



## NEW JERSEY LAW REVISION COMMISSION

### **Draft Tentative Report Regarding Proposed Changes to New Jersey’s Kidnapping Statute to Clarify that the “Harm” Component Includes Physical, Emotional or Psychological Harm, N.J.S. 2C:13(c)(1).**

**June 08, 2020**

The New Jersey Law Revision Commission is required to “[c]onduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it” and to propose to the Legislature revisions to the statutes to “remedy defects, reconcile conflicting provisions, clarify confusing language and eliminate redundant provisions.” *N.J.S. 1:12A-8*.

This Report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. Comments should be received by the Commission no later than **August 20, 2020**.

The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the Report, please inform the Commission so that your approval can be considered along with other comments. Please send comments concerning this Report or direct any related inquiries, to:

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## Executive Summary<sup>1</sup>

The “unharmful release” provision of New Jersey’s kidnapping statute, N.J.S. 2C:13-1(c)(1), does not set forth the type of harm contemplated by the statute in order for a defendant to be convicted of first-degree kidnapping.

This provision of the statute has been the subject of litigation in *State v. Sherman*<sup>2</sup> and most recently in *State v. Nunez-Mosquea*.<sup>3</sup>

In addition, since the Appellate Division’s decision in *Sherman*, the model jury charge for kidnapping has been modified on two separate occasions to address this issue.

The pages that follow contain a recommendation to clarify that the “harm” component of New Jersey’s kidnapping statute should include physical, emotional or psychological harm.

## Statute Considered

N.J.S. 2C:13-1(c)(1) provides:

[\*\*\*]

c. Grading of kidnapping. (1) Except as provided in paragraph (2) of this subsection, kidnapping is a crime of the first degree and upon conviction thereof, a person may, notwithstanding the provisions of paragraph (1) of subsection a. of N.J.S.2C:43-6, be sentenced to an ordinary term of imprisonment between 15 and 30 years. If the actor releases the victim **unharmful** and in a safe place prior to apprehension, it is a crime of the second degree. (Emphasis added).

[\*\*\*]

## Background

In March of 2012, a woman was kidnapped at gunpoint and forced into a van by Porfirio A. Nunez-Mosquea (defendant).<sup>4</sup> The defendant drove his victim, Y.S., to a residence not far from the location from which she was taken, and told her to get out of the van without doing “anything crazy,” while still holding her at gunpoint.<sup>5</sup> Once inside a house, the defendant gagged, kicked, suffocated, and sexually assaulted the victim.<sup>6</sup> The victim fought back, and DNA evidence from Nunez-Mosquea under her fingernails would later be used as evidence in the case.<sup>7</sup> The defendant

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<sup>1</sup> The N.J.L.R.C. would like to thank Marissa Soistman, a Legislative Law Clerk from the New Jersey Institute of Technology for her work on this project.

<sup>2</sup> *State v. Sherman*, 367 N.J. Super. 324 (App. Div), *cert. denied*, 180 N.J. 356 (2004) *overruled in part on other grounds*, *State v. Dalziel*, 182 N.J. 494, 504 (2005).

<sup>3</sup> *State v. Nunez-Mosquea*, 2017 WL 3623378 (App. Div. Aug. 24, 2017).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at \*1-2.

<sup>7</sup> *Id.* at \*2.

then walked Y.S out of the house and released her down the street from where she had been held.<sup>8</sup> Y.S. ran to the nearest business and asked the person behind the counter to call 911.<sup>9</sup>

With Y.S's assistance, the police were able to locate evidence of the attack, and ultimately, the defendant.<sup>10</sup> From the defendant's apartment and van, the police recovered the clothing worn by the alleged attacker and Y.S.'s college identification, phone, and phone case.<sup>11</sup> The defendant was arrested and charged with first degree kidnapping.<sup>12</sup>

