

**KIDNAPPING
FIRST DEGREE
(A-I Felony)
(Victim dies)
PENAL LAW 135.25(3)
(Committed on or after Sept. 1, 1973)**

The _____ count is Kidnapping in the First Degree.

Under our law, a person is guilty of Kidnapping in the First Degree when he or she abducts another person and when the person abducted dies during the abduction or before he or she is able to return or to be returned to safety.

The term "abduct" used in this definition has its own special meaning in our law. I will now give you the meaning of that term.

ABDUCT means to restrain a person with intent to prevent that person's liberation either by secreting or holding him or her in a place where he or she is not likely to be found, or by using or threatening to use deadly physical force.¹

The words "restrain," "intent," and "deadly physical force" used in the definition of "abduct" also have their own special meanings.

Restrain means to restrict a person's movements intentionally and unlawfully in such manner as to interfere substantially with his or her liberty by moving him or her from one place to another, or by confining him or her either in the place where the restriction commences or in a place to which he or she has been moved, without consent and with knowledge that the restriction is unlawful.²

A person restricts another's movements intentionally when

¹ See Penal Law § 135.00(2).

² See Penal Law § 135.00(1).

his or her conscious objective or purpose is to restrict that person's movements.³

A person restricts another's movements unlawfully when he or she is not authorized by law to do so.

NOTE: Select appropriate alternative:

Under our law, with certain exceptions not applicable here, a person is not authorized by law to restrict another's movements.

or

Under our law, a person is authorized by law to restrict another's movements when (read the applicable law that authorizes a person to restrict another's movements⁴).

A person restricts another's movements with knowledge that the restriction is unlawful when he or she is aware that the restriction is not authorized by law.⁵

A person is moved or confined without consent when such is accomplished

NOTE: Select appropriate alternative:

by physical force, intimidation or deception.

or

by any means whatever, including acquiescence of the victim, if he or she is a child less than sixteen years old or an incompetent person and the parent, guardian or other

³ See Penal Law § 15.05(1).

⁴ See e.g., CPL §§ 140.15, 140.35, Penal Law §§ 35.05, 35.10.

⁵ See *People v. Weiss*, 276 N.Y. 384 (1938). Cf. Penal Law § 15.05(2).

person or institution having lawful control or custody of him or her has not acquiesced in the movement or confinement.

Intent means conscious objective or purpose.⁷ Thus, a person acts with intent to prevent another's liberation either by secreting or holding him or her in a place where he or she is not likely to be found, or by using or threatening to use deadly physical force, when that person's conscious objective or purpose is to do so.

Deadly physical force means physical force which, under the circumstances in which it is used, is readily capable of causing death or other serious physical injury.⁸ Serious physical injury means impairment of a person's physical condition which creates a substantial risk of death or which causes death or serious and protracted disfigurement, protracted impairment of health, or protracted loss or impairment of the function of any bodily organ.⁹

[NOTE: Add if appropriate:

Under our law, in a case where the person abducted was less than sixteen years old (*or* an incompetent person) at the time of the abduction, the death of that person during the abduction or before he or she is able to return or to be returned to safety shall be presumed from evidence that his or her parents, guardians or other lawful custodians did not see or hear from him or her following the termination of the abduction and prior to trial, and received no reliable information during such period persuasively indicating that he or she was alive.¹⁰ What this means is that, if the

⁶ See Penal Law § 135.00(1).

⁷ See Penal Law § 15.05(1).

⁸ See Penal Law § 10.00(11).

⁹ See Penal Law § 10.00(10).

¹⁰ See Penal Law § 135.25(3).

People have proven beyond a reasonable doubt that (specify) was abducted, that, at the time of the abduction, he/she was less than sixteen years old (or an incompetent person), that his/her parents, guardians or other lawful custodians did not see or hear from him/her from the termination of the abduction to the commencement of the trial, and that they received no reliable information during that period persuasively indicating that he/she was alive, then you may, but you are not required to, infer from those facts that (specify) died during the abduction or before he/she was able to return or to be returned to safety.]

