NEW JERSEY LAW REVISION COMMISSION

Final Report
Relating to

Title 2C – Sexual Offenses

December 8, 2014

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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Title 2C – Sexual Offenses

I. Introduction

The Commission approved a project to revise the provisions of Title 2C that pertain to criminal sexual offenses as set forth in *N.J.S.* § 2C:14-1 – 2C:14-12. Over the years, several prominent court opinions have interpreted these statutory provisions and the Commission determined it would be useful to align the statutory language with these guiding interpretations. As a result of research and subsequent outreach to various interested parties conducted during the pendency of the project, various approaches towards these revisions have been considered and this Report has been accordingly refined.

This Revised Tentative Report suggests revisions to several different areas of the law. Revisions to *N.J.S.* § 2C:14-2 are recommended to reflect the concept of force as established by *State in Interest of M.T.S.*[1] and *State v. Triestman.*[2] Additionally, this Report suggests revisions based upon the Court's decision in *State v. Olivio,*[3] relating to sexual offenses against those with intellectual and developmental disabilities in light of courts' application as well as modern sensibilities. Further, clarification of *N.J.S.* § 2C:14-2 subsection a.(3) based upon the Court's decision in *State v. Rangel,*[4] interpreting the object of an aggravating crime is suggested. Finally, the Revised Tentative Report contemplates a revision based upon the Court's decision in *State v. Drury,*[5] in which the Court determined that carjacking is not a predicate aggravating offense. Staff has incorporated changes to the statutory language addressing issues arising from each of these cases.

Beginning with the *M.T.S.* case in 1992, courts in New Jersey have grappled with the conflict between long-standing statutory language governing crimes of rape and sexual assault and the developments in societal understanding of the nature and harms involved in these crimes. Historically, rape was defined as "'unlawful carnal knowledge of a woman by force and against her will."[6] Prosecutors were required to prove that "the victim 'resisted to the utmost.'"[7] The crime of rape was historically therefore made up of two key elements – the lack of the woman's consent, as indicated by her resistance, and force sufficient to overpower her.[8] Moreover, force

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[1] 129 *N.J.* 422 (1992).
[2] 416 *N.J. Super.* 195 (App. Div. 2010).
[3] 123 *N.J.* 550 (1991).
[4] 213 *N.J.* 500 (2013).
[5] 190 *N.J.* 197 (2007).
[6] Futter & Walter R. Mebane, Jr., *The Effects of Rape Law Reform on Rape Case Processing*, 16 Berkeley Women's L.J. 72, 74 (2001) (Notably, there was no such crime as rape within marriage because consent to marriage was viewed as consent to all sexual intercourse from that point on.), Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 Cal. L. Rev. 1373, 1373 (2000).
[7] *Id*. at 74.
[8] *See, e.g.*, George E. Burns, Jr., *Rape, Consent & Force: Legal Mystery—Modern Problem*, 34 Apr. Md. B.J. 44 (2001).

and resistance were typically the main focus in rape prosecutions, as women's statements regarding their own consent were not typically believed and women who made allegations of rape were typically viewed with suspicion and distrust.[9] Further, the victim's sexual and moral history were considered relevant and admissible to determine her credibility, so juries were confronted with all evidence of a woman's past sexual conduct as they were determining whether in this particular case she had given consent.[10] Given that most juries were not willing to believe that a woman who had consented in the past would fail to give consent in any other situation, rape prosecutions hinged primarily on whether the woman had struggled sufficiently to show that she had not consented to intercourse.[11] Societal mores, and most courts, expected women to resist to the fullest extent of her capabilities.[12] Essentially, rape laws put the victim on trial.[13] In the absence of evidence of a struggle, including physical injury to the woman, rape prosecutions were rarely successful.[14]

Rape laws began to be reformed in the 1970s, as part of a wave of criminal law reform and as a result of successful lobbing on the part of sexual violence and women's rights groups.[15] Rape law reform took on many aspects of the criminal law of rape, including the violent nature of the crime, the relevant evidence that could be presented at trial about both the victim and the accused, the age of consent, and the appropriate penalties.[16] Most relevant to this Project, reformers took on both the issue of consent and the issue of resistance.[17] The overarching goal was to eliminate the presumption that a victim must forcefully resist an attack in order to show lack of consent and to focus instead on the assaultive nature of the crime.[18] Reformers sought to ensure that rape was viewed as a violent crime, like other violent crimes, with the focus on the perpetrator's actions rather than the victim's.[19] Over the last thirty years, every state has considered some reforms to the state law on rape or sexual assault and there continue to be developments as societal understanding and expectations relating to gender, violence and sexuality have shifted.[20]

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[9] Richard Klein, *An Analysis of Thirty-five Years of Rape Reform: A Frustrating Search for Fundamental Fairness*, 41 Akron L. Rev. 981, 982-84 (2008).
[10] *Id.* at 984-85.
[11] *Id.* at 987.
[12] *Ibid*.
[13] Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 Geo. Wash. L. Rev. 51, 54 (2002).
[14] Klein, *supra*, at 982.
[15] Futter & Walter R. Mebane, Jr., *supra*, at 72.
[16] *Ibid*.
[17] *Id.* at 74.
[18] *Ibid*.
[19] Ronald J. Berger, Patricia Searles, W. Lawrence Neuman, *The Dimensions of Rape Reform Legislation*, 22 Law & Soc'y Rev. 329, 331 (1988). (Other goals of reform included broadening rape to include oral and anal penetration and making the crime gender neutral.) *Id*. at 331-32; (Evidentiary reform included removing resistance requirements and creating rape shield laws to limit evidence of victims' sexual history.) *Id.* at 332; (Statutory reform removed mistake of age defenses and created graded offenses for rape of particular ages.) *Id*; (Penalty reform created minimum sentences and graded penalties based on the seriousness of the crime.) *Id.*
[20] Futter & Walter R. Mebane, Jr., *supra*, at 79.

