

Minnesota Sentencing Guidelines Commission

Possible Re-Ranking of Child Neglect or Endangerment October 26, 2016 Update*

Issue: On September 28, 2016, the Sherburne County Attorney's Office asked the Commission to review the Severity Level 1 ranking of felony neglect or endangerment of child under Minn. Stat. § [609.378](#).

Background: A person is guilty of gross misdemeanor child neglect who "willfully deprives a child of necessary food, clothing, shelter, health care, or supervision appropriate to the child's age, when the parent, guardian, or caretaker is reasonably able to make the necessary provisions and the deprivation harms or is likely to substantially harm the child's physical, mental, or emotional health" Subdivision 1(a)(1).

A person is guilty of gross misdemeanor child endangerment who "endangers [a] child's person or health by ... intentionally or recklessly causing or permitting [the] child to be placed in a situation likely to substantially harm the child's physical, mental, or emotional health or cause the child's death" Subd. 1(b)(1). Alternatively, a person commits the offense who endangers a child's person or health by knowingly causing or permitting the child to be present where controlled substance crime 1st through 4th Degree, or possession of substances with intent to manufacture meth, is being committed. Subd. 1(b)(2).

A person is guilty of gross misdemeanor child endangerment by firearm access who "intentionally or recklessly causes a child under 14 years of age to be placed in a situation likely to substantially harm the child's physical health or cause the child's death as a result of the child's access to a loaded firearm" Subd. 1(c).

Each of these gross misdemeanors is enhanced to a felony, with a maximum 5-year prison sentence and \$10,000 fine, if the neglect or endangerment "results in substantial harm to the child's physical, mental, or emotional health." Subds. 1(a)(1) & 1(b)(2). In the case of child endangerment by firearm access, substantial harm to the child's physical health only—not mental nor emotional health—is sufficient to enhance the offense to a felony. Subd. 1(c).

Definitions: "Substantial harm to the child's physical, mental, or emotional health," a term unique in Minnesota Statutes to § 609.378, is not statutorily defined.¹ A similar term is

* This update adds definitions (p.2), expands Table 1 (p.4), and analyzes prison-bed impact (p.6).

¹ A related term, "substantial child endangerment," is defined in the context of reporting maltreatment of minors, and that definition includes the phrase "neglect ... that substantially endangers the child's physical or mental health" An example of such endangerment (failure to thrive) is given. Minn. Stat. § [626.556](#), subd.

found in Minn. Stat. § [609.02, subd. 7a](#): “ ‘Substantial bodily harm’ means bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily member or organ, or which causes a fracture of any bodily member.” “Substantial bodily harm” is used in various contexts within the criminal code; for example, its infliction will elevate an assault from the fifth degree (Minn. Stat. § [609.224](#)) to the third degree (Minn. Stat. § [609.223](#)). Unlike the term used in Minn. Stat. § 609.378, however, “substantial bodily harm” has no mental or emotional component, and does not use the term “health.”

Regarding the meaning of the term “substantial harm to the child’s physical, mental, or emotional health,” CRIMJIGs² 13.88, 13.92, and 13.94 (explaining the elements of child neglect or endangerment) recommend that judges provide juries the following guidance:

There is no precise definition for the term ‘substantial harm to³ the child’s physical, mental, or emotional health.’ In determining whether _____ suffered physical, mental, or emotional harm, you may consider, but you are not limited to, any evidence showing that any conduct by the defendant has resulted in behavior by _____ of a type that would not normally be expected of this child, and that has interfered with the child’s normal growth and development. From all of the evidence that you have seen and heard in this case, and using your own good judgment and common sense, you must determine the meaning of the term as it relates to _____, and decide whether or not _____, as a result of any conduct of the defendant, suffered physical, mental, or emotional harm.

