

Fiscal impact reports (FIRs) are prepared by the Legislative Finance Committee (LFC) for standing finance committees of the NM Legislature. The LFC does not assume responsibility for the accuracy of these reports if they are used for other purposes.

Current and previously issued FIRs are available on the NM Legislative Website ([www.nmlegis.gov](http://www.nmlegis.gov)) and may also be obtained from the LFC in Suite 101 of the State Capitol Building North.

## FISCAL IMPACT REPORT

ORIGINAL DATE 02/24/15

SPONSOR Maestas LAST UPDATED 03/04/15 HB 393/aHSCAC

SHORT TITLE Kidnapping Definitions & Penalties SB \_\_\_\_\_

ANALYST Cerny

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>		Indeterminate	Indeterminate			General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Administrative Office of the District Attorneys (AODA)  
 Office of the Attorney General (AGO)  
 Public Defender Division (PDD)  
 NM Sentencing Commission (NMSC)  
 NM Corrections Department (NMCD)

### SUMMARY

#### Synopsis of HSCAC Amendment

House Committee for Safety and Civil Affairs amendment to HB 393 deleted subsection D from the bill which required that the conduct relied upon to increase the penalty (to a more severe degree of felony) for kidnapping for inflicting physical injury or a sex offense upon the victim would not separately form the basis for a separate criminal conviction. Deletion of this subsection resolves the most significant issue posed by the bill to prosecutors.

This means that the primary result of the enactment of HB 393 will be a change to criminal penalties for kidnapping, as detailed below.

#### Synopsis of Original Bill

House Bill 393 amends the Kidnapping statute, NMSA 1978, Section 30-4-1.

HB 393 requires that taking, restraining, transporting or confining must “substantially interfere with the victim’s liberty and carry significance beyond facilitating the commission of another

offense.”

The bill alters the criminal penalties for kidnapping:

- It lowers the penalty from a second degree felony under current law to a third degree felony if the offender voluntarily frees the victim in a safe place and does not inflict physical injury or a sexual offense on the victim;
- It lowers the penalty from a first degree felony to a second degree felony if the offender voluntarily frees the victim in a safe place but inflicts physical injury or a sexual offense upon the victim; and
- It maintains the criminal penalty at a first degree felony if the offender does not voluntarily free the victim in a safe place and inflicts physical injury or a sexual offense upon the victim.

Finally, the bill indicates that the conduct relied upon to increase the penalty (to a more severe degree of felony) for kidnapping for inflicting physical injury or a sex offense upon the victim shall not separately form the basis for a separate criminal conviction.

## **FISCAL IMPLICATIONS**

HB 393 carries no appropriation.

The fiscal impact on NMCD is indeterminate. NMCD analysis states:

By generally lowering the criminal penalties for kidnapping and putting into place the above-mentioned limitations, the bill could reduce the number of kidnapping convictions, could eliminate convictions for other crimes (causing physical harm or constituting a sex offense) committed during the kidnapping, and could reduce the incarceration periods (by generally reducing the felony levels) for those individuals ultimately convicted of kidnapping.

However, it is difficult to estimate whether or not this bill will ultimately result in fewer individuals being incarcerated in NMCD prisons or placed on probation in lieu of incarceration, and whether or not this bill will ultimately reduce the incarceration periods served by those offenders convicted of kidnapping (including those offenders who commit a sex offense or cause physical harm during the kidnapping).

While the bill might result in fewer convictions for kidnapping and/or shorter sentences, the fact that the bill generally lowers the criminal penalties for kidnapping might also result in more convictions due to more individuals being encouraged (or not deterred) from engaging in kidnapping. Therefore, the fiscal impact of this bill on NMCD is unknown at this time.

It should be noted that a first degree felony carries a potential 18 year incarceration period, that a second degree felony carries a potential 9 year incarceration period, and a third degree felony carries a potential 3 year incarceration period.

NMCD’s current incarceration costs are as follows. The classification of an inmate determines his or her custody level, and the incarceration cost varies based on the custody

level and particular facility. The average cost to incarcerate a male inmate is \$43,603 per year in a state-owned and operated prison, and the average annual cost in a privately operated prison is \$29,489 (where primarily only level III or medium custody inmates are housed).