II. New Jersey Statutory Background

N.J.S. §§ 2C:14-1 to -11 address criminal sexual offenses. N.J.S. § 2C:14-2, enacted in 1978, governs the crimes of sexual assault and aggravated sexual assault, which are defined as "an act of sexual penetration" under circumstances in which the victim either does not consent or the victim is statutorily incapable of consent. The crime of sexual assault against a person capable of consent has two elements: both that the victim did not consent and that there was "physical force or coercion" involved in the crime.[21] The 1978 amendment to the rape law resulted from a state-based law reform process that included input from many law reform bodies as well as a number of feminist groups working on the issue.[22] The general intent of the drafters was to "remove all features found to be contrary to the interest of rape victims" and to focus instead on the "forceful or assaultive conduct of the defendant."[23] Apparently as a result, the legislative language incorporates the terms "physical force" and "coercion" but does not define "force."[24]

Although not the primary focus of the law reform efforts aimed at rape laws in the 1970s and 80s, more recent attempts to address sexual assault laws have tried to take into account the emerging social awareness of discrimination against individuals with intellectual and physical disabilities. The original 1978 statute made it a second degree offense to "commit the act of sexual penetration with another person" if the victim "is one whom the actor knew or should have known was physically helpless, mentally defective or mentally incapacitated."[25] "Mentally defective" was originally defined as "that condition in which a person suffers from a mental disease or defect which renders that person temporarily or permanently incapable of understanding the nature of his conduct, including, but not limited to, being incapable of providing consent."[26] In 1997, the statute was amended and this offense was upgraded to a first degree offense.

Over the next dozen years, social standards surrounding intellectual disabilities changed and law reforms have been enacted to address the discrimination against individuals with intellectual and developmental disabilities in various parts of the New Jersey statutes.[27] Among

[21] *See* N.J.S. § 2C:14-2 subsections a.(6) & c.(1).
[22] *See State in the Interest of M.T.S.*, 129 N.J. 422, 440 (1992).
[23] *Ibid*.
[24] *Ibid*.
[25] Law of 1978, ch. 95, § 2C:14-2, eff. Sept. 1, 1979 (amended seven times between 1979 and 2011).
[26] *See Olivio*, 123 N.J. at 556.
[27] In 2008, New Jersey adopted an amendment to its Constitution removing the words "idiot and insane" from the voting rights provision, changing the standards so that only those who were adjudicated incompetent could be prevented from voting. Two separate statutes have since been enacted to remove additional pejorative terms relating to mental health from the New Jersey statutes. *See* Law of 2010, ch. 50, effective August 16, 2010 (amending multiple sections of N.J. statutes to take out pejorative terms and replace them with "person first" language); Law of 2013, ch. 103, effective August 7, 2013 (amending other sections of N.J. statutes to take out additional pejorative terms and replace them with "person first" language).

other amendments, in 2011, the Legislature enacted a law intended to eliminate the terms "mentally defective" from the statutes.[28] As a result, the current law now reads:

> An actor commits an act of sexual penetration with another person [if] . . . The victim is one whom the actor knew or should have known was physically helpless or incapacitated, intellectually or mentally incapacitated, or had a mental disease or defect which rendered the victim temporarily or permanently incapable of understanding the nature of his conduct, including, but not limited to, being incapable of providing consent.[29]

A committee statement accompanying the original version of the 2011 bill noted that the Assembly "committee's understanding [was] that the bill would not make any substantive change to the legal meaning of the affected statutes and should not be deemed to change or overrule any precedential judicial interpretation as to that meaning."[30] As is described in detail below, the meaning of the terms "mentally defective," "mental disease" and "mental defect" are governed by the New Jersey Supreme Court's decision in *State v. Olivio*.[31]

III. New Jersey Interpretive Case Law

A. The Issue of "Force" in the Crime of Sexual Assault

In 1992, the New Jersey Supreme Court interpreted the requirement that the crime of sexual assault include "physical force or coercion."[32] The key issue confronting the Court in *M.T.S.* was whether by including the words "physical force" in the statute, the Legislature had intended to require that force "in addition to that entailed in an act of involuntary or unwanted sexual penetration" be proven in order to convict a defendant for the crime of sexual assault.[33] The Court examined the history of the law reform efforts related to sexual assault and found that although the language had been drafted in an effort to eliminate the reliance on the idea of "resistance," in practice the need to prove the element of "physical force" implicitly reintroduced the need to show resistance in order to be able to prove that forced had been used.[34] The Court found that in order to prove the element of force, prosecutors relied on the amount of resistance offered, so the victim needed to resist enough to show that the perpetrator used "more force than was necessary for penetration."[35] This often required visible signs of resistance like torn clothing.[36]