‘Substantial physical harm’ means bodily harm that involves a temporary but substantial disfigurement, causes a temporary but substantial loss or impairment of the function of any bodily member or organ, or causes a fracture of any bodily member.⁴

While a number of cases have addressed the degree of likelihood of harm required by this Minn. Stat. § 609.378, few have addressed the meaning of that harm itself:

Minnesota caselaw has yet to precisely define the element of substantial harm for this offense. See 10 *Minnesota Practice*, CRIMJIG 13.92 (1999) (providing

2(o)(3). Also, the undefined term “substantial emotional harm” is found in Minn. Stat. § [609.26](#), subd. 2(1); it is an affirmative defense to the crime of Depriving Another of Custodial or Parental Rights that the action was necessary to protect the child from substantial emotional harm.

² The Minnesota District Judges Association publishes criminal jury instruction guides, or CRIMJIGs, in Vol. 10 & 10A of Thomson Reuter’s *Minnesota Practice Series* (6th ed.). While the CRIMJIGs are prepared by learned judges and intended to be standard jury instructions, they may not always be authoritative statements of law.

³ CRIMJIG 13.92 here reads “substantially harms” rather than “substantial harm to.”

⁴ The CRIMJIG footnote here reads, “Definition of substantial physical harm is drawn from M.S.A. § 609.02, subd. 7a.” This paragraph is also included in CRIMJIG 13.96 (explaining the elements of child endangerment by access to firearms), which does not include the preceding paragraph in the quotation.

alternate definitions for substantial harm). The standard jury instruction suggests that substantial harm to a child's physical health may be evaluated, in accordance with the statutory definition of substantial bodily harm, as a 'bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily member or organ, or which causes a fracture of any bodily member.' Minn. Stat. § 609.02, subd. 7a.

Three of our prior decisions provide additional direction on the meaning of substantial harm in the context of child endangerment. *State v. Hatfield* involved a child who lived near a methamphetamine lab and was in close proximity to dangerous chemicals. Stating that 'the mere potential for substantial harm to children is sufficient to constitute child endangerment,' we concluded there was sufficient evidence to establish a likelihood of substantial harm. 627 N.W.2d 715, 720 (Minn. App. 2001), *aff'd on other grounds*, 639 N.W.2d 372 (Minn. 2002). *State v. Cyrette* held that a likelihood of substantial harm was presented when the defendant left a two-year-old and an eight-year-old unsupervised at home for two hours. 636 N.W.2d 343, 348 (Minn. App. 2001). Without considering any factual scenario, *State v. Tice* reconsidered the language of *Hatfield*, holding that 'mere potential' was not meant to describe 'the degree of potential for harm that would satisfy the statute.' 686 N.W.2d 351, 354 (Minn. App. 2004), *review denied* (Minn. Nov. 16, 2004).

State v. Benton, No. A04-1673, 2005 WL 2352543, at *2-3 (Minn. Ct. App. Sept. 27, 2005) (unpublished) (holding that evidence was sufficient to support a likelihood of substantial harm to infant child who was being held by assault victim during violent assault). In a more recent opinion, the Court of Appeals illustrated, but did not define, the degree of harm required:

Here, the record shows that while caring for a two-year-old child, appellant became so inebriated that she forgot the child's location. As a result, R.A.W. was abandoned in a closed car and unable to free herself, despite her attempts to twist out of her car seat. When found, she was crying and gasping, clearly distraught and in both physical and emotional discomfort. Further, it is likely that if R.A.W. continued to struggle in the car seat, the straps would have cut or injured her bare legs or, even more seriously, become tangled around R.A.W.'s neck. The district court's conclusion that appellant's actions were likely to lead to substantial physical and emotional harm is supported by sufficient evidence.

State v. Swedberg, No. A06-1395, 2007 WL 2601358, at *2 (Minn. Ct. App. Sept. 11, 2007) (unpublished), *review denied* (Minn. Nov. 21, 2007).

Guidelines Considerations: Felony child neglect is currently ranked at Severity Level 1. The presumptive disposition is "stayed" at a Criminal History Score 5 or less, and "commitment" at Criminal History Score 6 or more. The presumptive duration ranges from

12 months and one day at Criminal History Score 0, 1, and 2, to 19 months (with a prison range from 17 to 22) at Criminal History Score 6. Felony child neglect under Minn. Stat. § [609.378](#), is on the list of offenses eligible for permissive consecutive sentences in Guidelines § 6.

