NO. _____

IN THE UNITED STATES SUPREME COURT

_____ TERM

TRAVIS MILES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX

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No. 19-5741

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TRAVIS MILES,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Travis Miles, a federal prisoner represented by counsel, appeals the district court's judgment denying his 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence. The court construes his notice of appeal as an application for a certificate of appealability ("COA"). *See* 28 U.S.C. § 2253(c)(1)(B); Fed. R. App. P. 22(b)(2). Miles also moves to proceed in forma pauperis.

In 2014, Miles pleaded guilty without a plea agreement to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). In 2015, the district court sentenced him under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(1), to 180 months of imprisonment. Miles did not appeal. In 2016, he filed this § 2255 motion, arguing that his ACCA sentence should be voided given the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015). The district court denied his motion and declined to issue a COA. *Miles v. United States*, No. 3:16-CV-00327-PLR, 2019 WL 2062509 (E.D. Tenn. May 9, 2019).

A court may issue a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "That standard is met when 'reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner,'" *Welch v. United States*, 136 S. Ct. 1257, 1263 (2016) (quoting *Slack v.*

McDaniel, 529 U.S. 473, 484 (2000)), or when "jurists could conclude the issues presented are adequate to deserve encouragement to proceed further," *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

The ACCA increases a § 922(g) offender's potential sentence from a maximum of 120 months of imprisonment, *see* 18 U.S.C. § 924(a)(2), to a minimum of 180 months, *see* 18 U.S.C. § 924(e)(1). To qualify, a defendant must have three prior convictions that meet the ACCA's definition of "violent felony." *Id.* The ACCA defines a "violent felony" as "any crime punishable by imprisonment for a term exceeding one year" that (1) "has as an element the use, attempted use, or threatened use of physical force against the person of another" (the elements clause); (2) "is burglary, arson, or extortion, [or] involves [the] use of explosives" (the enumerated-offense clause); or (3) "otherwise involves conduct that presents a serious potential risk of physical injury to another" (the residual clause). 18 U.S.C. § 924(e)(2)(B). In *Johnson*, the Supreme Court struck down the ACCA's residual clause as unconstitutionally vague. 135 S. Ct. at 2563.

The district court determined that Miles qualified for an ACCA sentence based on his prior conviction for Tennessee aggravated burglary, *see* Tenn. Code Ann. § 39-14-403, and three prior convictions for Tennessee burglary, *see* Tenn. Code Ann. § 39-14-402(a). In Miles's § 2255 motion, he argued that his sentence should be voided because his prior convictions qualified as ACCA predicates under the now-defunct residual clause, and so, after *Johnson*, they were no longer "violent felon[ies]" under the ACCA. The government argued in response that Miles's Tennessee aggravated-burglary and burglary convictions were ACCA predicates under the enumerated-offense clause. The district court agreed, holding that *Johnson* did not affect Miles's sentence. *Miles*, 2019 WL 2062509, at *3.

A conviction meets the enumerated-offense clause if the elements of the offense are the same as or narrower than the generic form of the offense. *See Descamps v. United States*, 570 U.S. 254, 257 (2013). When a statute is "divisible," that is, when it "list[s] elements in the alternative, and thereby define[s] multiple crimes," then "a sentencing court looks to a limited class of [what are called *Shepard*] documents (for example, the indictment, jury instructions, or plea

agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of." *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016) (citing *Shepard v. United States*, 544 U.S. 13, 26 (2005)).

Tennessee's burglary statute provides that "[a] person commits burglary [when], without the effective consent of the property owner," he

> (1) Enters a building other than a habitation (or any portion thereof) not open to the public, with intent to commit a felony, theft or assault;
>
> (2) Remains concealed, with the intent to commit a felony, theft or assault, in a building;
>
> (3) Enters a building and commits or attempts to commit a felony, theft or assault; or
>
> (4) Enters any freight or passenger car, automobile, truck, trailer, boat, airplane or other motor vehicle with intent to commit a felony, theft or assault or commits or attempts to commit a felony, theft or assault.

Tenn. Code Ann. § 39-14-402(a). This court recently reaffirmed that the statute is divisible and that convictions subsections (1), (2), or (3) "fit within the generic definition of burglary and are therefore violent felonies for purposes of the ACCA." *Brumbach v. United States*, 929 F.3d 791, 794 (6th Cir. 2019) (quoting *United States v. Ferguson*, 868 F.3d 514, 515 (6th Cir. 2017), *cert. denied*, 139 S. Ct. 2712 (2019)). Subsection (4), because it includes crimes that take place in locations other than a building or structure, is not generic burglary, *see Taylor v. United States*, 495 U.S. 575, 599 (1990), and does not qualify as an ACCA predicate under the enumerated-offense clause, *see United States v. Davis*, 737 F. App'x 736, 739 (6th Cir. 2018). Helpfully, a conviction under subsections (1), (2), or (3) is a Class D felony, *see* Tenn. Code Ann. § 39-14-402(c), while a conviction under subsection (4), which is not an ACCA predicate offense, is a Class E felony, *see* Tenn. Code Ann. § 39-14-402(d). Thus, if the *Shepard* documents show that a defendant was convicted of Class D felony burglary, it follows that the offense is an ACCA predicate.

The *Shepard* documents here showed that Miles's prior Tennessee burglary convictions were Class D felonies and thus qualified as ACCA predicates. Therefore, because his three

convictions met the ACCA's enumerated-offense clause, the district court held that Miles's sentence was not called into question by *Johnson* or related cases. *Miles*, 2019 WL 2062509, at *3. The court also noted that, in *United States v. Stitt*, 139 S. Ct. 399, 406-07 (2018), the Supreme Court had recently held that Tennessee aggravated burglary also qualified as an ACCA predicate under the enumerated-offense clause, and so Miles's fourth conviction for that offense also qualified. *Miles*, 2019 WL 2062509, at *3.