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[28] *See* Act of March 17, 2012, ch. 232, §4, 2010 N.J. Leg. Session, P.L. 2011; *see also* Act of January 17, 2014, ch. 214, § 3, 2014 N.J. Leg. Session, P.L. 2013, c.214.
[29] N.J.S. 2C:14-2(a)(7).
[30] N.J. Assembly, Judiciary Committee, Statement Regarding Changes to AB 4403, Dec. 12, 2011, 2010 Legislative Session, *available at* http://www.njleg.state.nj.us/2010/Bills/A4500/4403_S1.PDF.
[31] 123 N.J. 550 (1991).
[32] *See M.T.S.*, 129 N.J. at 422.
[33] *Id.* at 443.
[34] *Ibid.*
[35] *Id*. at 435.
[36] *Ibid*.

However, the Court also found that by eliminating the idea of "resistance" from the definition of sexual assault and by ensuring that the victim would not be "put on trial" in sexual assault cases, the Legislature had the clear "purpose [of] eliminate[ing] any consideration of whether the victim resisted or expressed non-consent."[37] Moreover, the Court noted that the word "force" was ambiguous in this context—the legislature had not defined it and had relied on concepts like the law of criminal battery, which criminalizes any "unauthorized touching" without reference to the level of force used or resistance displayed.[38] The Court ultimately concluded that it would be "fundamentally inconsistent" with that purpose to interpret the statute to require additional physical force beyond that "entailed in an act of involuntary or unwanted sexual penetration."[39] Thus, the Court redefined rape as a violation of autonomy, privacy and bodily control.[40]

In order to read the statutory language as consistent with the statutory intent, the Court held that the only requirement for conviction under the sexual assault statute is proof "beyond a reasonable doubt that there was sexual penetration and that it was accomplished without the affirmative and freely-given permission of the alleged victim."[41] "[J]ust as any unauthorized touching is a crime under traditional laws of assault and battery, . . . so is any unauthorized sexual penetration a crime under the reformed law of sexual assault."[42] Essentially, the Court read the "physical force" requirement simply to "define and explain the acts that are offensive, unauthorized and unlawful," namely the penetration itself, but not to add an additional requirement of harm beyond the penetration.[43] As a result, although the "force" requirement has remained in the statute, physical force in addition to the act of penetration is not necessary for a conviction under § 2C:14-2, if penetration occurred without the permission of the victim.[44]

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[37] *Id*. at 443.
[38] *Id.* at 442.
[39] *Id.*
[40] *Id.* at 446.
[41] *Id.* at 449.
[42] *Id.* at 443.
[43] *Id.* at 445.

[44] The Supreme Court also addressed the phrase "physical force" in the sexual assault context in a case related to the No Early Release Act (NERA), 2C:43-7.2, a statute that exposes defendants to longer sentences for some serious crimes. *State v. Thomas*, 166 N.J. 560 (2001). In *Thomas*, in which the defendant was convicted for second-degree sexual assault based on sexual contact with a child under the age of thirteen, the Court was asked to determine whether the state was required to prove an additional level of "physical force" in order to expose the defendant to a more severe NERA sentence. 166 N.J. at 567. The Court ultimately concluded that under the then-existing language in NERA, when "physical force" had not been an element of the underlying offense, as in the case of a conviction for sexual contact with a child under thirteen, the prosecutor must prove "physical force" as an added element in order subject the defendant to the more severe sentence associated with NERA. Id. at 563-64. The Court's holding did not disturb its earlier decision in *M.T.S.* as to the meaning of the words "physical force" or regarding the determination of consent rather than force as the key element in the crime of sexual assault. *See id*. at 571. In response to this case and several others, the legislature then amended NERA to clarify that sexual assault based on non-consent is clearly with the set of offenses that qualifies for more severe sentencing under the law, regardless of whether "physical force" was involved. *See* Law of 2001, ch. 129, § 2C:43-7.2, eff. June 29, 2001 (amending NERA). Neither the Court's holding in *Thomas* nor the legislature's amendment to the NERA statute conflict with the Court's holding in *M.T.S.*, nor are they contrary to the recommendations in this report.

After *M.T.S.*, prosecutors and courts that consider sexual assault cases have had to use both the statute and the court decision to determine the elements necessary for conviction. Under *M.T.S.*, "any act of sexual penetration engaged in by the defendant without the affirmative and freely-given permission of the victim to the specific act of penetration constitutes the offense of sexual assault."[45] The Court determined that a reasonable person standard to determine what constitutes affirmative and freely-given consent should apply, holding that "[p]ermission may be inferred either from acts or statements reasonably viewed in light of the surrounding circumstances.[46] Such permission "may be physical actions rather than words."[47] The fact finder must decide "whether the defendant's belief that the alleged victim had freely given affirmative permission was reasonable."[48] The victim's state of mind or reasonableness of her actions is not relevant, and the victim may only be questioned about the circumstances of the act to determine whether the defendant was reasonable in believing the victim consented.[49]

