

## 24.4 Escape from Custody (18 U.S.C. § 751(a))

The defendant is charged in [Count \_\_\_\_\_ of] the indictment with escape from custody in violation of Section 751(a) of Title 18 of the United States Code. For the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant was in the custody of [specify custodian];

Second, the defendant was in custody by virtue of [specify reason for or type of custody]; and

Third, the defendant knowingly and voluntarily left custody without permission.

### Comment

An intent to avoid confinement is not an element of escape. *United States v. Bailey*, 444 U.S. 394, 408 (1980).

Section 751(a) provides a maximum punishment of one year in prison for certain types of custody, such as custody imposed by virtue of an arrest for a misdemeanor, and a maximum punishment of five years in prison for other types of custody, such as custody imposed by virtue of a felony arrest. It is therefore necessary to include the type of custody in the instruction. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (holding that other than fact of prior conviction, any fact that increases statutory maximum must be submitted to jury).

For cases considering what constitutes federal custody under 18 U.S.C. § 751(a), see

*United States v. Brown*, 875 F.3d 1235, 1239 (9th Cir. 2017) (holding that federal inmate in state custody under writ of habeas corpus ad prosequendum was in federal custody); *United States v. Burke*, 694 F.3d 1062, 1064-65 (9th Cir. 2012) (holding that defendant who resided at residential reentry center under supervised release was not in federal custody).

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