No reasonable jurist could debate the district court's denial of Miles's § 2255 motion. Given this court's precedents holding that Class D felony burglary in Tennessee qualifies as an ACCA predicate offense under the enumerated-offense clause, Miles has not made a substantial showing that his ACCA sentence was unconstitutional.

Accordingly, Miles's COA application is **DENIED**, and his motion to proceed in forma pauperis is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

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Re: Case No. 19-5741, *Travis Miles v. USA*
Originating Case No. : 3:16-cv-00327 : 3:14-cr-00100-1

Dear Counsel

The Court issued the enclosed (Order/Opinion) today in this case.

Sincerely yours,

s/Michelle M. Davis
Case Manager
Direct Dial No. 513-564-7025

cc: Mr. John L. Medearis

Enclosure

No mandate to issue

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

TRAVIS MILES,	)	
	)	
Petitioner,	)	
	)	
v.	)	**No.: 3:16-CV-00327-PLR**
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

MEMORANDUM OPINION

Federal inmate Travis Miles has filed a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. Respondent has filed a response in opposition to the petition. Having considered the pleadings and the record, along with the relevant law, the Court finds that it is unnecessary to hold an evidentiary hearing[1], and Miles' § 2255 motion will be denied.

I. BACKGROUND FACTS AND PROCEDURAL HISTORY

In 2014, Miles pleaded guilty and was convicted of possessing a firearm as a felon in violation of 18 U.S.C. § 922(g) [*See* Doc. 15 in No. 3:14-CR-100]. Based on his prior convictions, which included three burglaries and one aggravated burglary, Miles was deemed an armed career criminal [Doc. 16 ¶¶ 20, 28, 34, 37, 39, 59 in No. 3:14-CR-100]. At sentencing, this Court imposed the statutorily-mandated minimum sentence of 180 months' imprisonment [Doc. 22 in No. 3:14-CR-100]. Miles did not appeal. On June 14, 2016, with the assistance of counsel, Miles filed the instant § 2255 motion, alleging that his status as an armed career criminal is no longer valid after

[1] An evidentiary hearing is required on a § 2255 motion unless the motion, files, and record conclusively show that the prisoner is not entitled to relief. *See* 28 U.S.C. § 2255(b). It is the prisoner's ultimate burden, however, to sustain his claims by a preponderance of the evidence. *See Pough v. United States*, 442 F.3d 959, 964 (6th Cir. 2006). Accordingly, where "the record conclusively shows that the petitioner is entitled to no relief," a hearing is not required. *Arredondo v. United States*, 178 F.3d 778, 782 (6th Cir. 1999) (citation omitted).

the Supreme Court's decision in *Johnson v. United States*, which invalidated the residual clause of the Armed Career Criminal Act "(ACCA") [Doc. 1]. *Johnson v. United States*, 135 S. Ct. 2551 (2015). The United States was ordered to respond to Miles' allegations, and it complied with the order by filing a response in opposition to the motion on July 18, 2016 [Doc. 3].

II. LEGAL STANDARD

After a defendant has been convicted and exhausted his appeal rights, a court may presume that "he stands fairly and finally convicted." *United States v. Frady*, 456 U.S. 152, 164 (1982). A court may grant relief under 28 U.S.C. § 2255, but the statute "does not encompass all claimed errors in conviction and sentencing." *United States v. Addonizio*, 442 U.S. 178, 185 (1979). Rather, collateral attack limits a movant's allegations to those of constitutional or jurisdictional magnitude, or those containing factual or legal errors "so fundamental as to render the entire proceeding invalid." *Short v. United States*, 471 F.3d 686, 691 (6th Cir. 2006) (citation omitted); *see also* 28 U.S.C. § 2255(a).

III. ARMED CAREER CRIMINAL ACT STANDARDS

The ACCA requires a 15-year minimum sentence for a felon who unlawfully possesses a firearm after having sustained three prior convictions "for a violent felony or a serious drug offense, or both." 18 U.S.C. § 924(e)(1). The statute defines a "violent felony" as "any crime punishable by imprisonment for a term exceeding one year" that (1) "has as an element the use, attempted use, or threatened use of physical force against the person of another" (the "use-of-force clause"); (2) "is burglary, arson, or extortion, involves use of explosives" (the "enumerated-offense clause"); or (3) "otherwise involves conduct that presents a serious potential risk of physical injury to another") (the "residual clause"). 18 U.S.C. § 924(e)(2)(B).

In *Johnson v. United States*, the Supreme Court struck down the residual clause of the ACCA as unconstitutionally vague and violative of due process. *Johnson*, 135 S. Ct. at 2563.

However, *Johnson* did not invalidate "the remainder of the Act's definition of a violent felony." *Id.* Therefore, for a § 2255 petitioner to obtain relief under *Johnson*, he must show that his ACCA-enhanced sentence was necessarily based on a predicate violent felony that only qualified as such under the residual clause. *See, e.g., Potter v. United States*, 887 F.3d 785, 788 (6th Cir. 6018). Accordingly, post-*Johnson*, a defendant can properly receive an ACCA-enhanced sentence based either on the statute's use-of-force or enumerated-offense clauses. *United States v. Priddy*, 808 F.3d 676, 683 (6th Cir. 2015); *see also United States v. Taylor*, 800 F.3d 701, 719 (6th Cir. 2015) (affirming ACCA sentence where prior convictions qualified under use-of-force and enumerated-offense clauses).