## SIGNIFICANT ISSUES

Currently, a person commits “kidnapping” by committing any act of taking, restraining, transporting or confining a victim, through the use force, intimidation or deception, with the intent: (1) to ransom that victim, (2) to confine that victim against their will and use that victim as a hostage or a shield, (3) to hold a victim to service against their will, and (4) to inflict death, physical injury, or a sexual offense to that victim. This proposed legislation does not change this, as the current elements of Kidnapping would remain intact under HB 393.

HB 393 does however substantially change the penalties for kidnapping, in Section 1C.

Analysis from the PDD states:

The penalties for kidnapping appear in Section 30-4-1(B), which currently provides that, “[w]hoever commits kidnapping is guilty of a first degree felony, except that he is guilty of a second degree felony when he voluntarily frees the victim in a safe place and does not inflict physical injury or a sexual offense upon the victim.”

This phrasing has long proven problematic because it creates a presumption of a first-degree felony unless certain elements are proven to *reduce* the charge to a second-degree felony, an unconstitutional shifting of the burden of proof. However, the Supreme Court has interpreted Subsection B as requiring the State to prove the converse of the statutory language, i.e., that the victim was *not* voluntarily freed, and/or that injury or a sexual offense *was* inflicted. To accomplish this, the essential elements jury instruction includes only the primary elements contained in Subsection A of the statute and “special interrogatories” regarding the additional findings of Subsection B are required to pursue a first-degree kidnapping conviction. *See State v. Gallegos*, 2009-NMSC-017, ¶ 13, 146 N.M. 88, 206 P.3d 993 (the elements in UJI 14-403 only “establish the offense of second-degree kidnapping.”). The new penalty provisions avoid this problem by clearly indicating what elements the State must prove to a jury for each penalty tier.

The new penalties also appear to more reasonably balance the current jump from fourth-degree felony consequences for false imprisonment to a second degree felony for kidnapping not resulting in physical injury and where the victim is voluntarily freed.

HB 393 would reduce the penalty for this least serious kidnapping scenario to a third-degree felony, still a higher penalty than false imprisonment in recognition of a more culpable mental state.

The bill then also retains a first-degree penalty for the worst of kidnappings, where injury or a sex offense does occur *and* the victim is not voluntarily freed.

The bill finally creates an intermediary second-degree penalty for the scenario in which injury does occur but the victim is then voluntarily released. It seems appropriate to

include this reduced penalty alternative to incentivize the release of kidnapping victims even if an injury or sex offense has been inflicted, recognizing that the injury or sex offense will most certainly be prosecuted in conjunction with kidnapping to allow for additional penalties beyond the nine years of a second degree felony to account for those supplemental harms.

On the other hand, NMCD states:

Kidnapping with the intent to commit a sexual offense constitutes a sex offense and requires registration as a sex offender under the provisions of the Sex Offender Registration and Notification Act (SORNA), and criminal sexual penetration (committed during a kidnapping or otherwise) also constitutes a sex offense requiring registration under SORNA. The bill appears to indirectly encourage the commission of batteries and sex offenses during kidnapping by limiting the charging options of prosecutors, to the potential detriment of public safety.

The proposed legislation, in subsection B, further defines “kidnapping” to require that the act would have to be of a character that substantially interferes with a victim’s liberty and carry significance beyond facilitating the commission of another offense. This proposed section resulted in agency analysis that did not concur with regard to its meaning..

According to the AGO, proposed subsection B would make the statute consistent with New Mexico Court of Appeals opinion in *State v. Trujillo*, 2012-NMCA-112:

In *Trujillo*, the Defendant and another broke into the home of Juaquin Lujan, armed with bats. Lujan began fighting with Defendant, ultimately getting the upper hand. Mr. Lujan sat atop the Defendant, hitting him, when the Defendant called out for help. The Defendant’s co-assailant was able to free the Defendant, and both men in turn began beating Mr. Lujan. The Defendant was eventually convicted of aggravated burglary, aggravated battery, conspiracy to commit aggravated battery, kidnapping, and false imprisonment.

On appeal, the Defendant argued that “the Legislature did not intend to punish restraint incidental to an aggravated battery as kidnapping.” The Court of Appeals agreed...[and] based its ruling on the facts that the restraint was a momentary grab in the middle of a fight, the restraint was not longer or greater than that necessary to achieve the battery, and the brief restraint did not subject victim to substantially greater risk of harm.

