

## Kidnapping

<NOTE: A person may be convicted of kidnapping under any one of three theories.<sup>1</sup> The judge should charge on the theory or theories supported by the evidence.>

### (a) First Theory – Confined in Massachusetts.

DFT is charged with kidnapping AVM. To prove DFT guilty of kidnapping, the Commonwealth must prove four elements beyond a reasonable doubt.

1. DFT confined AVM in Massachusetts;<sup>2</sup>
2. DFT did so forcibly or secretly;
3. DFT did so against AVM's will; and
4. DFT did so without lawful authority.

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<sup>1</sup> G.L. c. 265, § 26 states: "Whoever, without lawful authority, [1] forcibly or secretly confines, or imprisons another person within this Commonwealth against his will, or [2] forcibly carries or sends such person out of this commonwealth, or [3] forcibly seizes and confines or inveigles or kidnaps another person, with intent either to cause him to be secretly confined or imprisoned within this commonwealth against his will, or to cause him to be sent out of this commonwealth against his will or in any way held to service against his will, shall be punished." (Internal numbering was added to designate the three different theories of kidnapping.)

<sup>2</sup> Massachusetts cases treat the terms "confine" and imprison as synonymous under the kidnapping statute. See, e.g., *Commonwealth v. Wilcox*, 72 Mass. App. Ct. 344, 350 (2008) ("The law of this Commonwealth for over one century instructs that 'any restraint of a person's liberty is a confinement or an imprisonment.'") (quoting *Commonwealth v. Dykens*, 438 Mass. 827, 841 (2003)). The same is true in other contexts. See *Ortiz v. Hampden County*, 16 Mass. App. Ct. 138, 140 (1983) ("false imprisonment requires unlawful confinement"). Dictionaries define each term by using the other. See, e.g., [https://www.merriamwebster.com/dictionary/imprison?utm\\_campaign=sd&utm\\_medium=serp&utm\\_source=jsonld](https://www.merriamwebster.com/dictionary/imprison?utm_campaign=sd&utm_medium=serp&utm_source=jsonld). To the extent "imprison" has as a meaning "to put in a prison," which is a form of "confinement," using the term "confine" is more unambiguously inclusive.

“Confine” means to enclose within bounds, isolate, restrict, restrain, shut up or keep in.<sup>3</sup> So, to prove the first element, the Commonwealth must prove that DFT restrained AVM’s movement in some way, and did so within Massachusetts.

As for the second element, the Commonwealth must prove either that DFT used force to restrain AVM’s movement or that DFT restrained AVM in secret.<sup>4</sup>

Force may involve actual physical contact or threatened contact. Examples of actual force include grabbing or dragging someone. An example of threatened force is compelling someone to move by using menacing words or gestures.<sup>5</sup>

Secretly, as used here, should be given its common meaning.<sup>6</sup>

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<sup>3</sup> *Commonwealth v. Oberle*, 476 Mass. 539, 548 (2017); *Commonwealth v. Nickerson*, 87 Mass. (5 Allen) 518, 525–26 (1862); *Commonwealth v. Rivera*, 460 Mass. 139, 142–144 (2011) (“In the context of the kidnapping statutes, the word “confine” has been interpreted to mean “any restraint of a person’s movement.”); *Commonwealth v. Jackson*, 417 Mass. 830, 844 (1994) (conviction for kidnapping upheld where there was evidence that the victim “was transported, that he was alive at the time that he was bound, and that the manner in which he was bound would have rendered him incapacitated”).

<sup>4</sup> Cf. *Commonwealth v. Maynard*, 436 Mass. 558, 567 (2002) (“forcibly or secretly confines,” the statutory language, means the same thing as “to confine ... by force and in secret”).

<sup>5</sup> *Commonwealth v. Caracciola*, 409 Mass. 648, 652 (1991); *Commonwealth v. LaPlante*, 73 Mass. App. Ct. 199, 202-03 (2008).

<sup>6</sup> <**Alternative Instruction**> A judge who feels that the case calls for a definition of “secretly confine” may instruct as follows:

Confinement is “secret” if it happens in a place or in a manner that makes it unlikely that members of the public will know or learn of the person’s unwilling confinement within a reasonable period of time.

