

ESCAPE

The defendant is charged with escaping from lawful custody. Section 16 of chapter 268 of our General Laws provides as follows:

“A prisoner

(of any penal institution . . .)

(or) (committed to any jail or correctional institution under
a lawful order of a court,)

who escapes . . .

(from any such institution or from land appurtenant
thereto,)

(or) (from any courthouse or from land appurtenant
thereto)

(or) (from the custody of any officer thereof while being
conveyed to or from said institution, . . .)

(or) ([who] fails to return from any temporary release from said
institution . . .)

shall be punished”

In order to prove the defendant guilty of this offense, the

Commonwealth must prove three things:

***First:* That the defendant was a prisoner who had been committed by legal procedures to the custody of a penal institution or correctional institution, or a jail;**

***Second:* That the defendant escaped from (that [institution] [jail]) (the grounds of that [institution] [jail]) (a courthouse) (the grounds of a courthouse) (the custody of an officer of that [institution] [jail] [courthouse] while being conveyed to or from that [institution] [jail]);**

and *Third:* That the defendant intentionally left custody without permission, in the sense that it was not done by accident or mistake.

See Instruction 3.120 (Intent).

The statute was broadened by St. 1989, c. 313, § 2 to include escapes from a jail or correctional institution, and St. 1993, c. 376 to include escapes from a courthouse. The statute also penalizes attempts to escape; in such cases the model instruction (including its statutory quotation) should be appropriately adapted, and the required fourth element (an overt act) added. *Commonwealth v. Gosselin*, 365 Mass. 116, 121-122, 309 N.E.2d 884, 888 (1974). See Instruction 4.120 (Attempt). The model instruction (and its statutory quotation) may also be appropriately adapted for escapes by persons committed pursuant to G.L. c. 123A as sexually dangerous.

Commonwealth v. Best, 381 Mass. 60, 61-64, 407 N.E.2d 1214, 1215-1216 (1980) (escape from work release program in violation of G.L. c. 127, § 86F can also be prosecuted under G.L. c. 268, § 16); *Lynch, petitioner*, 379 Mass. 757, 760-761, 400 N.E.2d 854, 857 (1980) (statute applicable to defendant who should have been paroled but had not been); *Commonwealth v. Reed*, 364 Mass. 545, 546-548, 306 N.E.2d 816, 817-819 (1974) (because of G.L. c. 127, § 119, statute is applicable to prisoners temporarily transferred to a hospital); *Commonwealth v. Antonelli*, 345 Mass. 518, 520-521, 188 N.E.2d 478, 480 (1963) (guard supervising prisoners is “officer” for purposes of statute); *Commonwealth v. Curley*, 101 Mass. 24, 25 (1869) (“land appurtenant thereto” is to be understood broadly to include all grounds “entirely devoted to the purpose, sufficiently secure and suitably protected from all persons without”); *Commonwealth v. Clark*, 20 Mass. App. Ct. 962, 962-963, 480 N.E.2d 653, 654-655 (1985) (lawfulness of custody is an element of offense, but Commonwealth need not demonstrate that original conviction was free of legal error); *Commonwealth v. Faulkner*, 8 Mass. App. Ct. 936, 937, 396 N.E.2d 1024, 1024-1025 (1979) (statute encompasses escape of pretrial

detainee); *Commonwealth v. Giordano*, 8 Mass. App. Ct. 590, 592, 395 N.E.2d 896, 897-898 (1979), cert. denied, 446 U.S. 968 (1980), denial of habeas corpus aff'd sub nom. *Giordano v. Fair*, 697 F.2d 14 (1st Cir. 1983) (Commonwealth can demonstrate lawful pretrial custody of defendant obtained pursuant to interstate detainer by relying on presumption of regularity); *Commonwealth v. Pettijohn*, 4 Mass. App. Ct. 847, 847-848, 356 N.E.2d 273, 273-274 (1976) (statute encompasses escape from county jail or house of correction, and therefore deputy sheriff transporting sentenced prisoner from county jail to court); *Commonwealth v. Meranda*, 2 Mass. App. Ct. 890, 891, 318 N.E.2d 926, 927 (1974) (wrongful intent is necessary element, but inferable from unlawful departure in absence of satisfactory explanation); *Commonwealth v. Gosselin*, 1 Mass. App. Ct. 849, 849-850, 301 N.E.2d 870, 870 (1973) (prison librarian was not "officer"; offense requires proof that defendant left prison grounds, not just that whereabouts were unknown for a time), aff'd on other grounds, 365 Mass. 116, 309 N.E.2d 884 (1974).

SUPPLEMENTAL INSTRUCTIONS

1. "Prisoner."

A "prisoner" is defined as a person who is placed in custody in a penal institution or correctional institution or a jail, in accordance with law.

See G.L. c. 125, § 1(k) & (m).

2. "Escape."

Escape means "absenting oneself from confinement without permission."

United States v. Bailey, 444 U.S. 394, 407, 100 N.E.2d 624, 633 (1980).

3. "Penal institution" or "correctional institution."

A "penal institution" or a "correctional institution" is defined as "any building, enclosure, space or structure used for the custody, control and rehabilitation of committed offenders and of such other persons

as may be placed in custody therein in accordance with law.”

G.L. c. 125, § 1(d), (e) & (k). A police station cell block is not a penal institution. *Commonwealth v. Clay*, 65 Mass. App. Ct. 215, 216, 837 N.E.2d 725, 726 (2005). Nor does the statute seem to apply to persons who, in the absence of criminal charges, have been civilly committed under G.L. c. 123, §§ 7, 8.

4. “Jail.” A “jail” is a facility that is used for the detention

of persons who are charged with a crime and committed by a

court until they are tried.

G.L. c. 126, § 4. “Jails may also be used for the detention of persons arrested without a warrant and not admitted to bail pending appearance before the district court” instead of a local lock-up. *Id.*

NOTES:

1. **Common law escape.** In Massachusetts an escape by a convicted criminal that is not encompassed by one of the various escape statutes may still be punished as an offense at common law. *Commonwealth v. Farrell*, 87 Mass. (5 Allen) 130 (1862).

2. **Necessity defense.** Necessity may be a defense to an escape charge. *Commonwealth v. Thurber*, 383 Mass. 328, 330-333, 418 N.E.2d 1253, 1256-1257 (1981); *Commonwealth v. Mandile*, 17 Mass. App. Ct. 657, 659-661, 461 N.E.2d 838, 840-841 (1984); *Commonwealth v. O'Malley*, 14 Mass. App. Ct. 314, 319-322, 439 N.E.2d 832, 835-837 (1982). See Instruction 9.240 (Necessity or Duress).