In 2010, the Appellate Division extended the *M.T.S.* ruling to the crime of sexual contact, *N.J.S.* 2C:14-3(b). Sexual contact is defined as "an intentional touching by the victim or actor, either directly or through clothing, of the victim's or actor's intimate parts for the purpose of degrading or humiliating the victim or sexually arousing or sexually gratifying the actor. Sexual contact of the actor with himself must be in view of the victim whom the actor knows to be present."[50] The elements of the crime of sexual contact are linked to the elements of the crime of sexual assault, and thus sexual contact includes an element of "physical force" in situations where the victim has capacity to give consent.[51] Because the two statutes are so linked, the Court held that, under the logic of *M.T.S.*, unauthorized sexual contact without additional force is sufficient to uphold a conviction of criminal sexual contact.[52]

In *Triestman*, the defendant, a manager at a furniture store in Newark, was accused of unauthorized sexual contact with an employee.[53] The defendant asked the victim to prepare a bed so he could take pictures of it and sell it online.[54] As the victim changed the bedding, the defendant told her it would look better with her naked, and moved closer, "plac[ing] his left hand on her shoulder,[55] put[ting] his right hand on her breast over her clothes, and tr[ying] to kiss her."[56] The victim immediately left and contacted help.[57] As in *M.T.S.*, the Court was asked to

[45] *M.T.S.*, 129 N.J. at 444.
[46] *Id.* at 444-45.
[47] *Id.* at 445.
[48] *Id.* at 448.
[49] *Ibid.*
[50] Definitions, N.J.S. 2C:14-1.
[51] *State v. Triestman*, 416 *N.J. Super.* 195 (App. Div. 2010); *see* Criminal sexual conduct, N.J.S. 2C:14-3(b) ("An actor is guilty of criminal sexual contact if he commits an act of sexual contact with the victim under any of the circumstances set forth in section 2C:14-2c. (1) through (4).").
[52] *Id.* at 220.
[53] *Triestman, supra*, 416 *N.J. Super.* at 198.
[54] *Ibid.*
[55] The court, in dicta, mentioned that the force of the actor placing his hand on the victim's shoulder could have amounted to a level of physical force beyond that of the sexual contact itself; nonetheless, the court held that sexual contact without additional force could satisfy the elements of criminal sexual contact. *See State v. Triestman, supra*, 416 *N.J. Super.* at 221.
[56] *Ibid.*
[57] *Ibid.*

determine whether the "physical force" element of the crime required force beyond that involved in the sexual contact itself.[58]

The *Triestman* court reviewed the legislative history of the sexual contact crime and found that "the only distinguishing feature between criminal sexual assault and criminal sexual contact is the presence or absence of penetration."[59] The court also noted that in *M.T.S.*, the Supreme Court had already found that "'[t]he characteristics that make a sexual contact unlawful are the same as those that make a sexual penetration unlawful. . . . That the Legislature would have wanted to decriminalize unauthorized sexual intrusions on the bodily integrity of the victim by requiring a showing of force in addition to that entailed in the sexual contact itself is hardly possible.'"[60] The court concluded that the *M.T.S.* decision governed both sexual assault and sexual contact crimes and that there was no need to provide force beyond that which was necessary to accomplish the sexual contact.[61] The *Triestman* court also reiterated the standard established in the *M.T.S.* decision—whether "a reasonable person would have believed the act unauthorized and offensive to the victim."[62] The court distinguished *State v. Thomas*, noting that the decision related only sentence enhancements and to situations where the defendant was charged with an offense that did not include a NERA element.[63]

B. Incapacity in Sexual Assault Cases

New Jersey's sexual offenses statutes have always included sections relating to sexual assaults against persons with intellectual or developmental disabilities, although the language therein has changed slightly over time to remove pejorative terms. *State v. Olivio* was the first significant case to interpret these terms and the Court's interpretation of the statute guides its application today. In *Olivio*, the defendant was charged with sexual assault of a mentally defective woman after having sexual intercourse with a sixteen year old woman who was considered "educable mentally retarded."[64] The defendant admitted that sexual intercourse had occurred, but argued that the young woman was not mentally defective.[65] The Court was thus asked to determine "when a person who engages in such sexual conduct is mentally defective under the criminal code."[66] The Court recognized that its conclusion would have "implications for both mentally-defective persons who are vulnerable and need the special protection of our laws from the sexual intrusions of others and persons whose mental deficiencies need not be an impediment to the enjoyment of a reasonably normal life, including consensual sexual relations."[67] This critical balance led to the Court's conclusion that "a person is mentally defective within the meaning of N.J.S. 2C:14-2c(2) if, at the time of the sexual activity, he or she is unable to comprehend the distinctly sexual nature of the conduct or is incapable of

[58] Neither court addressed the element of "coercion" in the statutes, as neither case involved coercion. *See id.* at 210; *see generally M.T.S.*, 129 N.J. at 445-50.
[59] *Id.* at 213.
[60] *Id.* at 217 (quoting *M.T.S.*, 129 A.2d at 444).
[61] *Id.* at 219.
[62] *Id*.
[63] *Id*. at 220.
[64] *Olivio*, 123 N.J. at 553.
[65] *Ibid*.
[66] *Ibid*.
[67] *Ibid*.

understanding or exercising the right to refuse to engage in such conduct with another."[68] This conclusion remains the guiding standard for sexual assault cases relating to individuals with intellectual and developmental disabilities.

[68] *Ibid*.

