



## **NEW JERSEY LAW REVISION COMMISSION**

### **Final 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:13-1(c)(1).**

**December 17, 2020**

The work of the New Jersey Law Revision Commission is only a recommendation until enacted.

Please consult the New Jersey statutes in order to determine the law of the State.

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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 state or describe the type of harm contemplated by the Legislature in order to find a defendant guilty 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.

This Report recommends clarifying that the “harm” in New Jersey’s kidnapping statute includes 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].

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## 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 where 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 then walked Y.S.

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<sup>1</sup> The NJLRC would like to thank Marissa Soistman, an intern from the New Jersey Institute of Technology, for her initial 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.

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.<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> that 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. STAT. ANN. § 2C:13-1(c)(1) (West 2020).

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* was 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 that 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 she stated 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> The Court went on to hold that “disproving unharmed release is a ‘material element’ of the crime of first degree kidnapping.”<sup>31</sup> As such, the State is required to “prove that a defendant ‘knowingly’ harmed or ‘knowingly’ released the victim in an unsafe place.”<sup>32</sup> As a material element, the focus of the harm component of the unharmed release provision in the kidnapping statute is on the “conduct of the kidnapper during the purposeful removal and holding or confining of the victim.”<sup>33</sup>

Following the Court’s decision in *Sherman*, the Model Jury Charge for first degree kidnapping was amended twice.<sup>34</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

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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 333-34.

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

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

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Model Jury Charge (Criminal)*, “Kidnapping – Permanent Deprivation of Custody” (revised Mar. 5, 2007).

did not release” the victim in a safe place prior to his apprehension.<sup>35</sup> In addition, the Model Jury Charge clarified that the “harm” element can include physical, emotional, or psychological harm.<sup>36</sup>

In 2014, the Model Jury Charge for kidnapping was again revised<sup>37</sup> to provide 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 or psychological harm.”<sup>38</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>39</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>40</sup> Those inflicted upon the defendant in this case, however, were “plainly not of that trifling character.”<sup>41</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>42</sup>

## Outreach

In connection with this Report, the Commission sought comments from knowledgeable individuals and organizations, including: the Attorney General of New Jersey; the New Jersey Administrative Office of the Courts; the New Jersey Municipal Prosecutor’s Association; Association of Criminal Defense Lawyers; the Office of the Public Defender; the Criminal Law Section of the New Jersey State Bar Association; the New Jersey County Prosecutor’s Association and each of the County Prosecutors; private criminal defense attorneys; the New Jersey State League of Municipalities; the New Jersey Association of Counties; New Jersey State Association of Chiefs of Police; and the New Jersey Police Traffic Officers Association.

The Division of Criminal Justice (DCJ or Division) offered comments on the proposed modifications to the kidnapping statute.<sup>43</sup> Preliminarily, the DCJ stated, “[o]verall, we find that

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<sup>35</sup> *Nunez-Mosquea*, 2017 WL 3623378 at \*6.

<sup>36</sup> *Id.* See *Model Jury Charge (Criminal)*, “Kidnapping – Permanent Deprivation of Custody” (revised Mar 5, 2007).

<sup>37</sup> *Model Jury Charge (Criminal)*, “Kidnapping” (revised Oct. 6, 2014).

<sup>38</sup> *Nunez-Mosquea*, 2017 WL 3623378 at \*7 quoting *Model Jury Charge (Criminal)*, “Kidnapping” (revised Oct. 6, 2014).

<sup>39</sup> *Nunez-Mosquea*, 2017 WL 3623378 at \*7

<sup>40</sup> *Id.* at \*7 citing *Robinson v. United States*, 324 U.S. 282, 285 (1945).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at \*8.

<sup>43</sup> See Comments from Mallory Shanahan, Deputy Attorney General, Division of Criminal Justice to Samuel M. Silver, Deputy Director, New Jersey Law Revision Commission (Nov. 19, 2020) (on file with the NJLRC).

the proposed revisions capture the case law’s guidance and adaptations in a way that will provide greater comprehension and clarity.”<sup>44</sup>

• ***Subsection a.***

The mental element, “knowing”, is well established by the existing case law, but is absent from the text of the statute. The Division supports the Commission’s recommendation to incorporate the knowledge standard into the text of the statute “to provide a sharper perception of the required culpability standard.”<sup>45</sup>

