

# ***Wisconsin Sentencing Guidelines Notes***

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## ***Introduction***

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The Sentencing Guidelines Worksheets (the Worksheets) and the Sentencing Guidelines Notes (the Notes) describe factors frequently considered at sentencing. They are not intended to preclude consideration of additional or alternative factors. Since **the Guidelines are advisory, and are not intended to replace the traditional exercise of discretion**, the sentencing court need not address each factor for each crime. However, the court should weigh all relevant factors. When the court determines that certain factors are not applicable, the court should leave the appropriate *Mitigating* and *Aggravating* boxes unchecked.

The Guidelines apply to the following offenses, if committed on/after February 1, 2003:

- **first degree sexual assault**  
Wis. Stat. 940.225(1)
- **second degree sexual assault**  
Wis. Stat. 940.225(2)
- **first degree sexual assault of a child**  
Wis. Stat. 948.02(1)
- **second degree sexual assault of a child**  
Wis. Stat. 948.02(2)
- **armed robbery**  
Wis. Stat. 943.32(2)
- **robbery**  
Wis. Stat. 943.32(1)
- **burglary**  
Wis. Stat. 943.10(1)
- **delivery or possession with intent to deliver cocaine — one gram or less**  
Wis. Stats. 961.41(1)(cm), (1m)(cm)
- **delivery or possession with intent to deliver THC — 200 to 1000 grams**  
Wis. Stats. 961.41(1)(h), (1m)(h)
- **theft — more than \$10,000**  
Wis. Stat. 943.20(3)(c)
- **forgery and forgery uttering**  
Wis. Stats. 943.38(1) and (2)

Each worksheet is divided into four principal sections: (1) Offense Severity, (2) Risk Factors, (3) the Specific Offense Chart and (4) Other factors that may warrant adjustment of the sentence.

Many factors that are appropriately considered at sentencing are primarily associated with **Offense Severity** (the vertical axis of the sentencing chart) or **Future Risk** (the horizontal axis of the sentencing chart). Offense Severity pertains to the character of the specific offense—mitigated, intermediate or aggravated. Future Risk addresses the risk posed by the defendant—lesser, medium or high.

## ***1 Offense Severity***

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Offense severity reflects the need for punishment. Whether the offense should be treated as mitigated, intermediate or aggravated depends on various factors, including the characteristics of the offense and its actual or intended impact upon the victim(s) and/or the community

### ***1A Factors affecting the severity of the specific offense***

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#### **First degree sexual assault, Wis. Stat. 940.225(1)**

First degree sexual assault includes conduct ranging from sexual contact to intercourse. The court should examine the nature of the conduct to determine the severity of the assault. The court also may consider:

- great bodily harm
- other forms of harm—  
including extreme emotional harm
- pregnancy
- transmission of disease
- whether multiple acts were involved
- whether the victim was threatened,  
abducted or restrained
- the location of the assault
- the kind of weapon used, and the  
manner of its use
- extreme degradation of the victim

The court should examine information available at sentencing in connection with short and long-term psychological and bodily harm. No single factor, through its presence or absence, necessarily makes the offense more or less severe. A dangerous weapon may raise the offense severity level unless the weapon forms an element of the crime, in which case this factor may not increase the offense severity level without further analysis.

### **Second degree sexual assault, Wis. Stat. 940.225(2)**

Many factors related to first degree sexual assault are appropriately considered in connection with the second degree offense. However, the crimes have different elements, and this difference must guide the manner in which these factors are weighed.

### **First degree sexual assault of a child, Wis. Stat. 948.02(1)**

Without further analysis, the sentencing court may not increase the offense severity level just because the victim was under 13 when the offense was committed—this fact is an element of the crime. However, the court is not precluded from considering factors associated with age. Ordinarily, young children are more dependent than older children and are especially vulnerable, but age alone is not the truest measure of vulnerability.