C. The Object of the Crime in Sexual Assault Cases

In 2013, the New Jersey Supreme Court decided a case tangentially related to the issues set forth in this Report. In *State v. Rangel*,[69] the Court was asked to interpret the following section of N.J.S. 2C:14-2(a)(3):

> An actor is guilty of aggravated sexual assault if he commits an act of sexual penetration with another person under any one of the following circumstances [] . . . (3) The act is committed during the commission, or attempted commission, . . . of . . . aggravated assault on another[;] . . . (6) The actor uses physical force or coercion and severe personal injury is sustained by the victim[.][70]

In this case, the defendant was alleged to have physically and sexually assaulted the victim and the prosecutor had charged the defendant with aggravated sexual assault not because of the victim had sustained "severe personal injury" but on the basis that the defendant had committed "aggravated assault" against the victim in addition to the sexual assault. The Court was asked to determine whether the statute's language "aggravated assault on another" intended to include the victim as a potential "another," or whether that language was intended to include only situations where the defendant had assaulted a person in addition to the victim, such as a watching loved one, in the course of committing the sexual assault.[71] The trial court had held that "on another" could include the victim and that the phrase was intended to act as an "'enhancement feature' that responded to the 'additional threat of physical harm to the victim that's over and above the act of penetration or the violent act.'"[72] However, the Appellate Division reversed the trial court's decision, holding that "the aggravated assault must be on a third person, committed for the purpose of compelling the submission of the sexual assault victim."[73]

The Supreme Court agreed with the Appellate Division, determining that the key question was whether the word "another" was intended to refer to the victim or to someone other than the victim and concluding that the legislature must have intended it to refer to someone other than the victim.[74] The Court reached that conclusion for several reasons, including that since "aggravated sexual assault" covers situations where the victim has sustained "severe personal injury," it seemed clear that "the 'severe personal injury' provision . . . is intended to punish the enhanced violence committed *against the victim*, whereas the 'aggravated assault on another' provision . . . is intended to punish the accompanying violence *against a third person*."[75] The Court also noted the legislature generally used the word "victim" when referring to the victim and did not use the word "another" in any other context where it was clear that they

[69] 213 *N.J.* 500 (2013).
[70] N.J.S. 2C:14-2(a)(3).
[71] *Rangel*, 213 N.J. at 503.
[72] *Id*.
[73] *Id*. at 505.
[74] *Id*. at 506-16.
[75] *Id*. at 512.

were referring to the primary victim of the crime.[76] For example, the statute considers a sexual assault that is committed "during the commission . . . of robbery" to be aggravated sexual assault without the qualifier "of another," and the Court noted that it was reasonable to assume that "if a sexual assault victim were also the target of a . . . . robbery" the intent would have been to elevate that to a first-degree crime.[77] The Court held that "the most plausible explanation is that, having addressed an aggravated assault on the victim in" the words "severe personal injury," "the Legislature intended to refer to a third party as "another" in (a)(3)."[78]

D. Aggravating Offenses

In a 2007 N.J. Supreme Court case, *State v. Drury*,[79] defendant was convicted of multiple offenses including first-degree aggravated sexual assault, third-degree aggravated assault, third-degree terroristic threats, four counts of first-degree carjacking, third-degree theft by unlawful taking and four counts of first-degree kidnapping.[80] In connection with his conviction for first-degree sexual offense, the trial court held that carjacking constituted a commission of robbery sufficient to elevate the second-degree charge of sexual assault to a first-degree charge of sexual assault.

On appeal to the Appellate Division, defendant argued that carjacking is not specifically enumerated as a predicate offense to first-degree sexual assault pursuant to N.J.S. § 2C:14-2a.(3) and accordingly requested his sentence for first-degree sexual assault be vacated. The Appellate Court agreed with the conclusion of the trial court and held that carjacking is in effect a robbery and therefore satisfies the predicate offense for a conviction of first-degree sexual assault. Further, the Appellate Court held that "it would be entirely illogical to conclude that the crime of carjacking, a more specific form of the crime of robbery, would not establish the required element of an aggravated sexual assault."[81]

The N.J. Supreme Court disagreed with the trial and appellate courts and concluded that the similarities between burglary and carjacking were insufficient to support the claim that carjacking is simply a form of robbery.[82] Further, the Court refused to conclude that the Legislature "intended carjacking to be subsumed within the term robbery as it is used in the aggravated sexual assault statute in order to elevate sexual assault to a first-degree crime."[83] The Court accordingly reversed the Appellate Court's conclusion that carjacking could support the conviction of first-degree sexual assault.[84]

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[76] *Ibid*.
[77] *Id*. at 513.
[78] *Id*.
[79] 190 *N.J.* 197 (2007).
[80] *Id.* at 206; Also, please note that the defendant was erroneously charged at the trial level; the indictment specified first-degree sexual assault based upon the predicate crime of carjacking. When State realized that carjacking was not a specifically enumerated underlying offense, State moved to seek an amended indictment basing the first-degree sexual assault charge on the underlying crime of kidnapping. The trial court held that such a modification was unnecessary because carjacking is a form of robbery which serves as a predicate crime. *State v. Drury*, 382 N.J. Super. 469, 477 (2006).
[81] *Drury*, 382 *N.J Super*. 469, 481.
[82] *Drury*, 190 *N.J.* at 211.
[83] *Id*.
[84] *Id*. at 218.