In addition, the Division supports the Commission’s recommendation to collapse the “removal” element to read “removes the victim from the place where the victim is found.” The revised text “clarifies the statute by streamlining the language without substantially altering its meaning as the two alternatives that currently exist in the statute....”<sup>46</sup> The Division suggested that the simple and plain language contained in this modification “... will reduce disputes over textual ambiguities and provided well-defined parameters for defendants, counsel, jurors and jurists alike.”<sup>47</sup> Finally, the elimination of “the ambiguous requirement of removing a victim a ‘substantial distance’ provides a better defined parameter to delineate conduct.”<sup>48</sup>

• ***Subsection b.***

The grading amendment to the statute is found in newly revised subsection b. The Division has expressed a preference for Option #2 as a “... clearer expression of the intended elements.”<sup>49</sup>

• ***Subsection f.***

The term “harm” is not defined in the kidnapping statute. The Commission recommends the addition of a definition in subsection f. The inclusion of this definition “... in the text of the statute itself is an important expansion that will reduce misinterpretations of an essential element of the offense.”<sup>50</sup> In the absence of the language proposed by the Commission, “...clarifying that emotional or psychological harm alone constitutes the ‘harm’ sufficient to satisfy the elements of the statute, there is a risk of incorrect verdict that overlook seminal case law.”<sup>51</sup> Further, without the proposed language, “prosecutions with facts similar to *Sherman*, where the victim is released prior to apprehension without any physical injuries, could potentially be overlooked by prosecutors who fail to comprehend the very serious mental toll inflicted by such incidents.”<sup>52</sup> According to

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<sup>44</sup> *Id.* at \*1.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at \*2.

<sup>50</sup> *Id.* at \*1. See discussion, *supra*, of *State v. Sherman*, 367 N.J. Super. 324 (App. Div. 2004).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

the Division, “[s]uch a result would undermine public safety, and trivialize the very real trauma experienced by this class of victim.”<sup>53</sup>

In the context of a kidnapping, the victim may either experience psychological or emotional harm, or both.<sup>54</sup> The Division believes that it would be a disservice to separate these two harms.<sup>55</sup> In place of the proposed language, the Division recommends a single clause that reads, “... (2) substantial or enduring emotional or psychological harm, or both.” This recommendation has been reflected in the proposed language.

### **Pending Bills**

There are no bills currently pending regarding N.J.S. 2C:13-1(c) regarding the use of “harm” in the statute.<sup>56</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>53</sup> *Id.*

<sup>54</sup> *Id.* at \*2.

<sup>55</sup> *Id.*

<sup>56</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 ~~striketrough~~, or underlining), follow:

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

(1) ~~unlawfully removes<sup>57</sup> another~~ the victim

(A) ~~from the place where he is the victim is found; or if he~~

~~(B) a substantial distance from the vicinity where the victim is found; or,~~

~~(C) from the victim's place of residence or business.~~

(2) ~~confines another~~ the victim with the purpose of holding ~~that person~~ the victim for:

(A) ~~ransom; or~~

(B) ~~reward; or~~

(C) ~~as a shield or hostage;.~~

(3) ~~confines another~~ the victim 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~~

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<sup>57</sup> See *State v. Marchand*, 227 N.J. Super. 92 (App. Div. 1988), *aff'd*, 114 N.J. 569 (1989) (providing that non-ransom kidnapping requires proof that the victim has been unlawfully removed either from a place of residence, business, a substantial distance, or was unlawfully confined for a substantial period of time, and that the removal was done for an enumerated, unlawful purpose); *State v. Federico*, 103 N.J. 169 (1986) (finding that the State does not meet the asportation element of kidnapping by proving that the victim was moved incidental to the commission of the underlying crime); *State v. Hampton*, 61 N.J. 250 (1972) (the decision as to whether asportation of a victim is sufficient rests with the discretion of the prosecutor).

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

e. b. Grading of kidnapping.<sup>58</sup> ~~Except as provided in paragraph (2) of this subsection, kidnapping~~

(1) Kidnapping is a crime of the first degree if the actor knowingly

(A) harms the victim; or,

(B) fails to release the victim in a safe place prior to apprehension.

~~and upon~~ Upon conviction thereof, ~~an person actor~~ 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)~~ (A), (B), or (C) 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

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<sup>58</sup> See *State v. Sherman*, 367 N.J. Super. 324, 345 (App. Div. 2004) (noting that “by choosing to downgrade the offense only if the victim is released “unharmed,” our Legislature has determined that the incentive to release the victim is not as important as upgrading the offense of kidnapping in most cases” and concluding that the intended breadth of the deterrence incentive is limited and not for the Court to modify); and, *Robinson v. United States*, 324 U.S. 282, 284-85 (1945) (rejecting the deterrence argument, refusing to expand the meaning of the statute in order to magnify the kidnapper’s inducement to release the victim).

