

LFC Requester:	Eric Cheiner
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**AGENCY BILL ANALYSIS
2015 REGULAR SESSION**

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

LFC@NMLEGIS.GOV

and

DFA@STATE.NM.US

{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}

SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Check all that apply: Date February 15, 2015
Original **Amendment** **Bill No:** HB 393
Correction **Substitute**

Sponsor: Rep. Antonio "Moe" Maestas **Agency Code:** Attorney General's Office
Short Kidnapping Definitions & **Person Writing** Clara Moran, AAG
Title: Penalties **Phone:** 505/222-9027 **Email** cmoran@nmag.gov

SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY15	FY16		

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY15	FY16	FY17		

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:
Duplicates/Relates to Appropriation in the General Appropriation Act:

SECTION III: NARRATIVE

This analysis is neither a formal Attorney General's Opinion nor an Attorney General's Advisory Letter. This is a staff analysis in response to an agency's, committee's, or legislator's request.

BILL SUMMARY

Synopsis:

The proposed legislation amends NMSA 30-4-1, such that the crime of kidnapping is divided into three distinct acts with graduated punishments depending on the severity of the crime. Further, it harmonizes the statute with current case law.

FISCAL IMPLICATIONS

Note: major assumptions underlying fiscal impact should be documented.

Note: if additional operating budget impact is estimated, assumptions and calculations should be reported in this section.

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.

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. In this regard, 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, finding that “an interpretation of our and other states' kidnapping statutes [indicates] that the Legislature did not intend to punish as “kidnapping” [those sort of] restraints that are merely incidental to another crime.” The Court 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.

The proposed legislation, in subsection C, introduces three distinct punishments for “kidnapping.” If an assailant kidnaps a victim, but frees that victim in a safe place and does not inflict a physical injury or a sexual assault, the punishment would be the basic sentence of a 3rd degree felony (3 years). Similarly, if an assailant kidnaps a victim, but frees that victim in a safe place after inflicting a physical injury or a sexual assault, the punishment would be the basic sentence of a 2nd degree felony (9 years). Finally, if an assailant kidnaps a victim, does not voluntarily free that victim in a safe place and inflicts a physical injury or a sexual assault, the punishment would be the basic sentence of a 1st degree felony (18 years). Currently, the penalty for kidnapping is a 1st degree felony, unless the assailant frees the victim in a safe place and does not inflict a physical injury or sexual assault.

The proposed legislation, in subsection D, appears to suggest that evidence of an assailant’s conduct, which would serve the basis for either physical injury or sexual assault, could not be used as the basis for a separate conviction. 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.

Subsection D of the proposed legislation would be 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.

Proponents of the proposed legislation will suggest that subsection B comports with current judicial interpretation. In this regard, the proposed subsection harmonizes with existing jurisprudence.

Opponents of the proposed legislation will argue the subsection D goes too far considering the large body of case law that provides guidance on the issue. Our Courts have been fair in looking at a person's criminal conduct, in regards to a kidnapping and subsequent physical injury or sexual assault, and there is no immediate need to strip away this fact-finding determination.

PERFORMANCE IMPLICATIONS

N/A

ADMINISTRATIVE IMPLICATIONS

N/A

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

N/A

TECHNICAL ISSUES

OTHER SUBSTANTIVE ISSUES

ALTERNATIVES

N/A

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status quo

AMENDMENTS