

**1011 FIRST DEGREE INTENTIONAL HOMICIDE OF AN UNBORN CHILD —  
§ 940.01(1)(b)****Statutory Definition of the Crime**

First degree intentional homicide, as defined in § 940.01(1)(b) of the Criminal Code of Wisconsin, is committed by one who causes the death of an unborn child with the intent to kill [that unborn child] [(or) the woman who is pregnant with that unborn child] [(or) another].

**State's Burden of Proof**

Before you may find the defendant guilty of first degree intentional homicide, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following two elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant caused the death of an unborn child.

"Cause" means that the defendant's act was a substantial factor in producing the death of the unborn child.<sup>1</sup>

"Unborn child" means any individual of the human species from fertilization until birth that is gestating inside a woman.<sup>2</sup>

2. The defendant acted with the intent to kill [the unborn child] [(or) the woman who was pregnant with the unborn child] [(or) another human being].

"Intent to kill" means that the defendant had the mental purpose to take the life of [an unborn child] [(or) the woman who was pregnant with the unborn child] [(or)

another human being] or was aware that his or her conduct was practically certain to cause the death of [an unborn child] [(or) the woman who was pregnant with the unborn child] [or another human being].

### **When May Intent Exist?**

While the law requires that the defendant acted with intent to kill, it does not require that the intent exist for any particular length of time before the act is committed. The act need not be brooded over, considered, or reflected upon for a week, a day, an hour, or even for a minute. There need not be any appreciable time between the formation of the intent and the act. The intent to kill may be formed at any time before the act, including the instant before the act, and must continue to exist at the time of the act.

### **Deciding About Intent**

You cannot look into a person's mind to find intent. Intent to kill must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.<sup>3</sup>

### **Intent and Motive**

Intent should not be confused with motive. While proof of intent is necessary to a conviction, proof of motive is not. "Motive" refers to a person's reason for doing something. While motive may be shown as a circumstance to aid in establishing the guilt of a defendant, the State is not required to prove motive on the part of a defendant in order to convict.

Evidence of motive does not by itself establish guilt. You should give it the weight you believe it deserves under all of the circumstances.

### **Jury's Decision**

If you are satisfied beyond a reasonable doubt that the defendant caused the death of an unborn child with the intent to kill [that unborn child] [(or) the woman who is pregnant with that unborn child] [(or) another], you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

### **COMMENT**

Wis JI-Criminal 1011 was originally published in 1999. This revision adapted the instruction to a new format and was approved by the Committee in April 2005.

This instruction is drafted for the offense defined in § 940.01(1)(b), which was created by 1997 Wisconsin Act 295 [effective date: July 1, 1998]. The act revised all the general homicide statutes to apply to causing the death of an unborn child; several nonhomicide statutes were similarly revised.

Section 939.75, also created by Act 295, defines "unborn child" and sets forth several exceptions to the applicability of the revised statutes. Subsection (2)(b) recognizes the following exceptions:

- induced abortions [subd. 1.]
- acts committed in accordance with usual and customary standards of medical practice during diagnostic testing or therapeutic treatment by a licensed physician [sub. 2.]
- an act by a health care provider that is in accordance with a pregnant woman's power of attorney for health care, etc. [subd. 2h.]
- an act by a woman who is pregnant with an unborn child [subd. 3.]
- the lawful prescription, dispensation or administration, and the use by a woman of, any medicine, drug or device that is used as a method of birth control or is intended to prevent pregnancy. [subd. 4]

Subsection (3) provides that if any of these exceptions are "placed in issue by the trial evidence, the state must prove beyond a reasonable doubt that the facts constituting the exception do not exist. . . ." Thus, these exceptions are to be handled in the same manner as, for example, the mitigating circumstance of adequate provocation under the general homicide law: once supported by some evidence, the absence of the exception becomes a fact the state must prove. The Committee decided not to draft instructions for the absence of these exceptions because it appeared to the Committee that their applicability would most likely be determined before charges were filed or at least before trial.

1. If a more extensive definition of "cause" is necessary, see Wis JI-Criminal 901.
2. This is the definition provided in § 939.75(1).
3. This instruction on finding intent is a shorter version of a longer statement commonly used in the standard instructions. The Committee concluded that this shorter version is appropriate for most cases. The complete, traditional statement is found at Wis JI-Criminal 923A.