See *Commonwealth v. Rivera*, 460 Mass. 139, 142–144 (2011) (to secretly confine someone is to isolate or insulate them from meaningful contact or communication with the public, where the confinement is in a place or manner that makes it unlikely that members of the public will know or learn of the victim’s unwilling confinement within a reasonable period of time) (citing 3 W.R. LaFave, *Substantive Criminal Law*

Third, the Commonwealth must also prove that DFT confined AVM against his/her will, that is without his/her consent.<sup>7</sup> A person who submits because of force or threat of force has not consented.<sup>8</sup>

Finally, the Commonwealth must prove that DFT did not have lawful authority to confine AVM. An act is under lawful authority if it is permitted by law. For example, a parent, teacher, or other caretaker of a child may reasonably limit that child's movement or behavior.

**(b) Second Theory – Carried or Sent out of Massachusetts.**

DFT is charged with kidnapping AVM. To prove DFT guilty of kidnapping, the Commonwealth must prove three elements beyond a reasonable doubt.

1. DFT carried or sent AVM out of Massachusetts;
2. DFT did so forcibly; and
3. DFT did so without lawful authority.

To prove the first element, the Commonwealth must prove that DFT moved, took, or transported AVM out of Massachusetts, or caused AVM to be moved, taken, or transported out of Massachusetts.

As for the second element, the Commonwealth must prove that DFT used force to carry or send AVM out of Massachusetts. Force may involve actual physical contact or threatened contact. Examples of actual force include

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§ 18.1(c), at 17 (3rd ed. 2003)); *Commonwealth v. Jackson*, 417 Mass. 830, 844 (1994) (conviction for kidnapping upheld where there was evidence that the victim "was transported, that he was alive at the time that he was bound, and that the manner in which he was bound would have rendered him incapacitated").

<sup>7</sup> *Commonwealth v. Edgerly*, 13 Mass. App. Ct. 562, 580 (1982) (the phrase "against her will" is equal to "without her consent"); see also *Commonwealth v. Travis*, 408 Mass. 1, 8 (1990) (preventing victim from leaving car "by pushing against her body with his hand" can support inference of nonconsensual conduct). A twelve-year-old child falls within the "tender years doctrine" and, as a matter of law, cannot consent to leaving or being taken from the custody of his or her parents or legal guardians. *Commonwealth v. Colon*, 431 Mass. 188, 191 (2000).

<sup>8</sup> *Commonwealth v. Caracciola*, 409 Mass. 648, 651 (1991).

grabbing or dragging someone. An example of threatened force is compelling someone to move by using menacing words or gestures.<sup>9</sup>

Finally, the Commonwealth must prove that DFT did not have lawful authority to confine AVM. An act is under lawful authority if it is permitted by law. For example, a parent, teacher, or other caretaker of a child may reasonably limit that child's movement or behavior.

**(c) Third Theory – Forcibly Seized and Confined, or Tricked into Confinement.**

DFT is charged with kidnapping AVM. To prove the DFT guilty of kidnapping, the Commonwealth must prove three elements beyond a reasonable doubt.

1. DFT [forcibly seized and confined AVM], or [tricked AVM into confinement];  
*< Instruct only on the conduct applicable to the case > .*
2. DFT did so without lawful authority; and
3. DFT intended either: [(i) to cause AVM to be secretly confined in Massachusetts against AVM's will,] [(ii) or to cause AVM to be sent out of Massachusetts against his/her will;] [(iii) or to cause AVM to be in any way held to service against AVM's will].  
*< Instruct on whichever of these theories is pressed at trial and delete the others.>*

"Seized" as used here, should be given its common meaning.<sup>10</sup>

"Confine" means to enclose within bounds, isolate, restrict, retrain, shut up or keep in. Any restraint of a person's movement is confinement.<sup>11</sup> So, to

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<sup>9</sup> *Commonwealth v. Caracciola*, 409 Mass. 648, 652 (1991); *Commonwealth v. LaPlante*, 73 Mass. App. Ct. 199, 202-03 (2008).

<sup>10</sup> *< Alternative Instruction >* A judge who feels that the case calls for a definition of "seize" may instruct as follows:

"To seize" means to forcibly take possession of a person.

See Black's Law Dictionary (11<sup>th</sup> ed. 2019).

<sup>11</sup> See fn. 3 above.

prove the first element, the Commonwealth must prove that DFT restrained AVM's movement, and did so either by forcibly "seizing" them<sup>12</sup> or by tricking them in some way.