PDD analysis concurs, stating:

The language in HB 393, Subsection B, appears to track the considerations deemed determinative by the Court of Appeals in *State v. Trujillo*. Codifying this case law in statute could aid prosecutors in narrowly targeting their prosecutions, aid defendants in preparing their defenses, and ultimately aid juries in understanding where the boundaries of kidnapping lie.

The new Subsection B contained in HB 393 would ensure that first and second-degree felony sentences are reserved for kidnappings that carry the level of culpability deserving of its harsh consequences, in contrast to the penalties for battery, for example. Moreover,

whatever other offense is committed will remain independently punishable at law.

The PDD reads Subsection D to mean that kidnapping and other crimes could still be prosecuted separately:

Double jeopardy is a constitutional doctrine, but is always a question of legislative intent. Because of the factual scenarios that most commonly arise, kidnapping is often charged in conjunction with battery or a sexual offense. This presents a “multiple punishment” double jeopardy question: did the legislature intend punishment for both?

This provision is included because under a traditional double jeopardy analysis, the appellate courts have found that the conduct for kidnapping is separate from the conduct for the offense committed *during* the kidnapping, because although kidnapping is a “continuing crime,” it is technically complete in the instant that the person is restrained or confined with the requisite intent. However, because of the penalty difference when a battery or sexual offense is inflicted, a person does essentially get punished twice for the same conduct. Without an affirmative legislative recognition of this, the appellate courts have held that this is not a double jeopardy violation. See *State v. Sotelo*, 2013-NMCA-028, ¶¶ 20-27, 296 P.3d 1232 (not factually unitary, nor unitary as a matter of law), *cert. denied*, 2013-NMCERT-001.

It is worth noting that this provision would not prevent the imposition of both convictions for kidnapping and the assaultive crime. It only prevents the use of the assaultive crime to *also* increase kidnapping to a second- or first-degree felony. As otherwise amended in Subsection C, HB 393 simply clarifies that, in order to pursue a separate criminal charge for the injury or sexual offense, kidnapping would be a third-degree felony, still twice the penalty of false imprisonment in recognition of the heightened intent requirement.

AODA analysis, however, does not concur with this interpretation of Subsections B and D:

HB 393 would probably isolate criminal sexual penetration and battery crimes so they would stand alone and could not be prosecuted with kidnapping crimes. Well established and undisputed case law has long recognized that once an offender restrains someone with the requisite intent to hold them for service against their will, the offender can be guilty of both kidnapping and criminal sexual penetration without a violation of the constitutional prohibitions against double jeopardy. (See *State v. Dominguez*, 2014—NMCA—013.) See also *State v. Pisis*, 119 N.M. 252.Ct. App. 1994, *State v. McGuire*, 110 N.M. 304, 1994.)

So long as a temporal point can be identified in which the restraint for kidnapping changed to the restraint for CSP, then it is proper to find someone guilty of both kidnapping and CSP and punish them for both crimes. *Dominguez*. See also, *State v. Andazola*, 2003—NMCA 146.

If language like “substantially interfere,” and “significance beyond...commission of another crime,” (emphasis added) is included in statute, the phrases can give rise to multiple, inconsistent interpretations. Besides the difficulty in preparing jury instructions to try to obtain uniform results, it is unclear how the proposed language in the bill might apply. As noted above, case law recognizes that someone can be kidnapped in their own

home or after voluntarily accompanying someone, if they are restrained by force, intimidation or even deception.

The bill also appears to be in conflict with those portions of the statute that taking, restraining, transporting or confining can occur in multiple ways, including but not limited to deception. Where the victim voluntarily accompanies the offender or permits them access until they are forcibly assaulted the current statute would still permit prosecution for kidnapping. See, *State v. Andazola*, 2014—NMSC—014. However the bill would exclude those crimes since the offender’s conduct must “...carry significance beyond facilitating commission of another crime.” Since the statute would require the restraints be for some reason other than, “facilitating the commission of another offense,” that would mean kidnapping, which is frequently the most serious offense, would usually not be allowed as a charge in any event which began as a consensual encounter, even if the offender used deception to gain access to the victim or changed a voluntary encounter to an involuntary encounter.