[NOTE: Add if appropriate:

Under our law, the death of a person abducted¹¹ shall be presumed from evidence that a person, whom the person abducted would have been extremely likely to visit or communicate with during the period following the abduction and prior to trial were he or she alive and free to do so, did not see or hear from him or her during such period and received no reliable information during such period persuasively indicating that he or she was alive.¹² What this means is that, if the People have proven beyond a reasonable doubt that (specify) was abducted, that a person, whom he/she would have been extremely likely to visit or communicate with during the period from the termination of the abduction to the commencement of the trial were he/she alive and free to do so, did not see or hear from him/her during such period, and received no reliable information during such period persuasively indicating that he/she was alive, then you may, but you are not required to, infer from those facts that (specify) died during the abduction or before he/she was able to return or to be returned to safety.]

¹¹This presumption applies where the person abducted was 16 years old or more and not an incompetent person. If the person is less than 16 years old or an incompetent person, the preceding presumption applies. See, Penal Law § 135.25(3).

¹² See Penal Law § 135.25(3).

In order for you to find the defendant guilty of this crime, the People are required to prove, from all the evidence in the case, beyond a reasonable doubt, each of the following six elements:

1. That on or about (date) , in the County of (county) , the defendant, (defendant's name) , restricted (specify)'s movements in such manner as to interfere substantially with his/ her liberty by moving him/her from one place to another, or by confining him/her either in the place where the restriction commenced or in a place to which he/ she had been moved;
2. That the defendant did so without consent of (specify) .
3. That the defendant did so intentionally;
4. That the restriction of (specify)'s movements was unlawful, and the defendant knew that the restriction was unlawful;
5. That the defendant restrained (specify) with intent to prevent (specify)'s liberation either by secreting or holding him/her in a place where he/she was not likely to be found, or by using or threatening to use deadly physical force; and
6. That (specify) died during the abduction or before he/she was able to return or to be returned to safety.

[NOTE: If affirmative defense does not apply, conclude as follows:

Therefore, if you find that the People have proven beyond a reasonable doubt each of those elements, you must find the defendant guilty of the crime of Kidnapping in the First Degree as charged in the _____ count.

On the other hand, if you find that the People have not proven beyond a reasonable doubt any one or more of those

elements, you must find the defendant not guilty of the crime of Kidnapping in the First Degree as charged in the _____ count.]

[NOTE: *If affirmative defense applies, continue as follows:*

If you find that the People have not proven beyond a reasonable doubt any one or more of those elements, you must find the defendant not guilty of Kidnapping in the First Degree as charged in the _____ count.

On the other hand, if you find that the People have proven beyond a reasonable doubt each of those elements, you must consider an affirmative defense the defendant has raised. Remember, if you have already found the defendant not guilty of Kidnapping in the First Degree, you will not consider the affirmative defense.

Under our law, it is an affirmative defense to this charge that the defendant was a relative of the person abducted, and the defendant's sole purpose was to assume control of such person.¹³ The term "relative" includes a parent [an ancestor] [a brother] [a sister] [an uncle] [an aunt].¹⁴

Under our law, the defendant has the burden of proving an affirmative defense by a preponderance of the evidence.

In determining whether the defendant has proven the affirmative defense by a preponderance of the evidence, you may consider evidence introduced by the People or by the defendant.

A preponderance of the evidence means the greater part of the believable and reliable evidence, not in terms of the number of witnesses or the length of time taken to present the evidence, but in terms of its quality and the weight and convincing effect it has. For the affirmative defense to be proved by a preponderance of

¹³ See Penal Law § 135.30.

¹⁴ See Penal Law § 135.00(3).

the evidence, the evidence that supports the affirmative defense must be of such convincing quality as to outweigh any evidence to the contrary.

Therefore, if you find that the defendant has not proven the affirmative defense by a preponderance of the evidence, then, based upon your initial determination that the People had proven each of the elements of Kidnapping in the First Degree beyond a reasonable doubt, you must find the defendant guilty of that crime as charge in the _____ count.

On the other hand, if you find that the defendant has proven the affirmative defense by a preponderance of the evidence, then you must find the defendant not guilty of Kidnapping in the First Degree as charged in the _____ count.]