The defendant requested a modification of the model charge for first-degree kidnapping at a charge conference.<sup>13</sup> The defendant maintained that the jury charge should distinguish between the type of harm occurring in every kidnapping from the harm the State must prove to secure a conviction.<sup>14</sup> The charge, he argued, should include that "minimal or insubstantial injuries are insufficient to establish physical harm."<sup>15</sup> The defendant contended that language in *State v. Sherman*, acknowledged a difference between emotional and psychological harm sufficient to satisfy the statute and "the type of harm inherent in every kidnapping."<sup>16</sup> That distinction, he argued, should apply to all harm, not merely psychological harm.<sup>17</sup> His request was denied and the trial court delivered the model charge on first-degree kidnapping in effect at the time of the trial, with no alterations.<sup>18</sup>

The defendant was sentenced to twenty-five years in State prison for first-degree kidnapping.<sup>19</sup> He appealed his conviction of first-degree kidnapping.<sup>20</sup>

### Analysis

On appeal, the defendant in *State v. Nunez-Mosquea* argued that the trial court "failed to properly instruct the jury on the "harm" element of the first-degree kidnapping charge [thereby depriving him] of his rights to a fair trial and due process."<sup>21</sup>

New Jersey's kidnapping statute contains a grading provision.<sup>22</sup> This provides that "kidnapping is a crime of the first degree... [but i]f the actor released the victim *unharm*ed and in

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at \*3. Defendant relied on *State v. Sherman*, 367 N.J. Super. 324 (App. Div), *cert. denied*, 180 N.J. 356 (2004) *overruled in part on other grounds*, *State v. Dalziel*, 182 N.J. 494, 504 (2005).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at \*5.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* Counsel for the defendant raised two additional points before the Court. The defendant raised four additional points in a pro se brief. These points are not germane to the instant memorandum and have been omitted.

<sup>22</sup> N.J.S. 2C:13-1(c)(1).

a safe place prior to apprehension, it is a crime of the second degree.”<sup>23</sup>

- *State v. Sherman*

The question of harm raised by the defendant in *Nunez-Mosquea* were examined by the Court in *State v. Sherman*.<sup>24</sup> In that case, the defendant abducted a child and held her at his mother’s home for approximately 24 hours.<sup>25</sup> During that time, he built her a “fort” from couch cushions, and fed her snacks, before deciding he wanted to return her to her parents without receiving a ransom.<sup>26</sup> The defendant dropped her at a shopping mall and instructed her “to run to the first adults she saw and tell them the police were looking for her.”<sup>27</sup> Although she appeared to be “good condition, with no signs of physical injury or emotional distress” and that “the man that took her treated her nicely” she was subsequently diagnosed with post-traumatic stress disorder.”<sup>28</sup>

In *Sherman*, the Appellate Division specifically rejected the defendant’s argument that the victim’s anxiety, nightmares and fear constituted only minimal emotional or psychological harm insufficient to support first degree kidnapping.<sup>29</sup> The Court held that “harm in the unharmed release provision of N.J.S. [ ] 2C:13-1(c), includes emotional or psychological harm suffered by the victim.”<sup>30</sup> Following *Sherman* the model jury charge for first degree kidnapping was amended twice.<sup>31</sup>

- *Model Jury Charge*

In 2007, the Model Jury Charge for Kidnapping was amended in response to *State v. Sherman* to provide that the State must prove the defendant “knowingly harmed” or “knowingly did not release” the victim in a safe place prior to his apprehension.<sup>32</sup> In addition, the Model Jury Charge clarified that the harm component can include physical, emotional, or psychological harm.<sup>33</sup>

In 2014, the model jury charge for kidnapping was revised once again.<sup>34</sup> This modification provides that: “[i]f the State is contending that the victim suffered emotional or psychological harm, it must prove that the victim suffered emotional or psychological harm beyond that inherent in a kidnapping. That is, it must prove that the victim suffered substantial or enduring emotional

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<sup>23</sup> *Id.* (Emphasis added).