In some child sexual assault cases, there are reliable indicators that the victim suffered prolonged sexual abuse over time. Under these circumstances, the court may consider the duration of the abuse and the relationship between the defendant and the victim. However, where the victim knew the offender, the court should not conclude that the offense was necessarily less severe. Reports of health care providers, family members and others who know the victim well may provide valuable insight when assessing harm to the victim.

### **Second degree sexual assault of a child, Wis. Stat. 948.02(2)**

The only distinction between second and first degree child sexual assault is the age of the victim. Generally, the sentencing court may consider the offense severity factors associated with the first degree offense. For second degree child sexual assault, the court also may consider whether the victim acted voluntarily, though legal consent was impossible; whether the victim and the defendant were adolescents engaging in voluntary sexual activity; and the fact that pregnancy has long-term consequences for the victim and the community.

### **Armed robbery, Wis. Stat. 943.32(2)**

The court should consider the character of the specific offense—the particular weapon(s) used and the manner of their use, the duration and location of the robbery, and the value of the property taken, although often this factor is less consequential than the traumatic impact of the crime. Generally, aggravated robberies involve loaded firearms, illegal weapons, weapons that are actually fired, disguises and/or significant force.

### **Robbery, Wis. Stat. 943.32(1)**

Offense severity is directly related to the degree and nature of the force used and the duration and location of the robbery. Additionally, the sentencing court may consider the value of the property taken. Mitigated robberies typically involve minimal threat of force, short duration and no injury. Intermediate robberies may involve some greater degree/threat of force. Aggravated robberies may involve weapons, disguises and some even greater degree of force/injury.

### **Burglary, Wis. Stat. 943.10(1)**

The court should consider factors including individual harm, whether the property taken or damaged was particularly valuable, and whether the burgled premises were damaged. Additionally, the court may consider the type of premises—home entry ordinarily being more serious than burglary of commercial structures—and the crime intended upon entry. Although burglaries of garages and commercial structures are often deemed less serious than residential burglaries, they may cause substantial harm if the premises were vandalized, the business was prevented from operating, or there were other economic consequences.

Burglaries in which the offender confronts the occupant(s) of the premises may cause significant trauma. The court may consider the nature and circumstances of the confrontation, and whether the confrontation was intended or reasonably anticipated. The court also may consider whether the defendant ultimately abandoned the crime.

**Delivery or possession with intent to deliver cocaine — one gram or less, Wis Stats 961.41(1)(cm), (1m)(cm)**

**Delivery or possession with intent to deliver THC — 200 to 500 grams, Wis Stats 961.41(1)(h), (1m)(h)**

A mitigated offense is generally delivery or possession with intent to deliver (PWID) without any indication that the offender was dealing for profit. An intermediate offense is generally delivery or PWID for profit, though the profit margin may be small. An aggravated offense is generally delivery or PWID near schools, other places where children are targeted, and/or in close proximity to weapons. Gang association and/or involvement with a drug distribution network is clearly related to offense severity. Additionally, the sentencing court should consider the impact of the offense upon the community.

**Theft of more than \$10,000, Wis. Stat. 943.20(3)(c)**

The sentencing court may consider not only the value of the property taken, but its impact upon the victim and the relationship between the victim and the defendant. The court also may consider how the defendant obtained the property, the degree of planning necessary to execute the offense, and though only one conviction may have been obtained, whether the offense was continuing. Additional considerations may include motive and how the defendant used the stolen property.

**Forgery, Wis. Stat. 943.38(1), and Uttering, Wis. Stat. 943.38(2)**

The sentencing court should consult the previous paragraph regarding theft—the factors relevant to that offense are similar to those that may affect the severity of these crimes. In connection with culpability and planning, specifically, the court may consider the sophistication necessary to commit the crime and whether the offender actually produced forged checks/documents or was merely recruited to pass them. The court also may consider that an offense motivated by common needs like rent may differ from one motivated by greed/addiction.

**1B Considering harm caused by the offense**

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To the extent that vulnerability and/or trauma have not been fully considered, the court should evaluate these factors taking into account any harm suffered by the victim, including physical, emotional and financial harm. The court also may consider whether the community has been affected.