The Commission may wish to consider a severity level no higher than Severity Level 5 because the presumptive sentence duration exceeds the statutory maximum of five years (60 months) at Criminal History Score 6 above that level. If an offender also had a Custody Status Point, a three-month enhancement would be applied, bringing the presumptive duration up to 51 months (with a prison range from 44 to 60).

Possible Comparison Offenses: Although no other offenses are enhanced to a felony due to the presence of “substantial harm to [the victim’s] physical, mental, or emotional health,” a limited basis for comparison may be found in those offenses that are enhanced due to the presence of “substantial bodily harm,” as discussed above.

Table 1, below, lists all offenses that are enhanced from a less severe crime to a more severe crime due to the presence of substantial bodily harm. Several of the offenses would be, like Child Neglect/Endangerment, gross misdemeanors if not enhanced due to the harm. Each offense listed in Table 1 carries a statutory maximum penalty equal to, or less than, the statutory maximum penalty for Child Neglect/Endangerment (5 years imprisonment and a \$10,000 fine).

Each offense listed in Table 1 is ranked at Severity Level 5, 4, 3, or 1.

At Severity Level 5, the presumptive disposition is “commitment” at Criminal History Score 3. The presumptive duration ranges from 18 months at Criminal History Score 0, to 48 months (with a prison range from 41 to 57) at Criminal History Score 6.

At Severity Level 4, the presumptive disposition is “commitment” at Criminal History Score 4. The presumptive duration ranges from 12 months and one day at Criminal History Score 0, to 30 months (with a prison range from 26 to 36) at Criminal History Score 6.

At Severity Level 3, the presumptive disposition is “commitment” at Criminal History Score 4. The presumptive duration ranges from 12 months and one day at Criminal History Score 0, to 23 months (with a prison range from 20 to 27) at Criminal History Score 6.

At Severity Level 1, the presumptive disposition is “commitment” at Criminal History Score 6. The presumptive duration ranges from 12 months and one day at Criminal History Score 0, to 19 months (with a prison range from 17 to 22) at Criminal History Score 6.

Table 1. Offenses with Elevated Severity Due to Substantial Bodily Harm (SBH)⁵

Crime	Offense Summary	Minn. Stat. section	Severity Level	Stat. Max.	Elevated From	Further Elevated by <i>Great Bodily Harm</i> ? ⁶
Deprivation of Vulnerable Adult	Capable caregiver intentionally deprives vulnerable adult of necessary food/clothing/shelter/supervision, over extended time or knowing SBH could result, & SBH results	609.233 , subd. 3(2)	5	5 yrs. & \$5,000	Gross misdemeanor	Yes, to Severity Level 8
False Imprisonment (child restraint)	Parent/guardian/caretaker intentionally, unreasonably, cruelly, & excessively confines/restrains child for prolonged time, & SBH results	609.255 , subd. 3(c)	4	5 yrs. & \$10,000	Felony; Severity Level 3	No
Fleeing Peace Officer	Person uses motor vehicle to flee or attempt to flee peace office, causes bodily injury to another, & SBH results	609.487 , subd. 4(c)	4	5 yrs. & \$10,000	Felony; Severity Level 1	Yes, to Severity Level 6
Criminal Abuse of Vulnerable Adult	With intent to produce physical/mental pain/injury, caregiver subjects vulnerable adult to aversive/deprivation procedure, unreasonable confinement, or involuntary seclusion, & SBH results	609.2325 , subd. 3(a)(3)	4	5 yrs. & \$10,000	Gross misdemeanor	Yes, to Severity Level 8
Malicious Punishment of Child	Parent/guardian/caretaker’s intentional act(s) evidence unreasonable force or cruel discipline that is excessive, & punishment results in SBH	609.377 , subd. 5	4	5 yrs. & \$10,000	Gross misdemeanor	Yes, to Severity Level 8
Assault 3rd Degree	Person assaults someone (commits an act with intent to cause fear of immediate bodily harm/death, or intentionally inflicts or attempts to inflict bodily harm) and inflicts SBH	609.223 , subd. 1	4	5 yrs. & \$10,000	Misdemeanor	Yes, to Severity Level 9