<sup>24</sup> *State v. Sherman*, 367 N.J. Super. 324 (App. Div.) *certif. denied*, 180 N.J. 356 (2004), overruled in part on other grounds, *State v. Dalziel*, 182 N.J. 494, 504 (2005).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 332.

<sup>27</sup> *Id.* at 333.

<sup>28</sup> *Id.* at 333-24.

<sup>29</sup> *Id.* at 330-31, 342.

<sup>30</sup> *Id.* at 330.

<sup>31</sup> See *Model Jury Charge (Criminal)*, “Kidnapping – Permanent Deprivation of Custody” (revised Mar. 5, 2007).

<sup>32</sup> *Nunez-Mosquea*, 2017 WL 3623378 at \*6.

<sup>33</sup> *Id.* See *Model Jury Charge (Criminal)*, “Kidnapping – Permanent Deprivation of Custody” (revised Mar 5, 2007).

<sup>34</sup> *Model Jury Charge (Criminal)*, “Kidnapping” (revised Oct. 6, 2014).

or psychological harm.”<sup>35</sup>

- *State v. Nunez-Mosquea*

The Appellate Division in *Nunez-Mosquea* observed that “[n]o New Jersey case of which we are aware has ever suggested that there is a difference between the physical harm sufficient to satisfy the released unharmed provision of the statute and “the type of harm inherent in every kidnapping.”<sup>36</sup> The Court recognized that, “[i]t may be possible that some types of injury would be of such trifling nature as to be excluded from the category of injuries which [the Legislature] had in mind...” in the kidnapping statute.<sup>37</sup> Those inflicted upon the defendant in this case, however, were “plainly not of that trifling character.”<sup>38</sup> Finally, the Court did “not fault the trial court for modifying the charge regarding emotional harm in anticipation of the revision adopted several months after” the defendant’s trial.<sup>39</sup>

As of this date, the “unharmed release” provision of New Jersey’s kidnapping statute, does not define the harm contemplated by the statute in order for a defendant to be convicted of first-degree kidnapping.

### **Pending Legislation**

There is no legislation currently pending regarding N.J.S. 2C:13-1(c) regarding the use of “harm” in the statute.<sup>40</sup>

### **Conclusion**

The proposed revisions, contained in the attached *Appendix*, are intended to clarify that the definition of “harm” in N.J.S. 2C:13-1 *et seq.* includes the physical, emotional or psychological harm suffered by a victim.

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<sup>35</sup> *Nunez-Mosquea*, 2017 WL 3623378 at \*7 quoting *Model Jury Charge (Criminal)*, “Kidnapping” (revised Oct. 6, 2014).

<sup>36</sup> *Nunez-Mosquea*, 2017 WL 3623378 at \*7

<sup>37</sup> *Id.* at \*7 citing *Robinson v. United States*, 324 U.S. 282, 285 (1945).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at \*8.

<sup>40</sup> S1268, 219th Leg., 2020 Sess. (N.J. 2020) (seeks to eliminate the statute of limitations for kidnapping).

## Appendix

The proposed modifications to **N.J.S. 2C:13-1, Kidnapping, Grading** (shown with ~~strikethrough~~, or underlining), follow:

a. ~~Holding for ransom, reward, or as a hostage.~~ A person is guilty of kidnapping if he, or she, unlawfully:

(1) ~~unlawfully~~ removes another from the place where ~~he is~~ they were found; ~~or if he~~

(2) removes another a substantial distance from the vicinity where they were found;

(3) ~~unlawfully~~ confines another with the purpose of holding that person for:

(A) ransom; ~~or~~

(B) reward; or

(C) as a shield or hostage;

(4) removes another from their place of residence or business; or,

(5) confines another for a substantial period, with any of the following purposes:

(A) to facilitate the commission of any crime or flight thereafter;

(B) to inflict bodily injury on or to terrorize the victim or another;

(C) to interfere with the performance of any governmental or political function; or,