**1C Statutory aggravating factors and penalty enhancers**

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**Statutory aggravating factors**

Generally, any statutory aggravating factor will increase the offense severity level.

**Offense committed in association with a gang**

Facts demonstrating that the crime was gang-related may raise the offense severity level because gang-relatedness will likely increase the traumatic impact upon the victim and the community. However, the crime does not automatically become more severe just because the defendant was affiliated with gang members. The crime itself must have been gang-related.

**Pleaded and proved penalty enhancers**

When pleaded and proved, penalty enhancers may increase the maximum penalty in each sentencing chart cell. The complete list of penalty enhancers for the offenses to which the Guidelines apply includes:

- Domestic abuse, Wis. Stat. 939.621
- Repeat offender, Wis. Stat. 939.62
- Repeat of serious sex crime, Wis. Stat. 939.623
- Repeat drug offender, Wis. Stat. 961.48
- Dangerous weapon, Wis. Stat. 939.63

- Hate crime, Wis. Stat. 939.645
- Violent crime in school zone, Wis. Stat. 939.632
- Distribution of controlled substance to person(s) under 18, Wis. Stat. 961.46
- Distribution or possession with intent to distribute controlled substance near certain public places, including public housing projects, parks, correctional facilities and youth centers, Wis. Stat. 961.49

### **Uncharged or dismissed penalty enhancers**

Where an uncharged/dismitted penalty enhancer fits the crime, the court may consider this factor, even though the penalty enhancer was neither pleaded nor proven. However, where the defendant disputes its applicability, the court should treat any uncharged/dismitted penalty enhancer with caution. Generally, this factor will increase the offense severity level, just like statutory aggravating factors.

### **Use of a dangerous weapon**

As with penalty enhancers that are neither pleaded nor proved, the court should consider with great care whether the offender used any dangerous weapons to commit or facilitate the offense. Although there may have been insufficient evidence to charge or prove the dangerous weapon enhancer, the court may conclude that the weapon is highly relevant to offense severity. Under those circumstances, the court should leave the *pleaded and proved* box **unchecked**. In determining how much weight to give this factor, the court should carefully consider the connection between the weapon and the offense, the type of weapon and its specific use.

## **1D Role of the defendant in the offense**

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Generally, if the defendant led/organized the offense or abused any position of trust/authority, this will increase offense severity. Conversely, if the defendant was only minimally involved, or was pressured or manipulated, this will decrease offense severity. This determination should be made within the context of **all other factors** bearing upon the offense severity level.

## **1E Other factors related to offense severity**

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The sentencing court may consider whether the defendant used any special skill or license to commit the crime. This factor may increase the offense severity level. Additionally, the court may consider whether the underlying conduct reflects conduct more serious than the offense of conviction.

## **2 Risk Factors**

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The second part of the worksheet contains factors that are useful in thinking about future risk and the need to incapacitate the defendant to safeguard public safety. To gauge future risk, the court may consider the character of the offense itself. For example, the crime may have been mischievous or thrill-seeking, with no purpose other than to cause damage. In contrast, the offender who commits burglary for the underlying purpose of committing sexual assault may pose significant risk, though not necessarily to commit burglary. In this situation, an examination of the risk factors pertaining to sex offenses would be appropriate.

### **2A Age, education and employment history**

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Except for sex offenses, adolescents and young adults commit most crimes. An offender who is 30–40 years old and has prior conviction(s) may pose significant risk, because his conduct has not improved with age. Education and employment that enables the defendant to support himself and his family is generally an indication of reduced risk to re-offend. Employment history also may be relevant when setting conditions of probation or extended supervision.

The Worksheets give the sentencing court an opportunity to indicate the highest educational grade level completed by the defendant, any degrees obtained, and whether these factors—grade level completed and degree(s) obtained—are mitigating or aggravating. The boxes for degree(s) obtained are not mutually exclusive.