In evaluating whether a conviction qualifies as a predicate offense under the ACCA's enumerated-offense clause, courts apply the "categorical approach," which requires the reviewing court to compare the elements of the statute of conviction with the "generic elements" of the offense. *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016); *Descamps v. United States*, 570 U.S. 254, 257 (2013). If the statute of conviction is broader than that criminalizing the generic offense, then it cannot qualify as a violent felony, regardless of the facts comprising the offense. *See, e.g., Mathis*, 136 S. Ct. at 2248-49.

IV. ANALYSIS

Miles claims that his aggravated burglary and burglary convictions are no longer ACCA predicates after *Johnson*, as they only qualify as "violent felonies" under the now-void residual clause [*See* Doc. 1 p.2]. As noted above, a burglary offense constitutes a predicate offense for purposes of the enumerated-offense clause of the ACCA when the offense's statutory definition substantially corresponds to the "generic" definition of burglary, which the Supreme Court has defined as "any crime, regardless of its exact definition or label, having the basic elements of

unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Taylor v. United States*, 495 U.S. 575, 599 (1990).

The Tennessee burglary statute under which Miles was convicted provides that an individual commits burglary when, "without the effective consent of the property owner," he:

> (1) Enters a building other than a habitation (or any portion thereof) not open to the public, with intent to commit a felony, theft or assault;
>
> (2) Remains concealed, with the intent to commit a felony, theft or assault, in a building;
>
> (3) Enters a building and commits or attempts to commit a felony, theft or assault; or
>
> (4) Enters any freight or passenger car, automobile, truck, trailer, boat, airplane or other motor vehicle with intent to commit a felony, theft or assault or commits or attempts to commit a felony, theft or assault.

Tenn. Code Ann. § 39-14-402(a). Burglary under subsections (a)(1) through (a)(3) is a Class D felony, while burglary under subsection (a)(4) is a Class E felony. *See* Tenn. Code Ann. § 39-14-402(c),(d).

Tennessee's burglary statute is "divisible," in that it lists elements in the alternative to define several different variants of the crime. *See United States v. Davis*, 737 F. App'x 736, 739 (6th Cir. June 13, 2018); *Lofties v. United States*, 694 F. App'x 996, 1000 (6th Cir. June 1, 2017). When considering whether a conviction under a divisible statute qualifies as a predicate offense under the enumerated-offense clause of the ACCA, courts may employ the "modified categorical approach" in order to evaluate which of the alternative elements constituted the offense of conviction. *See, e.g., Mathis*, 136 S. Ct. at 2249. Under this approach, courts may review a limited set of documents (referred to as *Shepard* documents) to determine the elements of the crime of conviction and compare that crime to the generic offense. *See id.; see also Shepard v. United States*, 125 S. Ct. 1254 (2005).

In this case, a review of the *Shephard* documents associated with Miles' burglary convictions show that Miles was convicted of Class D felonies, necessarily indicating violations of subsection (a)(1), (2), or (3) of the burglary statute [Doc. 27-1 in No. 3:14-CR-100]. Binding circuit precedent holds that violations of these subsections constitute generic burglary, and therefore, such violations are violent felonies under the enumerated-offense clause of the ACCA. *See United States v. Ferguson*, 868 F.3d 514, 515 (6th Cir. 2017); *Priddy*, 808 F.3d at 684-85; *see also United States v. Eason*, 643 F.3d 622, 624 (8th Cir. 2011) ("Subparts (1) – (3) of [§ 39-14-402] plainly set forth the elements of generic burglary as defined by the Supreme Court in *Taylor*."). Accordingly, Miles' three burglary convictions qualify as ACCA predicates, and he is properly classified as an armed career criminal.

Moreover, the Supreme Court has held that aggravated burglary under Tennessee law[2] is generic burglary within the meaning of the ACCA, and thus, a conviction under the statute is a violent felony under the ACCA's enumerated-offense clause. *United States v. Stitt*, 139 S. Ct. 399, 406-07 (2018). Therefore, Miles' conviction for aggravated burglary also qualifies as an ACCA predicate.

IV. CERTIFICATE OF APPEALABILITY

When considering a § 2255 motion, this Court must "issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rule 11 of the Rules Governing Section 2255 Proceedings for the United States District Courts. Miles must obtain a COA before he may appeal the denial of his § 2255 motion. 28 U.S.C. § 2253(c)(1)(B). A COA will issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). For cases rejected on their merits, a movant "must demonstrate that

[2] Aggravated burglary is burglary of a habitation. *See* Tenn. Code Ann. § 39-14-403(a).

reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong" to warrant a COA. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). To obtain a COA on a claim that has been rejected on procedural grounds, a movant must demonstrate "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* Based on the *Slack* criteria, the Court finds that a COA should not issue in this cause.

V. CONCLUSION

For the reasons stated above, Miles has failed to establish any basis upon which § 2255 relief could be granted, and his motion will be **DENIED**. A COA from the denial of his § 2255 motion will be **DENIED**.

An appropriate Order will enter.

Pamela L. Reeves

PAMELA L. REEVES
CHIEF UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

TRAVIS MILES,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Nos.: 3:14-CR-100-PLR-HBG**
	)	**3:16-CV-327-PLR**
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

JUDGMENT ORDER

In accordance with the Memorandum Opinion entered today, it is **ORDERED** that Petitioner's § 2255 motion [Doc. 25 in 3:14-CR-100] is **DENIED**. A certificate of appealability from this decision is **DENIED**, as Petitioner has failed to demonstrate a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). There being no remaining issues, the Clerk of Court is **DIRECTED** to close the civil case.