(D) to permanently deprive a parent, guardian, or other lawful custodian of custody

of the victim.

b. ~~Holding for other purposes.~~ A person is guilty of kidnapping if he ~~unlawfully removes another from his place of residence or business, or a substantial distance from the vicinity where he is found, or if he unlawfully confines another for a substantial period, with any of the following purposes:~~

(1) ~~To facilitate commission of any crime or flight thereafter;~~

(2) ~~To inflict bodily injury on or to terrorize the victim or another;~~

(3) ~~To interfere with the performance of any governmental or political function; or~~

(4) ~~To permanently deprive a parent, guardian, or other lawful custodian of custody of the~~

~~victim.~~

e. ~~b.~~ Grading of kidnapping. ~~Except as provided in paragraph (2) of this subsection, kidnapping~~

(1) Kidnapping is a crime of the first degree where a person knowingly harmed the victim or knowingly released the victim in an unsafe place prior to being apprehended. and upon Upon conviction thereof, a person may, notwithstanding the provisions of paragraph

(1) of subsection a. of N.J.S. 2C:43-6, be sentenced to an ordinary term of imprisonment between 15 and 30 years.

~~(2) Kidnapping is a crime of the second degree. If if the actor releases the victim unharmed and in a safe place prior to apprehension, it kidnapping is a crime of the second degree.~~

~~(3) Kidnapping is a crime of the first degree and upon conviction thereof, an actor shall be sentenced to a term of imprisonment by the court, if the victim of the kidnapping is less than 16 years of age and if during the kidnapping:~~

~~(a) (A) A crime under N.J.S.2C:14-2 or subsection a. of N.J.S.2C:14-3 is committed against the victim;~~

~~(b) (B) A crime under subsection b. of N.J.S.2C:24-4 is committed against the victim; or~~

~~(c) (C) The actor sells or delivers the victim to another person for pecuniary gain other than in circumstances which lead to the return of the victim to a parent, guardian or other person responsible for the general supervision of the victim.~~

Upon conviction an actor shall be sentenced to a term of imprisonment by the court. Notwithstanding the provisions of paragraph (1) of subsection a. of N.J.S. 2C:43-6, the term of imprisonment imposed under this paragraph shall be either a term of 25 years during which the actor shall not be eligible for parole, or a specific term between 25 years and life imprisonment, of which the actor shall serve 25 years before being eligible for parole; provided, however, that the crime of kidnapping under this paragraph and underlying aggravating crimes listed in subparagraph ~~(a), (b), or (c)~~ (1), (2), or (3) of this paragraph shall merge for purposes of sentencing. If the actor is convicted of the criminal homicide of a victim of a kidnapping under the provisions of chapter 11, any sentence imposed under provisions of this paragraph shall be served consecutively to any sentence imposed pursuant to the provisions of chapter 11.

~~d. c.~~ “Unlawful” removal or confinement. A removal or confinement is unlawful within the meaning of this section and of sections 2C:13-2 and 2C:13-3, if:

~~(1) It is accomplished by force, threat, or deception; or,~~

~~(2) In the case of a person who is under the age of 14 or is incompetent, if it is accomplished without the consent of a parent, guardian, or other person responsible for general supervision of his welfare.~~

~~e. d.~~ It is an affirmative defense to a prosecution under paragraph (4) of subsection b. paragraph (5)(D) of subsection a. of this section, which must be proved by clear and convincing evidence, that:

(1) The actor reasonably believed that the action was necessary to preserve the victim from imminent danger to his, or her, welfare.

(A) However, no No defense shall be available pursuant to this subsection if the actor does not, as soon as reasonably practicable but in no event more than 24 hours after taking a victim under his protection give notice of the victim’s location to:

- ~~(i) the~~ The police department of the municipality where the victim resided,
- ~~(ii) the~~ The office of the county prosecutor in the county where the victim resided, or
- ~~(iii) the~~ The Division of Child Protection and Permanency in the Department of Children and Families;

(2) The actor reasonably believed that the taking or detaining of the victim was consented to by a parent, or by an authorized State agency; or

(3) The victim, being at the time of the taking or concealment not less than 14 years old, was taken away at his own volition by his parent and without purpose to commit a criminal offense with or against the victim.