⁵ Minn. Stat. § [609.222](#), subd. 2 (assault with a dangerous weapon resulting in substantial bodily harm) is omitted from Table 1. Although subd. 2 has a greater statutory maximum penalty than subd. 1 (assault with a dangerous weapon) due to the presence of substantial bodily harm, the Minnesota Sentencing Guidelines assign severity level 6 equally to both offenses.

⁶ “ ‘Great bodily harm’ means bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily harm.” Minn. Stat. § [609.02](#), subd. 7.

Crime	Offense Summary	Minn. Stat. section	Severity Level	Stat. Max.	Elevated From	Further Elevated by <i>Great Bodily Harm</i> ? ⁶
Assault of an Unborn Child 2nd Degree	Person assaults (see explanation of “assault,” above) pregnant woman and inflicts SBH on the subsequently born child	609.2671	4	5 yrs. & \$10,000	Misdemeanor	Yes, to Severity Level 9
Obstructing Legal Process, Arrest, etc.	Person intentionally obstructs, interferes, etc., with legal process, apprehension, peace officer performing duties, firefighter, or ambulance crew, and the act causes death, SBH, or serious property damage	609.50 , subd. 2(1)(ii)	3	5 yrs. & \$10,000	Misdemeanor	No
Depriving Another of Cust. or Parental Rights	Person takes child from state agency or parent in violation of court order, or after commencement of child-custody case, where the action manifests intent substantially to deprive parent of parental rights/ time/custody, and, to effect the taking, causes SBH	609.26 , subd. 6(a)(2)(i)	3	4 yrs. & \$8,000	Felony; Severity Level 1	No
Criminal Vehicular Operation	Person causes SBH to another by operating motor vehicle: in a grossly negligent manner; in a negligent manner while under influence of, or with the presence of, various substances; with alcohol level ≥ 0.08 ; causing an accident, and leaving the scene; or where the SBH was caused by defective maintenance about which the driver was on notice from police, knew had not been repaired, and had reason to know was presently dangerous to others	609.2113 , subd. 2	3	3 yrs. & \$10,000	Gross misdemeanor	Yes, to Severity Level 5
Duty to Render Aid	Person who shoots firearm has reason to know the shot caused bodily harm, fails immediately to investigate injury and render reasonable assistance, and the shot results in SBH	609.662 , subd. 2(b)(2)	1	1 yr., 1 day, & \$3,000	Gross misdemeanor	Yes, to Severity Level 2

Number of Child Neglect/Endangerment Cases: From 2010 through 2015, 46 offenders were sentenced for child neglect under Minn. Stat. § 609.378, all of whom had a presumptive “stayed” disposition. Of the 46 offenders sentenced, 3 (7%) received an aggravated dispositional departure. Two of the three offenders who received “commitment” sentences requested them. Of the 43 offenders who received a pronounced stayed sentence, six (14%) received a non-felony sentence. Of the 3 offenders who received prison, 2 (67%) received an aggravated durational departure and no one received a mitigated durational departure (Table 2).

Table 2. Departure Rates for Child Neglect/Endangerment; Sentenced 2010-2015⁷

Total Sentenced	Dispositional Departure			Durational Departure (received prison)			Durational Departure (received stayed sentence)		
	None	Aggravated	Mitigated	None	Aggravated	Mitigated	None	Aggravated	Mitigated (non-felony)
46	43 (93%)	3 (7%)	0 (0%)	1 (33%)	2 (67%)	0 (0%)	37 (86%)	0 (0%)	6 (14%)