Additionally, the Court **CERTIFIES** that any appeal from this action would not be taken in good faith and would be frivolous. Fed. R. App. 24. Therefore, Petitioner is **DENIED** leave to proceed *in forma pauperis* on appeal. Fed. R. App. P. 24.

SO ORDERED.

ENTER:

Pamela L. Reeves

PAMELA L. REEVES
CHIEF UNITED STATES DISTRICT JUDGE

ENTERED AS A JUDGMENT

/s/ JOHN L. MEDEARIS
JOHN L. MEDEARIS
CLERK OF COURT

TENNESSEE
PATTERN
JURY INSTRUCTIONS

Volume 7

CRIMINAL

[T.P.I.—CRIM.]

SECOND EDITION

Prepared and Edited by

THE COMMITTEE ON PATTERN JURY
INSTRUCTIONS (CRIMINAL)
OF THE
TENNESSEE JUDICIAL CONFERENCE

REPORTER

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ST. PAUL, MINN.
WEST PUBLISHING CO.
1988

CHAPTER 11.00

BURGLARY

Table of Instructions

Library References:

C.J.S. Burglary § 127.
West's Key No. Digests, Burglary ⇐46.

T.P.I.—CRIM. 11.01

BURGLARY: FIRST DEGREE

Burglary in the first degree is defined as breaking and entering a dwelling house or any other house, building, room or rooms therein used and occupied by any person or persons as a dwelling place or lodging, either permanently or temporarily, and whether as owner, renter, tenant, lessee, or paying guest, by night, with the intent to commit a felony.[1]

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:

(1) that the defendant did break and enter the alleged dwelling place.

T.P.I. 11.01

1. Tenn. Code Ann. § 39-3-401 (1982).

(a) The breaking requires only the slightest use of force by which an obstruction to entry is removed. For example, opening an unlocked door or further opening a window already open to allow entry constitutes breaking.[2]

(b) The entering requires only the slightest penetration of the space within the dwelling place, by a person with his hand or any instrument held in his hand.[3]

[(c) If a person enters a dwelling place with the intent to commit a felony, without a breaking, but subsequently breaks any part of the premises, or any safe or receptacle within the premises, then such person shall be treated as though he had broken and entered the premises.[4]],

(2) that the defendant entered with the intent to commit the felony of _____ therein; [5]

(3) that the structure was occupied permanently or temporarily as a dwelling. It is not necessary that occupants of the structure actually own it; it is sufficient if the structure was occupied as a dwelling by the owner or a renter, a tenant, a lessee, or a paying guest.[6] It is not necessary that there be anyone living in the dwelling at the time of the

2. Goins v. State, 192 Tenn. 32, 237 S.W.2d 8 (1950); Claiborne v. State, 113 Tenn. 261, 83 S.W. 352 (1904); Hall v. State, 584 S.W.2d 819 (Tenn. Crim. App. 1979). See also 13 Am.Jur.2d Burglary §§ 11–12 (1964).

3. State v. Crow, 517 S.W.2d 753 (Tenn. 1974); Hall v. State, 584 S.W.2d 819 (Tenn. Crim. App. 1979); 2 Wharton's Criminal Law and Procedure § 421, at 43 (R. Anderson ed. 1957).

4. Tenn. Code Ann. § 39–3–402 (1982).

5. State v. Lindsay, 637 S.W.2d 886 (Tenn. Crim. App. 1982).

6. Hindman v. State, 215 Tenn. 127, 384 S.W.2d 18 (1964); Hobby v. State, 480 S.W.2d 554 (Tenn. Crim. App. 1972); Taylor v. State, 2 Tenn.Crim.App. 459, 455 S.W.2d 168 (1970).

breaking and entering as long as it was not abandoned as a dwelling unit;[7] and

(4) that the offense occurred during the nighttime.[8]

[If you find beyond a reasonable doubt that the defendant is guilty of Burglary in the First Degree, and if you further find beyond a reasonable doubt that the defendant had in his possession a firearm at the time of the breaking and entering, then you shall so state in your verdict.][9]

[Possession of the firearm may be [actual or constructive] [exclusive or joint]. [Constructive] [joint] possession may occur only where the personally unarmed participant has the power and ability to exercise control over the firearm. Such possession may never exist absent knowledge that the other participant is in possession of a firearm][10]

7. State ex rel. Wooten v. Bomar, 209 Tenn. 166, 352 S.W.2d 5 (1961), cert. denied 370 U.S. 932, 82 S.Ct. 1616, 8 L.Ed.2d 832 (1962); State v. Berry, 598 S.W.2d 828 (Tenn. Crim. App. 1980). A person may maintain one or more homes as a dwelling house provided each home is intended to be a place of habitation. State v. Berry, 598 S.W.2d 828 (Tenn. Crim. App. 1980).

8. Trentham v. State, 210 Tenn. 381, 358 S.W.2d 470 (1962); Ledger v. State, 199 Tenn. 155, 285 S.W.2d 130 (1955); State v. Hammonds, 616 S.W.2d 890 (Tenn. Crim. App. 1981). In the absence of a statutory definition of nighttime, the common law definition should be followed:

> [N]ighttime within the definition of burglary, is, as was held at common law, that period between sunset and sunrise during which there is not daylight enough by which to discern or identify a man's face, except by artificial light or moonlight. It is not the less nighttime, within the definition of burglary, because the street lamps, or the reflection from the snow, or the moon, or all together, give sufficient light to discern a man's face, but the test is whether there is sufficient daylight. For the purpose of determining nighttime as an element of burglary, it is considered that moonlight or artificial light does turn night into day, nor can smog or fog turn daytime into nighttime. 616 S.W.2d at 894 quoting 12 C.J.S. Burglary § 26b (1960).