~~f. e.~~ (1) It is an affirmative defense to a prosecution under ~~paragraph (4) of subsection b.~~ paragraph (5)(D) of subsection a. of this section that a parent having the right of custody reasonably believed ~~he, or she,~~ was fleeing from imminent physical danger from the other parent, ~~provided that the parent having custody, as soon as reasonably practicable:~~

~~(2) No defense shall be available pursuant to this subsection if the parent having custody does not, as soon as reasonably practicable: Gives~~

~~(A) Give~~ Give notice of the victim's location to:

- ~~(i) the~~ The police department of the municipality where the victim resided,
- ~~(ii) the~~ The office of the county prosecutor in the county where the victim resided, or
- ~~(iii) the~~ The Division of Child Protection and Permanency in the Department of Children and Families; or

~~(2) (B) Commences~~ Commence an action affecting custody in an appropriate court.

f. "Harm", as used in subsections b. and c. of this section, means:

(1) bodily injury, serious bodily injury, or significant bodily injury as defined in N.J.S. 2C:11-1;

(2) substantial or enduring emotional harm; or,<sup>41</sup>

(3) substantial or enduring psychological harm.<sup>42</sup>

g. "Parent", As as used in subsections d. and e. and f. of this section, ~~"parent"~~<sup>2</sup> means a parent, guardian or other lawful custodian of a victim.

<sup>41</sup> *Model Jury Charge (Criminal)*, "Kidnapping" (revised Oct. 6, 2014). See *State v. Sherman*, 367 N.J. Super. 324, 331 (App. Div. 2004), *certif. denied*, 180 N.J. 356 (2004).

<sup>42</sup> *Id.*



## Comments

### *Elements of Kidnapping*

The elements of kidnapping are set forth in two separate sections of N.J.S. 2C:13-2, specifically sections a. and b. Section a. provides for the holding of victim for ransom, reward or as a hostage. Section b. provides for the holding of a victim for some other purposes which are subsequently enumerated in subsections (1) – (4). Rather than separate the elements of this crime into two sections, the elements set forth in section b. have been incorporated into section a. As modified, the unlawful conduct that constitutes kidnapping is set forth in a single section. The format, not the substance, of the kidnapping statute has been modified to clarify the statute and to adapt it to present social needs.

The unification of the elements of kidnapping into a single section has eliminated the need for a separate section b. This section has been eliminated and the balance of the statute renumbered in a serial manner.

### *Grading of Kidnapping*

The degree of kidnapping that an actor will be charged with depends on what transpires during the course of the kidnapping. As set forth in the statute, a kidnapping will be either a crime of the first or the second degree. The Legislature has determined that under certain circumstances the sentence for kidnapping will deviate from the sentence set forth in N.J.S. 2C:43-6 of the Code of Criminal Justice.

In order to both clarify and simplify the statute, the individual “types” of kidnappings proscribed by the Legislature have each been set forth in newly drafted sections b(1), b(2) and b(3).

#### *Section b(1)*

As discussed in *State v. Nunez-Mosquea*, section b(1) has been modified to reflect that in order to prove that the kidnapper is guilty of first-degree kidnapping, the state must prove beyond a reasonable doubt that the kidnapper “knowingly” caused harm to the victim.<sup>43</sup> In addition, the court held that “disproving unharmed release is a material element of the crime of first-degree kidnapping, requiring the State to prove that a defendant ‘knowingly’ harmed or ‘knowingly’ released the victim in an unsafe place.”<sup>44</sup> The language of the Court has been incorporated into the text of section b(1).