Force may involve actual physical contact or threatened contact. Examples of actual force include grabbing or dragging someone. An example of threatened force is compelling someone to move by using menacing words or gestures.<sup>13</sup>

The Commonwealth may also prove this first element by proving that DFT was able to confine AVM using some kind of trickery. If it proves that AVM was confined by trickery, the Commonwealth does not have to prove that DFT used force.<sup>14</sup>

To prove the second element, the Commonwealth must prove that DFT did not have lawful authority to confine AVM. An act is under lawful authority if it is permitted by law. For example, a parent, teacher, or other caretaker of a child may reasonably limit that child's movement or behavior.

Finally, the Commonwealth must also prove that DFT acted with the specific intent to cause AVM [to be secretly confined in Massachusetts against his/her will] [to be sent out of Massachusetts against AVM's will] [to be held to service against AVM's will].

*< Charge on whichever theory is pressed at trial >*

Intent is a state of mind. It means a person's purpose or objective. A person does an act with a specific intent to cause AVM [to be secretly confined in Massachusetts against his/her will] [to be sent out of Massachusetts against

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<sup>12</sup> *< Alternative Instruction >* A judge who defined seize may instruct as follows: "meaning to forcibly take possession of AVM" prior to "or by tricking. . ."

<sup>13</sup> *Commonwealth v. Caracciola*, 409 Mass. 648, 652 (1991); *Commonwealth v. LaPlante*, 73 Mass. App. Ct. 199, 202-03 (2008).

<sup>14</sup> See *Commonwealth v. Toto*, 487 Mass. 708, 735 (2021) (third clause of G.L. c. 256, § 26, "covers cases where the victim ... was confined, but not forcibly or secretly"); *Commonwealth v. Colon*, 431 Mass. 188, 191 n.6 (2000) (referring to "kidnapping by 'inveiglement' without the use of force").

AVM's will] [to be held to service against AVM's will] if the person has in mind the specific purpose or objective of causing AVM [to be secretly confined in Massachusetts against his/her will] [to be sent out of Massachusetts against AVM's will] [to be held to service against AVM's will] when the person does the act. The decision to do the act for that purpose requires some period of thought and deliberation, however brief.

< *If the theory of intent is to confine secretly.*> Secretly, as used here, should be given its common meaning.<sup>15</sup>

< *If the theory of intent is to send out of Massachusetts.*> A defendant carries or sends another out of Massachusetts if he/she moves, takes, or transports, or causes that person to be moved, taken, or transported, out of Massachusetts.

< *If the theory of intent is to hold to service.*> To hold to service means to force a person to work or perform services against his/her will.

Against AVM's will means that AVM did not consent to being confined. A person who submits because of force or threat of force has not consented.<sup>16</sup>

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<sup>15</sup> < *Alternative Instruction*> A judge who feels that the case calls for a definition of "secretly confine" may instruct as follows:

To prove that DFT intended to secretly confine AVM, the Commonwealth must prove that DFT intended to confine AVM in a place or in a manner that would make it unlikely that members of the public would know or learn of AVM's unwilling confinement within a reasonable period of time.

See fn. 6 above; *Commonwealth v. Rivera*, 460 Mass. 139, 144 (2011).

<sup>16</sup> *Commonwealth v. Caracciola*, 409 Mass. 648, 651 (1991).

## SUPPLEMENTAL INSTRUCTION

### Kidnapping with Intent To Extort<sup>17</sup>

Kidnapping with intent to extort has one element in addition to those required for kidnapping: that DFT committed the kidnapping with the specific intent to extort money or some other valuable thing.

To “extort” means to obtain property, coerce payment of money, secure a financial advantage for oneself, or compel another to do an act against his/her will.

Intent is a state of mind. It means a person’s purpose or objective. A person does an act with a specific intent to cause AVM [to be secretly confined in Massachusetts against his/her will] [to be sent out of Massachusetts against AVM’s will] [to be held to service against AVM’s will] if the person has in mind the specific purpose or objective of causing AVM [to be secretly confined in Massachusetts against his/her will] [to be sent out of Massachusetts against AVM’s will] [to be held to service against AVM’s will] when the person does the act. The decision to do the act for that purpose requires some period of thought and deliberation, however brief.<sup>18</sup>

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<sup>17</sup> G.L. c. 265, § 26 states: “Whoever commits any offence described in this section with the intent to extort money or other valuable thing thereby shall be punished.”

<sup>18</sup> If the judge previously instructed on specific intent in the context of the “third theory” of kidnapping, the judge does not have to redefine specific intent and may simply explain that the words specific intent have the same meaning previously given.