9. Tenn. Code Ann. § 39-3-401 (1982). This optional instruction serves only to enhance punishment upon a finding that the burglar was armed and should not be construed to create the separate crime of armed burglary. Key v. State, 563 S.W.2d 184, 186 (Tenn. 1978). However, this instruction is only applicable if the indictment included the charge that the defendant possessed a firearm at the time of the offense. State v. Lindsay, 637 S.W.2d 886 (Tenn. Crim. App. 1982).

10. Key v. State, 563 S.W.2d 184 (Tenn. 1978).

COMMENT

A jury would be warranted to infer, in the absence of an acceptable excuse, that a burglary is committed with the intent to steal when there has been an actual breaking and entering. See Price v. State, 589 S.W.2d 929 (Tenn. Crim. App. 1979); Petree v. State, 530 S.W.2d 90 (Tenn. Crim. App. 1975).

T.P.I.—CRIM. 11.02

BURGLARY: SECOND DEGREE

Burglary in the second degree is defined as breaking and entering a dwelling house or any other house, building, room or rooms therein used and occupied by any person or persons as a dwelling place or lodging, either permanently or temporarily, and whether as owner, renter, tenant, lessee, or paying guest, by day, with the intent to commit a felony.[1]

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:

(1) that the defendant did break and enter the alleged dwelling place.

(a) The breaking requires only the slightest use of force by which an obstruction to entry is removed. For example, opening an unlocked door or further opening a window already open to allow entry constitutes breaking.[2]

(b) The entering requires only the slightest penetration of the space within the dwelling place, by a person with his hand or any instrument held in his hand.[3]

(c) If a person enters a dwelling place with the intent to commit a felony, without a breaking,

T.P.I. 11.02

1. Tenn. Code Ann. § 39-3-402 (1982).

2. Goins v. State, 192 Tenn. 32, 237 S.W.2d 8 (1950); Claiborne v. State, 113 Tenn. 261, 83 S.W. 352 (1904); Hall v. State, 584 S.W.2d 819 (Tenn. Crim. App. 1979). *See also* 13 Am.Jur.2d Burglary §§ 11-12 (1964).

3. State v. Crow, 517 S.W.2d 753 (Tenn. 1974); Ferguson v. State, 530 S.W.2d 100 (Tenn. Crim. App. 1975); Hall v. State, 584 S.W.2d 819 (Tenn. Crim. App. 1979); 2 Wharton's Criminal Law and Procedure § 421, at 43 (R. Anderson ed. 1957).

but subsequently breaks any part of the premises, or any safe or receptacle within the premises, then such person shall be treated as though he had broken and entered the premises; [4]

(2) that the defendant entered with the intent to commit the felony of _____ therein; [5] and

(3) that the structure was occupied permanently or temporarily as a dwelling. It is not necessary that the occupants of the structure actually own it; it is sufficient if the structure was occupied as a dwelling by the owner or, a renter, a tenant, a lessee, or a paying guest.[6] It is not necessary that there be anyone living in the dwelling at the time of the breaking and entering as long as it was not abandoned as a dwelling unit.[7]

[The state is not required to show that it was daylight or dark at the time of the alleged offense to find the defendant guilty of second degree burglary.[8]]

[If you find beyond a reasonable doubt that the defendant is guilty of Burglary in the Second Degree, and if you further find beyond a reasonable doubt that the

4. *See* Tenn. Code Ann. § 39–3–402 (1982). While the specific language of § 39–3–402 only refers to § 39–3–401, the principle enunciated applies to this section. *See* Fox v. State, 214 Tenn. 694, 383 S.W.2d 25 (1964), cert. denied, 380 U.S. 933, 85 S.Ct. 938, 13 L.Ed.2d 820 (1965); Heald v. State, 472 S.W.2d 242 (Tenn. Crim. App. 1970), cert. denied 404 U.S. 825, 92 S.Ct. 54, 30 L.Ed. 2d 53 (1971).

5. State v. Lindsay, 637 S.W.2d 886 (Tenn. Crim. App. 1982).

6. Hindman v. State, 215 Tenn. 127, 384 S.W.2d 18 (1964); Hobby v. State, 480 S.W.2d 554 (Tenn. Crim. App. 1972); Taylor v. State, 2 Tenn.Crim.App. 459, 455 S.W.2d 168 (1970); Anderson v. State, 2 Tenn.Crim.App. 593, 455 S.W.2d 630 (1970).

7. State ex rel. Wooten v. Bomar, 209 Tenn. 166, 352 S.W.2d 5 (1961); State v. Berry, 598 S.W.2d 828 (Tenn. Crim. App. 1980).

8. Ledger v. State, 199 Tenn. 155, 285 S.W.2d 130 (1955); State v. Hammonds, 616 S.W.2d 890 (Tenn. Crim. App. 1981).

defendant had in his possession a firearm at the time of the breaking and entering, then you shall so state in your verdict.[9]]

[Possession of the firearm may be [actual or constructive] [exclusive or joint]. [Constructive] [Joint] possession may occur only where the personally unarmed participant has the power and ability to exercise control over the firearm. Such possession may never exist absent knowledge that the other participant is in possession of a firearm.[10]]

9. Tenn. Code Ann. § 39-3-403 (1982). This optional instruction serves only to enhance punishment upon a finding that the burglar was armed and should not be construed to create the separate crime of armed burglary. Key v. State, 563 S.W.2d 184, 186 (Tenn. 1978). However, this instruction is only applicable if the indictment included the charge that the defendant possessed a firearm at the time of the offense. State v. Lindsay, 637 S.W.2d 886 (Tenn. Crim. App. 1982).

