

**1492 UTTERING A FORGED WRITING (CHECK) — § 943.38(2)****Statutory Definition of the Crime**

Uttering a forged writing, defined in § 943.38(2) of the Criminal Code of Wisconsin, is committed by one who utters as genuine a forged writing or object by which legal rights or obligations are created or transferred, knowing that the writing or object was falsely made or altered.

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

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

1. The document in this case was a writing<sup>1</sup> by which legal rights or obligations are created or transferred.

(A bank check) (An endorsement on a bank check) is such a writing.<sup>2</sup>

2. The (check) (endorsement) was forged, that is, falsely (made) (altered).

The check must have been falsely (made) (altered) to appear to have been made (by another person) (at another time) (with different terms) (by authority of someone who really did not give such authority).<sup>3</sup>

3. The (check) (endorsement) was uttered as genuine by the defendant.

"To utter (a check) (an endorsement) as genuine" simply means that the check is presented for payment (or cashed) with the representation that the (check) (endorsement) is genuine.<sup>4</sup>

4. The defendant knew the (check) (endorsement) was falsely (made) (altered) at the time it was presented.<sup>5</sup>

### **Deciding About Knowledge**

You cannot look into a person's mind to find knowledge. Knowledge 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 knowledge.

### **Jury's Decision**

If you are satisfied beyond a reasonable doubt that all four elements of uttering a forged writing have been proved, you should find the defendant guilty.

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

### **COMMENT**

Wis JI-Criminal 1492 was originally published in 1980 and revised in 1985 and 1995. This revision was approved by the Committee in April 2008 and involved adoption of a new format and nonsubstantive changes to the text.

Under § 943.38(1) and (2), three forms of conduct are made felonies: the forging of a writing or object (Wis JI-Criminal 1491), the possession of a forged writing or object with intent to utter (Wis JI-Criminal 1493), and the uttering of a forged writing or object (Wis JI-Criminal 1492). Though these forms of conduct are distinct, they constitute only one offense, so that the person who both forges and utters an instrument is punishable for but one offense. *State v. Nichols*, 7 Wis.2d 126, 95 N.W.2d 765 (1959), cited in *Little v. State*, 85 Wis.2d 558, 562, 271 N.W.2d 105 (1978).

1. The instruction has been drafted using "writing" only. If the offense involved an "object," the Committee suggests naming the object and using that name in the instruction in place of "writing" and "check."

2. Since bank checks are the writings used in most forgery cases, the rest of the uniform instruction uses only the term "check." If the offense involved a different kind of writing or an "object," the Committee suggests naming the writing or object and using that name whenever "check" appears in the instruction. Whether a particular writing or object is one by which "legal rights or obligations are created or transferred" is a question of fact for the jury to determine. Where the law establishes that a particular writing or object has that effect, it is permissible to communicate that legal rule to the jury. With regard to the definition of "check" and other instruments, see § 403.104.

State v. Perry, 215 Wis.2d 690, 631 N.W.2d 651 (1997), held that "Transchecks" used by truckers for unexpected expenses are writings covered by the forgery statute.

3. Examples of the kinds of conduct covered are given in the Vol. V 1953 Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, page 131 (February 1953):

Signing a check with another's name (an example of making a writing purporting to have been made by another); raising a check (an example of making a writing purporting to have been made with different terms); filling in blanks over the signature of another either without authority or with unauthorized terms (an example of making a writing appearing to have been made by authority of one who did not give such authority).

The fact that the writing is nonnegotiable is immaterial. The absence of the maker's signature may mean the check is not a negotiable instrument, but presenting such a check for payment may constitute uttering a forged writing. See State v. Machon, 112 Wis.2d 47, 331 N.W.2d 665 (Ct. App. 1983).

"Falsely made" does not apply to writing someone else's name as the payer on a postal money order. "Wisconsin requires that a false making must relate to the genuineness of execution of a document, not to the genuineness of its contents." State v. Entringer, 2001 WI App 157, 246 Wis.2d 851, 631 N.W.2d 651.

4. "The virtually universal rule is that 'a forged instrument is uttered when it is offered as genuine by words or conduct indicating that it is genuine, without regard to whether it is accepted.' 2 Wharton's Criminal Law and Procedure, § 650, p. 441 (1957)." Little v. State, 85 Wis.2d 558, 564, 271 N.W.2d 105 (1978).

Depositing a forged check via an automated teller machine is "uttering," since it "introduced the forged check into the stream of financial commerce." State v. Tolliver, 149 Wis.2d 166, 440 N.W.2d 571 (Ct. App. 1989).

5. The Committee concluded that "intent to defraud" is not a statutorily-required element for a violation of sec. 943.38(2). Knowledge that the writing is forged and uttering it (or possessing it with intent to utter) is all that is required. The clearest support for this conclusion is the statutory language itself: "intent to defraud" appears in subsecs. (1) and (3), but not in (2). This difference between the subsections appears to be intentional: the parallel section in the 1953 draft of the proposed Criminal Code had "intent to defraud" as an element; as enacted in 1955, that element had been eliminated and the statute read essentially as it does today. (The 1953 version is found in the 1953 Report On The Criminal Code, Wisconsin Legislative Council, 1953; the Code was enacted as Chapter 696, Laws of 1955.)

The interpretation in the instruction is consistent with a policy of penalizing those who introduce forged writings into the stream of commerce, which the Committee concluded is the likely purpose of sec. 943.38(2).