Impact of Possible Re-ranking: The prison bed impact is estimated to be minor. Less than one offender a year would be recommended a prison sentence. It is assumed that eight offenders a year will be sentenced for this offense. (There were 38 offenders sentenced from 2011-2015). At severity levels 3 or 4, offenders with a criminal history score of four or more are recommended a prison sentence. At severity level five, prison is recommended for offenders with a criminal history score of three or more. Of the 38 offenders sentenced for child neglect from 2011-2015; 26 had a criminal history score of zero; 2 had a criminal history score of four or more and 3 had a criminal history score of three or more. Therefore over the course of 5 years it is estimated that 2 offenders would be recommended a prison sentence if the offense was ranked at severity levels 3 or 4 and three offenders would be recommended a prison sentence if the offense was ranked at severity level 5. Table 4 displays the estimated prison bed impact at each of the severity levels under consideration.

⁷ These data differ from the MSGC Information Response prepared for the Sherburne County Attorney’s Office on June 15, 2016, in that they have been updated to include six (6) offenders sentenced in 2015.

**Table 3. Estimated Bed Impact
Based on Offenders Sentenced 2010-2015**

Severity Level	Estimated 5 year Prison Rate	Estimated Av. Sentence	Estimated Prison Beds over Five Years	Estimated Prison Beds per year
3	5%	21 months	2.4	0.5
4	5%	27 months	3	0.6
5	8%	40 months	6.6	1.3

There could be some additional impact from probation revocations. The revocation rate for offenders placed on probation for child neglect from 2001-2014 is 10 percent. It is estimated that revocations could eventually result in the need for one additional prison bed a year at any of the severity levels under consideration.

Original Ranking Decision: The following is an excerpt of the May 27, 1993, minutes of the Minnesota Sentencing Guidelines Commission:

The Commission meeting was held on May 27, 1993, in the Main Dining Room of the Commodore Hotel in St. Paul, Minnesota. Chairman Gernes called the meeting to order at 3:25PM. Members present were [Winona County Attorney] Julius Gernes, [Chief Deputy Steele County Sheriff] James Dege, [Tenth Judicial District Chief Public Defender] Jenny Walker, [Ramsey County Probation Officer] Stan Suchta, [Court of Appeals] Judge R.A. Randall, and [Second Judicial District] Judge Edward Wilson. Steve Alpert of the Attorney General's Office was also present. Public attendance included Mr. Raymond Truelson, Jr., private citizen and Paul Scoggin, Hennepin County Attorney's Office.

* * *

The Commission then returned to the consideration of proposed modifications related to legislation passed in the last session.

CHILD NEGLECT/ENDANGERMENT

[Executive Director] Deb Dailey noted that currently the child neglect/ endangerment provisions are all gross misdemeanors. The new language creates felony level neglect and endangerment offenses. The new felony offenses all carry a maximum sentence of five years/\$10,000.

Ms. Dailey explained the amended language which includes the following changes and additions:

- 1) M.S. § 609.378, Subd. 1 (a): A felony level offense when neglect results in substantial harm to the child's physical, mental or emotional health. (Ms. Dailey noted that the substantial harm appears to be different from the substantial bodily harm that is currently defined in law to mean bodily injury which Involves a temporary but substantial disfigurement or which causes a temporary but substantial loss or impairment of the function of any bodily member or organ or which causes a fracture of any bodily member. She stated this definition seems to be broader as it includes not just physical but also mental and emotional health.)*
- 2) M.S. § 609.378, Subd. 2 (b): The word 'recklessly' was added to the endangerment statute. Under the new language, endangerment includes recklessly, as well as intentionally, causing or permitting a child to be placed in a situation likely to substantially harm the child's physical, mental or emotional health or cause the child's death. Subd. 2(b)(2) also defines endangerment as knowingly causing or permitting a child to be present when any person is selling or possessing a controlled substance. The offense is a felony if the endangerment results in substantial harm to the child's physical, mental, or emotional health.*
- 3) M.S. § 609.378, Subd. 2 (c): A new provision covering "A person who intentionally or recklessly causes a child under 14 years of age to be placed in a situation likely to substantially harm the child's physical health or cause the child's death as a result of the child's access to a loaded firearm is guilty of child endangerment...". If the endangerment results in substantial harm, the offense is a felony; otherwise it is a gross misdemeanor.*

