

2102 INTRODUCTORY COMMENT: § 948.02 SEXUAL ASSAULT OF A CHILD: AS AMENDED BY 2007 WISCONSIN ACT 80 [EFFECTIVE DATE: MARCH 27, 2008] AND 2013 WISCONSIN ACT 167 [EFFECTIVE DATE: MARCH 29, 2014]

Background

Section 948.02 was amended by both 2005 Wisconsin Act 430 and 2005 Wisconsin Act 437. The changes were inconsistent with one another, so the Revisor of Statutes published the statute as amended by Act 437. The statute as amended by Act 430 was printed immediately following that version in the 2005-06 Wisconsin Statutes – in boldface type. A study committee of the Wisconsin Legislative Council was convened to review the matter, and issued a report with recommendations for additional legislation. The Legislative Council draft was introduced in both houses: 2007 Assembly Bill 209 and 2007 Senate Bill 103. Senate Bill 103 was enacted as 2007 Wisconsin Act 80 [effective date: March 27, 2008.] Section 948.02(1)(e) was later amended by 2013 Wisconsin Act 167.

Summary: Offenses Defined in § 948.02

As amended by 2007 Wisconsin Act 80 and 2013 Wisconsin Act 167, § 948.02(1) defines 5 types of first degree sexual assault of a child. See Wis JI-Criminal 2102A-E. Section 948.02(2), which defines second degree sexual assault of a child, was not affected by Act 80. See Wis JI-Criminal 2104.

Because some of the offense definitions differ only slightly, the Committee concluded that a summary of the elements, penalties, and related issues might be helpful.

§ 948.02(1) 1st degree sexual assault of a child

- (am) • sexual contact or sexual intercourse
- with a person who has not attained the age of 13
 - causes great bodily harm
- [Wis JI-Criminal 2102A]

Class A felony. Minimum of 25 years confinement before extended supervision eligibility – § 939.616(1g).

- (b) • sexual intercourse
 • with a person who has not attained the age of 12
 [Wis JI-Criminal 2102B]

Class B felony. Mandatory minimum term of confinement of 25 years – § 939.616(1r).

- (c) • sexual intercourse
 • with a person who has not attained the age of 16
 • by use or threat of force or violence
 [Wis JI-Criminal 2102C]

Class B felony. Mandatory minimum term of confinement of 25 years – § 939.616(1r).

- (d) • sexual contact
 • with a person who has not attained the age of 16
 • by use or threat of force or violence
 • by a person who is at least 18 years of age
 [Wis JI-Criminal 2102D]

Class B felony. Mandatory minimum term of confinement of 5 years – § 939.616(2).

- (e) • sexual contact or sexual intercourse
 • with a person who has not attained the age of 13
 [Wis JI-Criminal 2102E]

Class B felony.

NOTE: 2013 Wisconsin Act 167 amended § 948.02(1)(e) by adding “sexual intercourse.” [Effective date: March 29, 2014.]

§ 948.02(2) 2nd degree sexual assault of a child

[Not affected by 2007 Wisconsin Act 80]

- sexual contact or sexual intercourse
- with a person who has not attained the age of 16
 [Wis JI-Criminal 2104]

Class C felony.

NOTE: Section 948.02(2) was amended by 2017 Wisconsin Act 174 [effective date: March 30, 2018] to add the following: “This section does not apply if s. 948.093 applies.” Section 948.093, Underage sexual activity, applies to sexual activity by a defendant who has not attained the age of 19.

Mandatory Minimum Sentences – § 939.616

As noted above, § 939.616 provides for mandatory minimum sentences for violations of § 948.02(1)(am) through (d). In *State v. Lalicata*, 2012 WI App 138, 345 Wis.2d 342, 824 N.W.2d 921, the court of appeals held that the mandatory minimum sentence under § 939.616(1r) for convictions under § 948.02(1)(b) is “truly mandatory, with no probation option.” ¶1.

Section 939.616(3) provides: “. . . The mandatory minimum sentences in this section do not apply to an offender who was under 18 years of age when the violation occurred.”

Penalty Increase for Sexual Assault or Physical Abuse of a Child by a Child Care Provider – § 939.635

Section 939.635 was created by 2011 Wisconsin Act 82 [effective date: December 9, 2011]. It allows an increase of not more than 5 years for violations of §§ 948.02, 948.025, 948.03(2) and (3), and 948.03(5)(a)1., 2., 3., and 4. if the defendant committed the crime against a child for whom the defendant was providing child care for compensation. Wis JI-Criminal 2115 provides a special question to be added to the applicable offense instruction when the enhanced penalty authorized by § 939.635 is alleged in the charging document and the evidence would support a finding that the penalty-increasing facts are established.

Lesser Included Offenses

Section 939.66(2p), created by 2005 Wisconsin Act 430, provides that a “crime which is a less serious or equally serious type of violation under s. 948.02 than the one charged” is a lesser included crime.

COMMENT

Wis JI-Criminal 2102 Introductory Comment was originally published in 2008 and revised in 2013 and 2015. The 2013 revision added reference to *State v. Lalicata*. The 2015 revision reflected a change made in § 948.02(1)(e) by 2013 Wisconsin Act 167. The 2016 revision corrected editorial errors. This revision was approved by the Committee in December 2018; it added a section describing the penalty increase under § 939.635.