The harm to the victim necessary to secure a conviction for first-degree kidnapping must be either be physical, emotional or psychological harm.<sup>45</sup>

#### *Section b(2)*

If the actor releases the victim “unharmed” and in a safe place prior to apprehension, the Legislature has determined that this constitutes a second-degree kidnapping. For the sake of clarity, this grade of kidnapping has been separated from the last sentence of what originally constituted section c(1) and placed in its own section, b(2).

#### *Section b(3)*

If the victim of the kidnapping is less than 16 years of age at the time of the kidnapping, and if during the course of the kidnapping certain enumerated crimes are committed against the victim. Only the format, and none of the substance, of this portion of the statute has been altered.

### *Unlawful Removal or Confinement*

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<sup>43</sup> *State v. Nunez-Mosquea*, 2017 WL 3623378 \*6 (App. Div. 2017).

<sup>44</sup> *Id.*

<sup>45</sup> See discussion of harm, *infra*, as defined in section f.

What was formerly enumerated as section d. of this statute, has been re-cast as section c. The format, and not the substance of this section has been modified for ease of review.

### *Affirmative Defenses*

The affirmative defenses have been preserved in what are now sections d. and e. The format of these sections has been simplified in order to highlight the actions necessary to avail oneself of either of these affirmative defenses.

### *Harm*

In 2004, New Jersey's Appellate Division addressed the issue of "harm" as set forth in the "unharmed release" provision of the State's kidnapping statute.<sup>46</sup> In *Sherman*, the Court considered the issue of harm in the context of post-traumatic stress disorder (PTSD) suffered by a six-year-old child who was kidnapped and subsequently released. Thirteen years later, the Court would again address the issue of what constituted "harm" for purposes of the statute.

As discussed in *State v. Nunez-Mosquea*, "no New Jersey case [...] has ever suggested that there is a difference between the physical harm sufficient to satisfy the "released unharmed" provision of the statute and the type of harm inherent in every kidnapping."<sup>47</sup> In addition to physical harm, the Court determined that "harm" in the unharmed release provision of N.J.S. 2C:13-1(c) includes, "emotional or psychological harm suffered by the victim."<sup>48</sup>

#### *Physical Harm*

The New Jersey Code of Criminal Justice (the Code) recognizes three, separate, and distinct types of physical injuries. These injuries include: "bodily injury", "serious bodily injury", and "significant bodily injury." Unless a different meaning is plainly required, these defined terms apply to chapters 11 through 15 of the Code. When defining "harm" in the kidnapping statute it was necessary to incorporate a reference to these defined terms in the newly drafted section. Therefore, section f(1) includes a reference to bodily injury, serious bodily injury, and significant bodily injury.

#### *Emotional or Psychological Harm*

The harm set forth in the kidnapping statute is not limited to bodily injury. As a result of being kidnapped, a victim may suffer emotional or psychological harm. These harms are included in the unharmed release provision of N.J.S. 2C:13-1(c).<sup>49</sup> In an attempt to eliminate future litigation on this subject, the definition of harm set forth in section f. has been expanded to incorporate substantial or enduring emotional or psychological harm sustained by a victim. The revised statutory language is consistent with the current Model Jury Charge on this subject-matter.<sup>50</sup>

### *Parent*

Only the syntax the definition of "parent", as set forth in section g., has been altered. The substance of this defined term remains the same.

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<sup>46</sup> *State v. Sherman*, 367 N.J. Super. 324 (App. Div), *cert. denied*, 180 N.J. 356 (2004) *overruled in part on other grounds*, *State v. Dalziel*, 182 N.J. 494, 504 (2005).

<sup>47</sup> *Nunez-Mosquea*, 2017 WL 3623378 at \*7.

<sup>48</sup> *Id.* at \*6.

<sup>49</sup> *Id.*

<sup>50</sup> See *Model Jury Charge (Criminal)*, "Kidnapping – Permanent Deprivation of Custody" (revised Mar. 5, 2007); see *Nunez-Mosquea*, 2017 WL 3623378 at \*7.