have addressed the revised intent definition. In *State v. Weeks*, 165 Wis.2d 200, 477 N.W.2d 642 (Ct. App. 1991), the court held that the definition in § 939.23(4) applies to the term, "with intent that" found in the attempt statute, § 939.32. In *State v. Smith*, 170 Wis.2d 701, 490 N.W.2d 40 (Ct. App. 1992), the court held that the definition in § 939.23(3) did not violate constitutional principles of due process or vagueness. As to due process, the court held that the two alternatives in the definition of "intentionally" "are merely alternative means in which intent is manifested" and that "it was not necessary that all jurors agree that Smith acted with a purpose to cause the fire, or that he acted with an awareness that his conduct was practically certain to cause that result." 170 Wis.2d 701, 713. As to vagueness, the court held that the definition of intent "is not so obscure that persons of common intelligence must necessarily guess at its meaning and differ as to its applicability." 170 Wis.2d 701, 712.

1. This instruction addresses the change in the definitions of "intentionally" and "with intent to" made by 1987 Wisconsin Act 399, effective date: January 1, 1989.

This change was made as part of the revision of Wisconsin's homicide statutes which was originally introduced as 1987 Senate Bill 191 and adopted as part of 1987 Wisconsin Act 399, the budget bill. The words, "is aware that his or her conduct is practically certain to [cause that result]," were substituted for "believes his act, if successful, will [cause that result]." See note 1, Wis JI-Criminal 923A for the revised text of subsections (3) and (4) of § 939.23. The more limited definition of "intent to kill" in § 940.01 was repealed so that the new definition applies to homicide offenses as well as to all other Criminal Code offenses.

The phrase in the former statutes "believed his act, if successful, would have that result" was not widely understood or used. It apparently was intended to reach the situation where a person had not formed the actual mental purpose to cause the prohibited result but believed that his act would cause it. For example, assume a criminal suspect is being chased through a parking lot by police in lawful pursuit. In trying to escape, the suspect runs across the hoods of several parked cars, causing serious damage to them. The suspect, if charged with criminal damage to property, might honestly be able to say that he had not acted with the mental purpose

to cause damage to the cars. But he probably did hold the belief that his acts would cause damage and thus would have had the required intent under the "believes his acts, if successful . . ." alternative.

The new phrase – "aware that his conduct is practically certain" – is based on the Model Penal Code, § 2.02(2)(b)ii, where almost identical language is used to define "knowingly." Acting either with "mental purpose" or "knowingly" is sufficient for liability for most offenses defined by the Model Penal Code. The basis for this approach is the conclusion that acting with awareness that one's conduct is "practically certain" to cause a result is as blameworthy as acting with the purpose to cause that harm. An example commonly used to illustrate the issue is that of the arsonist who is being paid to burn down a building. He knows that some people are in the building who will not be able to escape, but he sets the fire anyway. He does not have the purpose to cause their deaths; in fact, he hopes they are able to escape. Thus, he would not have "intent to kill" if that intent is limited to "purpose to cause the death of another." But he is "aware that his conduct is practically certain" to cause death and would have acted with the intent to kill under the Model Penal Code formulation now adopted in Wisconsin.

2. Here identify the result specified by the statute defining the criminal offense, for example: "take the life of another," or "cause great bodily harm to another."

3. When the "aware that it is practically certain" alternative is in the case, the Committee recommends simply adding it to the statement defining criminal intent. This style is illustrated in Wis JI-Criminal 1010. Jury agreement as to which alternative is established is not required. See State v. Smith, 170 Wis.2d 701, 490 N.W.2d 40 (Ct. App. 1992), discussed in the Comment preceding note 1, supra.

4. The complete alternatives for instructing on intent are set forth at Wis JI-Criminal 923A, and footnotes discuss their appropriate use.