Ms. Dailey noted that all of these offenses would otherwise be gross misdemeanors but in circumstances where substantial harm results they become felonies. She noted a similar crime is Malicious Punishment of a Child Resulting in Substantially Bodily Harm which is currently ranked at severity level IV. Ms. Dailey suggested the Commission evaluate whether these offenses are as egregious as malicious punishment offense or, whether, perhaps because of the different definition of substantial harm, they should be treated less seriously than malicious punishment.

Judge Wilson noted that the cases he has seen regarding child neglect/endangerment have involved crack cocaine and filthy living conditions. Chairman Gernes noted that solicitation of a child to engage in sexual conduct is severity level III and malicious punishment of a child is severity level IV. He also noted that injury of an unborn child during the commission of a crime is ranked at IV. He believed that these offenses have the same culpability as soliciting a child to engage in sexual conduct.

MOTION was made and seconded to propose ranking M.S. § 609.378; Subd. 1(a); Subd. 2(b); and Subd. 2(c) at severity level I.

MOTION carried.

609.378 NEGLECT OR ENDANGERMENT OF CHILD.

Subdivision 1. **Persons guilty of neglect or endangerment.** (a)(1) A parent, legal guardian, or caretaker who willfully deprives a child of necessary food, clothing, shelter, health care, or supervision appropriate to the child's age, when the parent, guardian, or caretaker is reasonably able to make the necessary provisions and the deprivation harms or is likely to substantially harm the child's physical, mental, or emotional health is guilty of neglect of a child and may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than \$3,000, or both. If the deprivation results in substantial harm to the child's physical, mental, or emotional health, the person may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than \$10,000, or both. If a parent, guardian, or caretaker responsible for the child's care in good faith selects and depends upon spiritual means or prayer for treatment or care of disease or remedial care of the child, this treatment or care is "health care," for purposes of this clause.

(2) A parent, legal guardian, or caretaker who knowingly permits the continuing physical or sexual abuse of a child is guilty of neglect of a child and may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than \$3,000, or both.

(b) A parent, legal guardian, or caretaker who endangers the child's person or health by:

(1) intentionally or recklessly causing or permitting a child to be placed in a situation likely to substantially harm the child's physical, mental, or emotional health or cause the child's death; or

(2) knowingly causing or permitting the child to be present where any person is selling, manufacturing, possessing immediate precursors or chemical substances with intent to manufacture, or possessing a controlled substance, as defined in section 152.01, subdivision 4, in violation of section 152.021, 152.022, 152.023, 152.024, or 152.0262; is guilty of child endangerment and may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than \$3,000, or both.

If the endangerment results in substantial harm to the child's physical, mental, or emotional health, the person may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than \$10,000, or both.

This paragraph does not prevent a parent, legal guardian, or caretaker from causing or permitting a child to engage in activities that are appropriate to the child's age, stage of development, and experience, or from selecting health care as defined in subdivision 1, paragraph (a).

(c) A person who intentionally or recklessly causes a child under 14 years of age to be placed in a situation likely to substantially harm the child's physical health or cause the child's death as a result of the child's access to a loaded firearm is guilty of child endangerment and may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than \$3,000, or both.

If the endangerment results in substantial harm to the child's physical health, the person may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than \$10,000, or both.

Subd. 2. **Defenses.** It is a defense to a prosecution under subdivision 1, paragraph (a), clause (2), or paragraph (b), that at the time of the neglect or endangerment there was a reasonable apprehension in the mind of the defendant that acting to stop or prevent the neglect or endangerment would result in substantial bodily harm to the defendant or the child in retaliation.

History: 1983 c 217 s 5; 1984 c 628 art 3 s 11; 1989 c 282 art 2 s 199; 1992 c 571 art 4 s 11; 1993 c 326 art 4 s 22; 2002 c 314 s 6; 2005 c 136 art 7 s 21