10. Key v. State, 563 S.W.2d 184 (Tenn. 1978).

T.P.I.—CRIM. 11.03

BURGLARY: THIRD DEGREE

Burglary in the third degree [1] is defined as breaking and entering any building of another, other than a dwelling house, with the intent to commit a felony.[2]

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:

(1) that the defendant did break and enter the alleged building of another.

(a) The breaking requires only the slightest use of force by which an obstruction to entry is removed. For example, opening an unlocked door or further opening a window already open to allow entry constitutes breaking.[3]

(b) The entering requires only the slightest penetration of the space within the building, by a person with his hand or any instrument held in his hand.[4]

[(c) If a person enters a building of another with the intent to commit a felony without a breaking, but subsequently breaks any part of the premises, or any safe or receptacle within the premises, then

T.P.I. 11.03

1. Tenn. Code Ann. § 39-3-404 (1982) defines two separate offenses. Church v. State, 206 Tenn. 336, 333 S.W.2d 799 (1960). *See also*, State v. Lindsay, 637 S.W.2d 886 (Tenn. Crim. App. 1982).

2. Tenn. Code Ann. § 39-3-404 (1982).

3. Goins v. State, 192 Tenn. 32, 237 S.W.2d 8 (1950); Claiborne v. State, 113 Tenn. 261, 83 S.W. 352 (1904); Hall v. State, 584 S.W.2d 819 (Tenn. Crim. App. 1979). *See also* 13 Am.Jur.2d Burglary §§ 11-12 (1964).

4. State v. Crow, 517 S.W.2d 753 (Tenn. 1974); Ferguson v. State, 530 S.W.2d 100 (Tenn. Crim. App. 1975); Hall v. State, 584 S.W.2d 819 (Tenn. Crim. App. 1979); 2 Wharton's Criminal Law and Procedure § 421, at 43 (R. Anderson ed. 1957).

such person shall be treated as though he had broken and entered the premises.[5]

(2) that the defendant intended to commit the felony of _____ therein; [6] and

(3) that the structure was a building other than a dwelling house.[7] It need not be inhabited nor is it necessary that the occupants of the building own it.[8]

[If you find beyond a reasonable doubt that the defendant is guilty of Burglary in the Third Degree, and if you further find beyond a reasonable doubt that the defendant had in his possession a firearm at the time of the breaking and entering, then you shall so state in your verdict.] [9]

[Possession of the firearm may be [actual or constructive] [exclusive or joint]. [Constructive] [joint] possession may occur only where the personally unarmed participant has the power and ability to exercise control over the firearm. Such possession may never exist absent knowledge that the other participant is in possession of a firearm.] [10]

5. *See* Tenn. Code Ann. § 39–3–402 (1982). While the specific language of § 39–3–402 only refers to § 39–3–401, the principle enunciated applies to this section. Fox v. State, 214 Tenn. 694, 383 S.W.2d 25 (1964), cert. denied 380 U.S. 933, 85 S.Ct. 938, 13 L.Ed.2d 820 (1965); Heald v. State, 472 S.W.2d 242 (Tenn. Crim. App. 1970), cert. denied 404 U.S. 825, 92 S.Ct. 54, 30 L.Ed.2d 53 (1971).

6. State v. Lindsay, 637 S.W.2d 886 (Tenn. Crim. App. 1982).

7. Petree v. State, 530 S.W.2d 90 (Tenn. Crim. App. 1975).

8. Hindman v. State, 215 Tenn. 127, 384 S.W.2d 18 (1964).

9. Tenn. Code Ann. § 39–3–404 (1982). This optional instruction serves only to enhance punishment upon a finding that the burglar was armed and should not be construed to create the separate crime of armed burglary. Key v. State, 563 S.W.2d 184, 186 (Tenn. 1978). However, this instruction is applicable only if the indictment included the charge that the defendant possessed a firearm at the time of the offense. State v. Lindsay, 637 S.W.2d 886 (Tenn. Crim. App. 1982).

10. Key v. State, 563 S.W.2d 184 (Tenn. 1978).

COMMENT

See comments to T.P.I.—Crim. 11.01—Burglary: First Degree and T.P.I.—Crim. 11.02—Burglary: Second Degree.

T.P.I.—CRIM. 11.04

BURGLARY: THIRD DEGREE (SAFECRACKING)

Burglary in the third degree—safecracking—is defined as breaking and entering any building, whether inhabited or not, with intent to commit crime, and the opening or attempt to open any vault, safe, or other secure place by any means.[1]

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:

(1) that the defendant did break and enter the alleged building.

(a) The breaking requires only the slightest use of force by which an obstruction to entry is removed. For example, opening an unlocked door or further opening a window already open to allow entry constitutes breaking.[2]

(b) The entering requires only the slightest penetration of the space within the building, by a person with his hand or any instrument held in his hand.[3]

[(c) If a person enters a building of another with the intent to commit a felony without a breaking,

T.P.I. 11.04

1. Tenn. Code Ann. § 39-3-404 (1982). § 39-3-404 defines two separate offenses. Church v. State, 206 Tenn. 336, 333 S.W.2d 799 (1960). See also State v. Lindsay, 637 S.W.2d 886 (Tenn. Crim. App. 1982).

2. Goins v. State, 192 Tenn. 32, 237 S.W.2d 8 (1950); Claiborne v. State, 113 Tenn. 261, 83 S.W. 352 (1904); Hall v. State, 584 S.W.2d 819 (Tenn. Crim. App. 1979). *See also* 13 AM.Jur.2d Burglary §§ 11-12 (1964).