N.J.S. § 2C:14-2a.(3) enumerates specific offenses which elevate a sexual assault from a first-degree crime to a second-degree crime. Specifically, a defendant will be charged with aggravated sexual assault if the act of penetration "is committed during the commission, or attempted commission, whether alone or with one or more other persons, of robbery, kidnapping, homicide, aggravated assault on another, burglary, arson or criminal escape."

In 1993, the New Jersey Legislature passed N.J.S. § 2C:15-2 which sought to address the increasingly problematic crime of carjacking.[85] While the carjacking mirrors the robbery statute in many respects, it adds the more specific requirement that the unlawfully taken property is a motor vehicle.[86]

Since the enactment of the carjacking legislation in 1993, the Legislature has amended several other criminal statutes to enumerate carjacking as an aggravating factor:

- New Jersey's felony murder statute, N.J.S. § 2C:11-3 (1978), originally included robbery as a specified triggering offense and was subsequently amended in 1998 to specifically include carjacking.[87]
- N.J.S. § 2A:4A-26 (1982) establishing grounds for the waiver of juveniles out of family court originally included robbery as a specified triggering offense and was subsequently amended in 1999 to specifically include carjacking.[88]
- N.J.S. § 2C:44-3 (1978) authorizing imposition of discretionary extended term under certain conditions was amended to include robbery as a triggering offense in 1981 and further amended to include carjacking in 1999.[89]

Additionally, in several post-1993 enactments, the Legislature has specifically enumerated both robbery and carjacking as aggravating offenses.[90] The New Jersey Supreme Court found this indicative that the Legislature views carjacking and robbery as separate and distinct crimes.[91] Further, given Legislative efforts to specifically include carjacking in new or amended laws, the Court refused to conclude carjacking is an aggravating offense as "the Legislature ha[ving] carefully employed a term in one place and excluded it in another, it should not be implied where excluded."[92]

In *Drury*, a first-degree sexual assault conviction would have otherwise been possible in connection with the kidnapping charge upon the issuance of the appropriate indictment. While it

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[85] *See State v. Garretson*, 313 *N.J. Super* 348, *certif.. denied*, 156 N.J. 428 (1998) (citing *Governor's Press Release* for Assembly Bill 2047 and Senate Bill 1324, dated August 4, 1993).
[86] *Drury,* 382 *N.J.Super.* at 481(*citing Garretson* at 355).
[87] *Drury* 190 *N.J.* at 214.
[88] *Id*.
[89] *Id*.
[90] N.J.S. § 2A:162-12 (1994) specifically enumerated robbery and carjacking as predicate offenses for bail restrictions; N.J.S. § 2C:43-7.2 (1997) specifically enumerated both robbery and carjacking in listing of offenses; N.J.S. § 2C:38-2 (2002) specifically enumerated both robbery and carjacking in offenses supporting conviction for crime of terrorism.
[91] *Drury*, 190 *N.J.* at 213.
[92] *Id*. at 215 (*citing GE Solid State, Inc. v. Dir., Div. of Taxation*, 132 *N.J.* 298, 308 (1993)).

may seem unlikely, it is not impossible to envision a factual situation in which a carjacking and sexual assault occur but elements of kidnapping or other predicate crimes are not satisfied.

IV. Issue and Purpose of Project

As a result of several important developments in case law, most notably *M.T.S.* and its progeny and *Olivio*, New Jersey's sexual offense statutes no longer reflect the current state of the law. Staff has drafted proposed changes to Title 2C:14 in an effort to conform the statutes to the current practice under governing case law. First, *N.J.S.* § 2C:14-2, sexual assault offenses, is modified by: 1) removing the ambiguous term "force" from the section; 2) codifying the *M.T.S.* decision so that the central issue related to consent is whether the actor commits the act in the absence of the victim's freely and affirmatively given permission; 3) clarifying the object of the aggravating crime identified in N.J.S. § 2C:14-2a.(3); 4) adding carjacking to the list of enumerated aggravating offenses; and 5) updating pronoun usage to render the statute gender neutral and reinforce its application to both males and females where appropriate. In relation to sexual assault against persons with intellectual and developmental disabilities, *N.J.S.* § 2C:14-2a.(7) is modified to fully incorporate the standard dictated by the Court in *Olivio*.

In addition, *N.J.S.* § 2C:14-3, sexual contact offenses are modified to incorporate the changes dictated by *M.T.S.* and *Triestman*.

The Commission has considered changes to these provisions for several years and the proposed language has gone through several iterations. In the course of Staff's circulation of Draft Tentative Reports, commenters expressed resistance to changes to the structure of the statute fearing such structural changes would have unintended substantive implications or fail to harmonize with the historical application and interpretation of the statute. Thus, the Commission now proposes more streamlined revisions that will reflect the manner in which the courts have made determinations in this area while maintaining the traditional statutory structure. This approach also alleviates ameliorates eliminates concerns that a statutory restructuring would do violence to the myriad of other statutory provisions that reference this section. The new language closely aligns with court decisions and also reflects jury instructions which are delivered to jurors in the course of sexual offense proceedings.