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~~ victim 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~~ the victim’s welfare.

~~e. d.~~ It is an affirmative defense to a prosecution under ~~paragraph (4) of subsection b. paragraph (3)(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~~ the victim’s, welfare.

(A) ~~However, no defense~~ The defense set forth in subsection d.(1) above shall not 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, or her, 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 (3)(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~~ harm from the other parent, ~~provided that the parent having custody, as soon as reasonably practicable:~~

~~(2)~~ The defense set forth in subsection e.(1) above shall not be available if the parent having the right of custody does not, as soon as reasonably practicable: Gives

(A) 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 subsection b. 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, or psychological harm, or both.~~;~~<sup>59</sup>

~~(3) substantial or enduring psychological harm.~~<sup>60</sup>

g. “Parent”, As as used in subsections d. and e. and f. of this section, “parent” means a parent, guardian or other lawful custodian of a victim.

### 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. addresses the holding of victim for ransom, reward or as a hostage. Section b. addresses the holding of a victim for other purposes identified 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 form, not the substance, of the kidnapping statute has been modified.

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.

#### *Grading of Kidnapping*

The degree of kidnapping that an actor will be charged with depends on what transpires during the course of the kidnapping. A kidnapping will be either a crime of the first or the second degree. The Legislature 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.

The individual “types” of kidnappings proscribed by the Legislature have been set forth in newly drafted sections b.(1), b.(2) and b.(3). Again, this is a proposed change in the form, not the substance, of the statute.

#### *“Unharmful Release”*

##### *The Model Penal Code*

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<sup>59</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>60</sup> *Id.*

The Model Penal Code provides that, [...] Kidnapping is a felony of the first degree unless the actor voluntarily releases the victim **alive** and in a safe place prior to trial, in which case it is a felony of the second degree [...].<sup>61</sup>

In New Jersey, the Legislature chose to use the term “unharmful” in place of the term “alive.” By rejecting the term “alive” the Legislature “determined that the incentive to release the victim is not as important as upgrading the offense of kidnapping in most cases.”<sup>62</sup> The New Jersey Supreme Court opined that with the rejection of the released alive standard, “it is evident that the legislature intended harsh treatment for kidnapers.”<sup>63</sup> Although the Court recognized the limited breadth of the deterrence incentive, it further recognized that it was not for the judiciary to modify the statute to adopt the incentive or deterrence concepts set forth in the Model Penal Code.<sup>64</sup>

Each of the elements of the “unharmful release” provision have been incorporated into the modifications set forth in section b.

#### *Subsection b.(1)*

As discussed in *State v. Nunez-Mosquea*, subsection 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>65</sup> In addition, the Court held that “disproving unharmful 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>66</sup> The language of the Court has been incorporated into the text of subsections b.(1)-(2).

The harm to the victim necessary to secure a conviction for first-degree kidnapping must be either be physical, emotional, or psychological harm.<sup>67</sup>

#### *Subsection b.(2)*

If the actor releases the victim “unharmful” 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 subsection c.(1) and placed in its own subsection, b.(2).

#### *Subsection b.(3)*

Kidnapping is a crime of the first degree 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*

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*

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<sup>61</sup> Model Penal Code and Commentaries, § 212.1, Kidnapping. (Emphasis added).

<sup>62</sup> *State v. Sherman*, 367 N.J. Super. at 345.

<sup>63</sup> *Id.* Quoting *State v. Masino*, 94 N.J. 436, 446 (1983).

<sup>64</sup> *Id.*

<sup>65</sup> *State v. Nunez-Mosquea*, 2017 WL 3623378 \*6 (App. Div. 2017).

<sup>66</sup> *Id.* citing *State v. Sherman*, 367 N.J. Super. 324, 330 (2004).

<sup>67</sup> See discussion of harm, *infra*, as defined in section f.

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>68</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>69</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>70</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>71</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>72</sup> and the recommendation of the Division of Criminal Justice.<sup>73</sup>

### *Parent*

Only the syntax the definition of “parent”, as set forth in section g., has been altered, the substance remains the same.

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<sup>68</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>69</sup> *Nunez-Mosquea*, 2017 WL 3623378 at \*7.

<sup>70</sup> *Id.* at \*6.

<sup>71</sup> *Id.*

<sup>72</sup> See *Model Jury Charge (Criminal)*, “Kidnapping – Permanent Deprivation of Custody” (revised Mar. 5, 2007); see *Nunez-Mosquea*, 2017 WL 3623378 at \*7.

<sup>73</sup> See n. 43.