3. State v. Crow, 517 S.W.2d 753 (Tenn. 1974); Ferguson v. State, 530 S.W.2d 100 (Tenn. Crim. App. 1975); Hall v. State, 584 S.W.2d 819 (Tenn. Crim. App. 1979); 2 Wharton's Criminal Law and Procedure § 421, at 43 (R. Anderson ed. 1957).

but subsequently breaks any part of the premises, or any safe or receptacle within the premises, then such person shall be treated as though he had broken and entered the premises.] [4]

(2) that the defendant intended to commit the crime of _____ therein;

(3) that the structure was a building of any nature. It need not be inhabited nor is it necessary that the occupants of the building own it; [5] and

(4) that the defendant opened or attempted to open, by any means, a safe, vault, or other secure place.

[If you find beyond a reasonable doubt that the defendant is guilty of Burglary in the Third Degree—Safe-cracking—and if you further find beyond a reasonable doubt that the defendant had in his possession a firearm at the time of the breaking and entering, then you shall so state in your verdict.] [6]

[Possession of the firearm may be [actual or constructive] [exclusive or joint]. [Constructive] [joint] possession may occur only where the personally unarmed participant has the power and ability to exercise control over the firearm. Such possession may never exist absent knowl-

4. *See* Tenn. Code Ann. § 39–3–402 (1982). While the specific language of § 39–3–402 only refers to § 39–3–401, the principle applies to this section. Fox v. State, 214 Tenn. 694, 383 S.W.2d 25 (1964) cert. denied 380 U.S. 933, 85 S.Ct. 938, 13 L.Ed.2d 820 (1965); Heald v. State, 472 S.W.2d 242 (Tenn. Crim. App. 1970), cert. denied 404 U.S. 825, 92 S.Ct. 54, 30 L.Ed.2d 53 (1971).

5. Tenn. Code Ann. § 39–3–404 (1982); Hindman v. State, 215 Tenn. 127, 384 S.W.2d 18 (1964).

6. Tenn. Code Ann. § 39–3–404 (1982). This optional instruction serves only to enhance punishment upon a finding that the burglar was armed and should not be construed to create the separate crime of armed burglary. Key v. State, 563 S.W.2d 184, 186 (Tenn. 1978). However, this instruction is applicable only if the indictment included the charge that the defendant possessed a firearm at the time of the offense. State v. Lindsay, 637 S.W.2d 886 (Tenn. Crim. App. 1982).

edge that the other participant is in possession of a firearm.] [7]

COMMENT

See Comment to T.P.I.—Crim. 11.01—Burglary: First Degree and T.P.I.—Crim. 11.02—Burglary: Second Degree.

7. Key v. State, 563 S.W.2d 184 (Tenn. 1978).

T.P.I.—CRIM. 11.05

BURGLARY OF A VEHICLE

Burglary of a vehicle is defined as breaking and entering any freight or passenger car, automobile, truck, trailer, or other motor vehicle, either in the day or night, with intent to steal anything of value therefrom or to commit a felony of any kind.[1]

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:

(1) that the defendant did break and enter the alleged vehicle.

(a) The breaking requires only the slightest use of force by which an obstruction to entry is removed. For example, opening an unlocked door or further opening a window already open to allow entry constitutes breaking.[2]

(b) The entering requires only the slightest penetration of the space within the vehicle, by a person with his hand or any instrument held in his hand.[3]

[(c) If a person enters a vehicle with the intent to steal or commit a felony without a breaking, but subsequently breaks any part of the vehicle, or any safe or receptacle within the vehicle, then

T.P.I. 11.05

1. Tenn. Code Ann. § 39-3-406 (1982).

2. Goins v. State, 192 Tenn. 32, 237 S.W.2d 8 (1950); Claiborne v. State, 113 Tenn. 261, 83 S.W. 352 (1904); Hall v. State, 584 S.W.2d 819 (Tenn. Crim. App. 1979). *See also* 13 Am.Jur.2d Burglary §§ 11-12 (1964).

3. State v. Crow, 517 S.W.2d 753 (Tenn. 1974); Hall v. State, 584 S.W.2d 819 (Tenn. Crim. App. 1979); 2 Wharton's Criminal Law and Procedure § 421, at 43 (R. Anderson ed. 1957).

such person shall be treated as though he had broken and entered the vehicle.[4]]

(2) that the defendant intended to steal something of value from the vehicle or to commit the felony of _____ therein; and

(3) that the premises broken into was a motor vehicle.

COMMENT

See Comment to T.P.I.—Crim. 11.01.

4. *See* Tenn. Code Ann. § 39-3-402 (1982). While the specific language of § 39-3-402 only refers to § 39-3-401, the principle enunciated applies to this section. *See* Fox v. State, 214 Tenn. 694, 383 S.W.2d 25 (1964), cert. denied 380 U.S. 933, 85 S.Ct. 938, 13 L.Ed.2d 820 (1965); Heald v. State, 472 S.W.2d 242 (Tenn. Crim. App. 1970), cert. denied 404 U.S. 825, 92 S.Ct. 54, 30 L.Ed. 2d 53 (1971).

T.P.I.—CRIM. 11.06

BURGLARY WITH EXPLOSIVES

Burglary by the use of explosives is defined as breaking and entering with intent to commit a crime, any building, whether inhabited or not, by day or by night, and the opening or attempt to open any vault, safe, or other secure place by use of nitroglycerine, dynamite, gunpowder, or any other explosive.[1]

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:

(1) that the defendant did break and enter the alleged building, whether inhabited or not.