## ***2B Criminal history***

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Criminal history should be treated objectively. This section provides space for the sentencing court to indicate whether certain criminal history factors are present. If criminal history does *not* factor into the sentencing process, the court should check the appropriate box and skip the remaining criminal history factors. **The court should *not* check this box where the defendant has no prior convictions and this fact mitigates the seriousness of his/her conduct.** Assuming that criminal history does factor into the sentencing process, the court should determine which criminal history factors apply and whether they are mitigating or aggravating:

- *No criminal record* — Does not necessarily mean that the defendant poses less risk, but this factor strongly suggests less risk.
- *Prior misdemeanor(s)* — In addition to indicating whether the court views prior misdemeanors as mitigating/aggravating factors, the court should specify the total number of prior misdemeanors and the number of assaultive misdemeanors.
- *Prior felony or felonies* — In addition to indicating whether the court views any prior felonies as mitigating/aggravating factors, the court should specify the total number of prior felonies and the number of assaultive felonies.
- *Prior offense(s) similar to the current offense* — The court should examine criminal history within the context of the present offense to determine whether prior convictions are reliable predictors of future risk.
- *Defendant was previously placed on community supervision*
- *Criminal history understates or overstates risk* — The court may consider whether the defendant has availed himself of rehabilitative resources, continued with his/her education, obtained an educational degree, established stable employment, etc. Conversely, the court may consider whether the defendant poses greater risk than his/her criminal history would suggest.
- *Time since most recent conviction or period of incarceration* — As prior convictions become more distant from the present offense, they become less reliable indicators of risk. Sexual offenses are significant exceptions. They must be carefully reviewed, no matter how old the conviction/offender. This factor provides the court with an opportunity to indicate whether the passage of time is calculated from the most recent conviction or period of incarceration, whether little time has passed or many years, and whether this factor is mitigating or aggravating.
- *On legal status / not on legal status when crime was committed* — The commission of any crime while the defendant was on legal status generally means that community supervision was insufficient to control the risk of recidivism. *Legal status* means that when the offense was committed, the defendant was either:
  1. on probation (felony or violent misdemeanor)
  2. on parole
  3. on extended community supervision
  4. subject to juvenile supervision in connection with an act that would ordinarily constitute an adult crime
  5. an escapee
  6. an absconder
  7. currently serving a sentence
  8. juvenile under secure corrections disposition

For purposes of the Guidelines, *conviction* means criminal convictions **and** delinquency adjudications for acts that would ordinarily constitute adult crimes. Similarly, any reference to *felony* or *misdemeanor* includes crimes so classified by statute and delinquency adjudications for acts that would ordinarily constitute adult felonies or misdemeanors. *Assaultive* crimes are those crimes (or juvenile acts that would ordinarily constitute adult crimes) that involve the use or threat of force in the context of person-to-person confrontations or child sexual assault.

## ***2C Mental and physical health; alcohol and drug abuse***

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Alcohol and drug dependence are positively correlated with many crimes. The defendant may pose significant risk unless his/her addiction has been dealt with effectively. Conversely, involvement in treatment may indicate that the defendant poses less risk, particularly if the underlying drug/alcohol problem was previously unaddressed. Previous *unsuccessful* courses of treatment, and the current degree of motivation or willingness to cooperate with treatment, may reflect upon future risk.

Regarding mental health problems, commitment to treatment and medication may indicate lesser risk. However, long-term mental illness, particularly when coupled with poor medication compliance and violent conduct, may reveal greater risk. The court also may consider whether physical health factors affect the risk of recidivism.

## ***2D Social factors; attitude***

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The court may consider whether the defendant has strong and stable ties to family and community—these may mitigate the seriousness of his/her conduct. The court also may consider character issues in determining whether the offense of conviction was anomalous. Generally, the court should look for the following factors:

- Demonstrated history of good conduct
- Remorse
- Acceptance of responsibility
- Cooperation with the police and/or the prosecution
- Detailed rehabilitative plan in progress

## ***Other factors pertaining to risk***

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Although these factors are not referenced in the worksheets, the sentencing court may consider the following:

- *Performance on bail* — Performance on bail may indicate that the defendant can/cannot be adequately supervised in the community. The court also may consider whether the offense for which the defendant is being sentenced was committed while on bail. However, even under these circumstances, the court should determine whether the bail violation necessarily increases the risk evaluation.
- *Prior Acts* — The court may consider wrongful conduct, including conduct that did not result in conviction. However, the court should bear in mind that such conduct may be insufficiently reliable to predict future risk. With respect to prior arrests, the court should evaluate the number and reason for the arrests. The court may view misconduct for which the offender was arrested as more serious than previous undetected misconduct. Prior acts may include previous read-in offenses that indicate future risk.
- *Multiple convictions for closely related crimes* — The court should determine whether multiple prior convictions resulted from one course of conduct; they may overstate future risk. However, the court should not disregard prior convictions just because they were closely related in time.

## ***General concepts of risk — Lesser risk***

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Generally, lesser risk is strongly suggested where the defendant, when he/she committed the present offense:

- had no legal status and no criminal history;
- had no legal status and prior convictions for nonviolent misdemeanors only; or
- had no legal status and only one nonviolent felony conviction

## ***General concepts of risk — Medium risk***

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Generally, medium risk is strongly suggested where the present offense is a non-violent felony and:

- the defendant was on legal status when he/she committed the crime;
- the defendant has one prior conviction for the same/similar offense;
- the defendant has two or three violent misdemeanor convictions;
- the defendant has two or three nonviolent felony convictions; or
- the defendant has one violent felony conviction

## ***General concepts of risk — High risk***

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Generally, high risk is strongly suggested where the present offense is a violent felony and:

- the defendant was on legal status when he/she committed the crime;
- the defendant has two or more prior convictions for the same/similar offense;
- the defendant has two or more violent felony convictions; or
- the defendant has four violent misdemeanor convictions

### **3 Specific Offense Chart**

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The design of the sentencing chart was not intended to suggest that the total number of offenders should be distributed equally among the cells. The distribution will vary by offense. The cell that represents aggravated offense severity and high risk accommodates the highest possible sentence for the worst-case offender.

Though probation might seem appropriate, considerations of retribution or deterrence not fully accommodated by the preceding sections may lead the sentencing court to order confinement. In these circumstances, the court should state its reasons for deviating from the sentencing range indicated in the sentencing chart.

### **4 Additional factors that may warrant adjustment of the sentence**

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The following factors, not always related to offense severity or risk, may warrant adjustment of the sentence:

- PSI Recommendation
- Victim statement
- Attorney recommendations — The court may give weight to attorney recommendations, especially when the reasons for the recommendation are set forth at sentencing and the court finds them well-founded
- Collateral consequences — The court may consider whether collateral punishment, for example, job loss, public humiliation, and/or long-lasting financial consequences, mitigates the sentence.
- Effect of multiple counts — Upward adjustment may be required where sentences are imposed concurrently; downward adjustment may be required where sentences are imposed consecutively.
- Habitual criminality — Where an allegation of habitual criminality has been established, the sentencing court may determine, consistent with the habitual criminality statute (Wis. Stat. 939.62) or the drug repeater statute (Wis. Stat. 961.48), that punishment exceeding the maximum indicated penalty is required.
- Read-in offenses — The court may deviate upwards, or may set different conditions for probation/supervision.
- Restitution paid at great sacrifice — When restitution is paid before sentencing, the court may give favorable consideration. However, restitution paid at minimal sacrifice means less than restitution paid at great sacrifice.

### **Imposition of sentence**

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When the court orders imprisonment, or imposes and stays imprisonment, the court must order extended supervision of at least  $\frac{1}{4}$  the term of confinement. The length and conditions of extended supervision, should the court determine that any special conditions are required, must be determined as part of the sentence.

The length of extended supervision should be sufficient to protect the community and may serve to punish the defendant. Other considerations—for example, rehabilitation, restitution, non-correctional treatment/counseling and reintegrating the defendant into society—may influence this decision.

The sentencing court should not automatically impose the maximum term of extended supervision. However, with certain offenses like child sexual assault, longer terms of extended supervision are often deemed necessary.