DRAFT

2C:14-2. Sexual assault

a. An actor is guilty of aggravated sexual assault if ~~he~~ the actor commits an act of sexual penetration with another person under any one of the following circumstances:

(1) The victim is less than 13 years old;

(2) The victim is at least 13 but less than 16 years old; and

(a) The actor is related to the victim by blood or affinity to the third degree, or

(b) The actor has supervisory or disciplinary power over the victim by virtue of the actor's legal, professional, or occupational status, or

(c) The actor is a resource family parent, a guardian, or stands in loco parentis within the household;

(3) The act is committed during the commission, or attempted commission, whether alone or with one or more other persons, of robbery, carjacking, kidnapping, homicide, aggravated assault ~~on another~~ on or of a person other than the victim, burglary, arson or criminal escape;

(4) The actor is armed with a weapon or any object fashioned in such a manner as to lead the victim to reasonably believe it to be a weapon and threatens by word or gesture to use the weapon or object;

(5) ~~the~~ The actor is aided or abetted by one or more other persons and the actor ~~uses physical force or coercion~~ commits the act of sexual penetration either using coercion or in the absence of the victim's freely and affirmatively given permission;

(6) ~~The actor uses physical force or coercion~~ The actor commits the act of sexual penetration either using coercion or in the absence of the victim's freely and affirmatively given permission and severe personal injury is sustained by the victim;

(7) The victim, at the time of sexual penetration, is one whom the actor knew or should have known was physically helpless or incapacitated, intellectually or mentally incapacitated, or had a mental disease or defect which rendered the victim temporarily or permanently incapable of understanding the nature of his conduct, including, but not limited to, being incapable of providing consent, or incapable of understanding or exercising the right to refuse to engage in the sexual conduct.

Aggravated sexual assault is a crime of the first degree.

b. An actor is guilty of sexual assault if he commits an act of sexual contact with a victim who is less than 13 years old and the actor is at least four years older than the victim.

c. An actor is guilty of sexual assault if he commits an act of sexual penetration with another person under any one of the following circumstances:

(1~~) The actor uses physical force or coercion~~ The actor commits the act of sexual penetration either using coercion or in the absence of the victim's freely and affirmatively given permission, but the victim does not sustain severe personal injury;

(2) The victim is on probation or parole, or is detained in a hospital, prison or other institution and the actor has supervisory or disciplinary power over the victim by virtue of the actor's legal, professional or occupational status;

(3) The victim is at least 16 but less than 18 years old and:

(a) The actor is related to the victim by blood or affinity to the third degree; or

(b) The actor has supervisory or disciplinary power of any nature or in any capacity over the victim; or

(c) The actor is a resource family parent, a guardian, or stands in loco parentis within the household;

(4) The victim is at least 13 but less than 16 years old and the actor is at least four years older than the victim.

Sexual assault is a crime of the second degree.

d. Notwithstanding the provisions of subsection a. of this section, where a defendant is charged with a violation under paragraph (1) of subsection a. of this section, the prosecutor, in consideration of the interests of the victim, may offer a negotiated plea agreement in which the defendant would be sentenced to a specific term of imprisonment of not less than 15 years, during which the defendant shall not be eligible for parole. In such event, the court may accept the negotiated plea agreement and upon such conviction shall impose the term of imprisonment and period of parole ineligibility as provided for in the plea agreement, and may not impose a lesser term of imprisonment or parole or a lesser period of parole ineligibility than that expressly provided in the plea agreement. The Attorney General shall develop guidelines to ensure the uniform exercise of discretion in making determinations regarding a negotiated reduction in the term of imprisonment and period of parole ineligibility set forth in subsection a. of this section.

COMMENT

This section has been revised in light of the Court's interpretation of the elements of the crime of sexual assault in *State in Interest of M.T.S.*, 129 *N.J.* 422 (1992). The Court's holdings have been incorporated into the statutory section; while careful not to change the intent of the 1978 Amendment, which focused on the assaultive nature of the crime, rather than the consent of the victim, this section removes the ambiguous term "force" from the statute. In its place, this section codifies the interpretation of the *M.T.S.* Court that "any act of sexual penetration engaged in by the defendant without the affirmative and freely-given permission of the victim to the specific act of penetration constitutes the offense of sexual assault." *M.T.S.*, *supra*, 129 *N.J.* at 444.

The concept of force, a requirement of the crimes of sexual assault and aggravated sexual assault is derived from the following passage from the *M.T.S.* decision:

> [J]ust as any unauthorized touching is a crime under traditional laws of assault and battery, so is any unauthorized sexual contact a crime under the reformed law of criminal sexual contact, and so is any unauthorized sexual penetration a crime under the reformed law of sexual assault. . . . The definition of "physical force" is satisfied under N.J.S. 2C:14-2c(1) if the defendant applies any amount of force against another person in the absence of what a reasonable person would believe to be affirmative and freely-given permission to the act of sexual penetration. Under the reformed statute, permission to engage in sexual penetration must be affirmative and it must be given freely, but that permission may be inferred either from acts or statements reasonably viewed in light of the surrounding circumstances. . . . Persons need not, of course, expressly announce their consent to engage in intercourse for there to be affirmative permission. Permission to engage in an act of sexual penetration can be and indeed often is indicated through physical actions rather than words. Permission is demonstrated when the evidence, in whatever form, is sufficient to demonstrate that a reasonable person would have believed that the alleged victim had affirmatively and freely given authorization to the act. . . . Hence, as a description of the method of achieving "sexual penetration," the term "physical force" serves to define and explain the acts that are offensive, unauthorized, and unlawful.
> [*Id.* at 443-45.]