HB 393, if passé [enacted] with its prohibition against a separate charge if conduct was used to increase the penalty for kidnapping involving infliction of personal injury or a sex offense, might mean that if someone raped and murdered their victim after they had been kidnapped, the defendant might only be prosecuted for kidnapping since that is a first degree felony and the murder might be a second degree felony. Cf., *State v. McGuire*, supra. (Kidnapping can continue from time of restraint with the intent to hold the victim to service through the time they were raped, and up until the time offender killed his victim.) See also, *State v. Andazola* (Two 17-year old girls voluntarily accompanied defendant in his vehicle until he threatened to kill them unless they had sex with him and after raping both of them then shot one girl in the head—she survived and got help from a nearby residence—before he drove away where the other girl was able to escape after seeing a police officer.)

Prosecutors and the courts would face a Hobson’s choice deciding which charges to pursue to try to hold someone accountable who might have kidnapped, beaten and raped a victim but would have to forego prosecution on all of their criminal acts in order to pursue the longest sentence possible under each particular fact situation.

AGO analysis agrees with AODA, stating:

In other words, an assailant who kidnaps a victim and then rapes, batters, or otherwise harms the victim, cannot be convicted of a criminal sexual penetration, an aggravated battery, or any other statute which concerns violent or sexual criminal behavior.

Further, AGO analysis concludes that Subsection D is inconsistent with current case law.

In *State v. Dominguez*, 2014 -NMCA- 064, the victim was home alone asleep with her young daughter when she was awakened by the sound of knocking and noticed a man outside her bedroom window. The victim went to the front door to see who was there and was confronted by Defendant, who asked whether her father-in-law or her husband were home. After victim told him that neither was home, Defendant asked if she had a gas can he could borrow because he had run out of gas. Defendant waited at the front door while victim went to look for the gas can. When the victim told Defendant that she did not have

one, Defendant then asked if he could use her restroom. The victim testified that although she did not know Defendant, she allowed him into the home because she thought Defendant knew her father-in-law.

The Defendant entered the victim's home and went to the bathroom. When Defendant emerged from the bathroom, he pulled a gun from the pocket of his hooded sweatshirt. Defendant put the gun to the victim's head and told her he planned to rape her. Defendant further threatened to kill the victim's daughter if she did not comply. Defendant, however, agreed to the victim's requests that he wear a condom and not rape her in the living room because it was adjacent to the room where her daughter was sleeping. While holding the gun to the victim's head, Defendant then followed the victim to the kitchen, where she retrieved a condom, and to a second bedroom, where he vaginally raped the victim.

The Defendant was convicted at trial for kidnapping and second-degree criminal sexual penetration (CSP II). On appeal, the Defendant argued that the kidnapping was incidental to the rape, and as such under Trujillo, there was insufficient evidence to support the kidnapping conviction.

The Court of Appeals denied this argument. In reaching its holding, the Court “emphasize[d] that it is not the same type of force that is material to the determination of whether the restraint supporting the kidnapping conviction was incidental to the separate crime. Instead, we must determine whether the force used during the other crime, in this case CSP II, is the only evidence of force supporting both the kidnapping conviction and the separate offense....As we concluded above, there was evidence of independent uses of force and intimidation before the CSP that supported Defendant's kidnapping conviction...Under no reading of Trujillo would Defendant's force and intimidation in effectuating the initial restraint supporting the kidnapping conviction be considered “merely incidental” to the CSP II as a matter of law.”

Thus, proposed subsection D would make the act of kidnapping, where there is physical injury or sexual assault, the lone charge for which a person can be charged.

## **OTHER SUBSTANTIVE ISSUES**

NMSC notes that as of June 30, 2014, there were 122 inmates in the custody of the NM Corrections Department who had a new admission for a kidnapping offense as their highest charge.

It is worth noting that false imprisonment is a lesser offense of kidnapping, so that unlawful taking, restraining, confining or transportation *without* one of the enumerated intents of kidnapping is false imprisonment, a fourth-degree felony. *See* NMSA 1978, § 30-4-3.

## **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

PDD advises:

Furthermore, kidnappings involving *no injury whatsoever*, but where the victim either escapes or is rescued (*no voluntary release*), will continue being punished as first-degree felonies, with mandatory 18-year sentences, and once an injury occurs, kidnappers will

have no incentive to voluntarily release their victim to reduce their penalty exposure.

CAC/bb/je