(a) The breaking requires only the slightest use of force by which an obstruction to entry is removed. For example, opening an unlocked door or further opening a window already open to allow entry constitutes breaking.[2]

(b) The entering requires only the slightest penetration of the space within the building, by a person with his hand or any instrument held in his hand.[3]

T.P.I. 11.06

1. Tenn. Code Ann. § 39–3–702(a) (1982). This section was not impliedly repealed by the extension of the definition of burglary in the third degree to the opening of a safe, etc., "by any means." State ex rel. Wooten v. Bomar, 209 Tenn. 166, 352 S.W.2d 5 (1961), cert. denied 370 U.S. 932, 82 S.Ct. 1616, 8 L.Ed.2d 832 (1962).

2. Goins v. State, 192 Tenn. 32, 237 S.W.2d 8 (1950); Claiborne v. State, 113 Tenn. 261, 83 S.W. 352 (1904); Hall v. State, 584 S.W.2d 819 (Tenn. Crim. App. 1979). *See also* 13 Am.Jur.2d Burglary §§ 11–12 (1964).

3. State v. Crow, 517 S.W.2d 753 (Tenn. 1974); Ferguson v. State, 530 S.W.2d 100 (Tenn. Crim. App. 1975); Hall v. State, 584 S.W.2d 819 (Tenn. Crim. App. 1979); 2 Wharton's Criminal Law and Procedure § 421, at 43 (R. Anderson ed. 1957).

[(c) If a person enters a building with the intent to commit a crime without a breaking, but subsequently breaks any part of the building, or any safe or receptacle within the building, then such person shall be treated as though he had broken and entered the building.[4]]

(2) that the defendant entered with the intent to commit the crime of _____ therein;

(3) that the structure was a building of any nature. It need not be inhabited nor is it necessary that the occupants of the building own it;[5] and

(4) that the defendant did open or attempt to open any vault, safe, or other secure place by use of nitroglycerine, dynamite, gunpowder, or any other explosive.

COMMENT

See Comment to T.P.I.—Crim. 11.01.

4. *See* Tenn. Code Ann. § 39–3–402 (1982). While the specific language of § 39–3–402 only refers to § 39–3–401, the principle enunciated applies to this section. *See* Fox v. State, 214 Tenn. 694, 383 S.W.2d 25 (1964) cert. denied 380 U.S. 933, 85 S.Ct. 938, 13 L.Ed.2d 820 (1965); Heald v. State, 472 S.W.2d 242 (Tenn. Crim. App. 1970), cert. denied 404 U.S. 825, 92 S.Ct. 54, 30 L.Ed. 2d 53 (1971).

5. *See* Hindman v. State, 215 Tenn. 127, 384 S.W.2d 18 (1964).

T.P.I.—CRIM. 11.07

BURGLARY: CARRYING BURGLARIOUS INSTRUMENTS

Any person who carries concealed on or about the person any false or skeleton keys, jimmies, or any article of the kind intended for effecting a secret entrance into houses or motor vehicles, for the purpose of committing theft or other violations of the law, is guilty of a felony.[1]

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:

(1) that the defendant had concealed on or about his person (describe article). It is sufficient if the article was either in the defendant's personal possession or in such close proximity to him that it would be readily available for his use;[2]

(2) that the (describe article) is of the type used to gain secret entrance into a house or motor vehicle;[3] and

(3) that the defendant intended to use or employ the alleged article to commit a theft or other violation of the law.[4]

T.P.I. 11.07

1. Tenn. Code Ann. § 39-3-408 (1982).

2. Duchac v. State, 505 S.W.2d 237 (Tenn. 1973), cert. denied 419 U.S. 877, 95 S.Ct. 141, 42 L.Ed.2d 117 (1974); Shafer v. State, 214 Tenn. 416, 381 S.W.2d 254 (1964), cert denied 379 U.S. 979, 85 S.Ct. 683, 13 L.Ed.2d 570 (1965); McDonald v. State, 210 Tenn. 258, 358 S.W.2d 298 (1962).

3. Duchac v. State, 505 S.W.2d 237 (Tenn. 1973), cert. denied 419 U.S. 877, 95 S.Ct. 141, 42 L.Ed.2d 117 (1974).

4. *Id.*

T.P.I.—CRIM. 11.08

BURGLARY: MANUFACTURE, POSSESSION, OR SALE OF EXPLOSIVES FOR BURGLARIOUS PURPOSES

Part I: Manufacture or Possession

Any person who makes, manufactures, concocts, or has in his possession any explosive, percussion caps, or fuses, with the intent to use same for burglarious purposes, shall be guilty of a felony.[1]

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:

(1) that the defendant [[made, manufactured, or concocted] [had in his possession]] [[an explosive] [percussion caps] [fuses]]; and

(2) that the defendant intended to employ the same to further a burglarious intent. To prove burglarious intent the state must show that the defendant had a fully-formed conscious intent to use the [explosive] [percussion caps] [fuses] to break and enter any building or vehicle with the intent to commit a felony therein.

Part II: Sales

Any person who sells, offers for sale, or gives away any explosive, percussion caps, or fuses, knowing that such is to be used for burglarious purposes, shall be guilty of a felony.[2]

T.P.I. 11.08

1. Tenn. Code Ann. § 39-3-702(b) (1982).

2. *Id.*

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:

(1) that the defendant [[sold] [offered for sale] [gave away]] [[an explosive] [percussion caps] [fuses]]; and

(2) that the defendant knew that the [[explosive] [percussion caps] [fuses]] [[was] [were]] to be used by another for the purpose of breaking and entering any building or vehicle with the intent to commit a felony therein.