

**1775A ESCAPE: INDIVIDUAL WITH CUSTODY INJURED — § 946.42(4)**

THE FOLLOWING INSTRUCTION SHOULD BE GIVEN IMMEDIATELY AFTER THE INSTRUCTION ON THE ESCAPE OFFENSE CHARGED.

If you find the defendant guilty, you must answer the following question:

"Was an individual who had custody of the defendant injured during the course of the escape?"

Before you may answer this question "yes," you must be satisfied beyond reasonable doubt that the answer is "yes."

If you are not so satisfied, you must answer the question "no."

**COMMENT**

Wis JI-Criminal 1775A was approved by the Committee in July 2008.

This instruction provides a special question to be added to instructions for escape offenses where a violation of subsection (4) of § 946.42 is alleged. This subsection was created by 2007 Wisconsin Act 226 [effective date: May 31, 2008] and reads as follows:

(4) If a person is convicted of an escape under this section, the maximum term of imprisonment for the escape may be increased by not more than 5 years if an individual who had custody of the person who escaped is injured during the course of the escape.

Because the facts identified in this subsection increase the maximum penalty for the crime, they must be submitted to the jury. Apprendi v. New Jersey, 530 U.S. 466 (2000).

The Committee recommends that this penalty-enhancing fact be submitted to the jury in the form of a special question. The following form is suggested for the verdict:

We, the jury, find the defendant guilty of escape, under Wis. Stat. § \_\_\_\_\_, at the time and place charged in the (information) (complaint).

We, the jury, find the defendant not guilty.

If you find the defendant guilty, answer the following question "yes" or "no":

"Was an individual who had custody of the defendant injured during the course of the escape?"