Based on the *M.T.S.* Court's interpretation of "force" and the Court's conclusion about the legislative intent behind the statutory language, this section has been revised so that the crimes of sexual assault and aggravated assault now hinge on the issue of consent, with the relevant standard set forth as whether a reasonable person would have believed the act of sexual penetration was *freely and affirmatively permitted* by the victim. This report has incorporated the concept of "free and affirmative" permission rather than the term "authorize," as this phrase appears to better reflects the Court's holding in M.T.S., addresses both the ideas of consent and coercion that were present in the original statute, and hews more closely to existing legislative language. See N.J.S. 2C:14-7 (New Jersey's Rape Shield law, regarding evidence that can be proffered by a defendant to show that he or she reasonably believed that the victim had given consent, states: "Evidence of the victim's previous sexual conduct with the defendant shall be considered relevant if it is probative of whether a reasonable person, knowing what the defendant knew at the time of the alleged offense, would have believed that the alleged victim freely and affirmatively permitted the sexual behavior complained of.").

The section was also revised to incorporate the Court's interpretation in *State v. Olivio,* 123 *N.J.* 550 (1991) of the mental capacity issues involved in what was previously termed "mentally defective" and was revised by the Legislature in 2011 to be referred to as "mental disease or defect." In *Olivio,* the defendant admitted having intercourse with the victim, but denied that she was mentally disabled under the criminal statute. The Court elaborated on the Code's definition of "mentally defective," holding that a person is mentally defective "if, at the time of sexual activity, the mental defect rendered him or her unable to comprehend the distinctively sexual nature of the conduct, or incapable of understanding or exercising the right to refuse to engage in such conduct with another." *See Olivio, supra*, 123 *N.J*. at 553. In 2011, when the Legislature eliminated the term "mentally defective" and replaced it with "mental disease or defect," the Legislature also eliminated statutory definition of "mentally defective" but without including a new definition. This indicates that the Legislature intended to continue using the Court's interpretation and standard set forth in *Olivio*.

Over the last several years, numerous New Jersey's statutes have also been amended to incorporate "person first" language and to remove pejorative terms relating to mental health from the statutes. Although the amendments to the statutes have not touched the criminal code, Staff has considered whether the terminology "mental disease or defect" should be replaced with the term "intellectual or developmental disability" consistent with both the purpose of the "person first" amendments and with the holding in *Olivio*. However, the term "mental disease or defect" presents elsewhere in the criminal code so the language has been maintained to ensure consistency in the criminal code. This section has also been revised to incorporate the more expansive *Olivio* language that includes victims who are "incapable of understanding or exercising the right to refuse to engage in the sexual conduct", *see Olivio, supra*, 123 *N.J*. at 553, as this parallels language delivered as part of current jury instructions.

Please note that the draft statutory language in subsection a.(3) reflects the inclusion, and subsequent removal, of a single sentence originally included to clarify that the ability of persons with intellectual and developmental disabilities to engage in consensual sexual activity would not be limited by statutory language.

Ultimately, the sentence proved to be a cause for concern among knowledgeable commenters who suggested that it might cause additional problems, confusion or prosecutorial difficulties. It was removed as a result.

This revision also incorporates the language "at the time of the sexual penetration" to further ensure that the analysis is based solely on whether the person with the intellectual or developmental disability was capable at that very moment of understanding, refusing or consenting, and leaves open the potential that if the person was not capable in that moment, in another situation, the person could be capable of engaging in those assessments.

2C:14-3. Criminal sexual contact

a. An actor is guilty of aggravated criminal sexual contact if ~~he~~ the actor commits an act of sexual contact with the victim under any of the circumstances set forth in 2C:14-2a. (2) through (7).
Aggravated criminal sexual contact is a crime of the third degree.
b. An actor is guilty of criminal sexual contact if ~~he~~ the actor commits an act of sexual contact with the victim under any of the circumstances set forth in section 2C:14-2c. (1) through (4).
Criminal sexual contact is a crime of the fourth degree.

COMMENT

This section incorporates by reference the Court's interpretation of the sexual assault statute in *M.T.S.* as extended to the sexual contact law by the Appellate Division in *State v. Triestman*, 416 *N.J. Super.* 195 (App. Div. 2010). In *Triestman*, the court concluded that the Supreme Court's reading of the terms "physical force" to essentially add no further requirement than the force necessary to accomplish the sexual penetration should equally apply to crimes of sexual contact. *Id.* at 220. The Appellate Division relied on *M.T.S.*, holding that the Court's decision dictated that "any unauthorized sexual contact is a crime under the law of criminal sexual contact," and that no additional "'physical force' extrinsic from and additional to the sexual contact is required for sexual contact to be criminal." *Triestman*, *supra*, 416 *N.J. Super.* at 220 (quoting *M.T.S.*, *supra*, 129 *N.J.* at 443). This section of the statute already cross-references and parallels the sexual assault statute ensuring that the legislature's intent in linking the criminal offenses is fulfilled. Additionally, non-substantive changes were made to pronoun usage in an attempt to make the language gender neutral and reinforce this section's application to both males and females.