NO. _____

IN THE UNITED STATES SUPREME COURT

_____ TERM

MARK NORRIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX

Erin P. Rust
Assistant Federal Defender
FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE, INC.
835 Georgia Avenue, Suite 600
Chattanooga, Tennessee 37402
(423) 756-4349

Counsel for Petitioner

No. 19-6030

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Feb 06, 2020
DEBORAH S. HUNT, Clerk

MARK NORRIS,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Before: READLER, Circuit Judge.

Mark Norris, a federal prisoner proceeding through counsel, appeals the district court's denial of his motion to vacate, set aside, or correct his sentence, filed pursuant to 28 U.S.C. § 2255. Currently pending are Norris's application for a certificate of appealability (COA) and motion to proceed in forma pauperis on appeal.

In June 2015, Norris pleaded guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). Norris's presentence report deemed him an armed career criminal based on his two prior burglary convictions in Georgia and over three dozen aggravated-burglary convictions in Tennessee, which subjected him to a mandatory minimum sentence of 180 months' imprisonment under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). Norris did not object to the presentence report. The district court granted the government's motion for a downward departure, *see* U.S.S.G. § 5K1.1, and sentenced Norris to 151 months' imprisonment and three years of supervised release. Norris did not appeal.

In August 2017, Norris was convicted in a Tennessee court of aggravated burglary and sentenced to ten years' imprisonment to run concurrently with his previously imposed federal sentence. In December of that year, Norris filed in the district court a pro se motion to correct or

reduce his sentence, pursuant to Federal Rule of Criminal Procedure 35. Norris argued that, after this court's decision in *United States v. Stitt*, 860 F.3d 854 (6th Cir. 2017) (*Stitt I*), his Tennessee aggravated-burglary convictions could no longer be used to enhance his sentence under the ACCA. The district court appointed counsel to represent Norris and notified him of its intent to construe his Rule 35 motion as a § 2255 motion. Counsel then filed a motion seeking relief under § 2255 and *Stitt I*. In response, the government filed a motion to defer ruling on Norris's motion pending a decision from the Supreme Court in *Stitt I*. Norris initially did not oppose the deferral, but he later moved to strike his response, arguing that the court should rule on his motion under the then-controlling decision from this court in *Stitt I*. Norris also filed a pro se motion for concurrent sentencing, asking that his federal sentence be ordered to run concurrently with his state aggravated-burglary sentence.

After the Supreme Court issued its decision reversing this court's ruling in *Stitt I* and "holding that the structures covered by Tennessee's aggravated burglary statute fit within the [ACCA's] generic-burglary definition" *Farmer v. United States*, 773 F. App'x 302, 303 (6th Cir. 2019) (citing *United States v. Stitt*, 139 S. Ct. 399, 406–08 (2018) (*Stitt II*)), the district court denied Norris's motion for relief under § 2255. The court also denied Norris's motion for concurrent sentencing, explaining that his request must be considered under 28 U.S.C. § 2241 because it challenged the execution of his sentence rather than the sentence itself. Because a § 2241 petition challenging the execution of one's sentence must be filed in the district where the prisoner is incarcerated and Norris was confined in the Northwest Correctional Complex, which is located in the Western District of Tennessee, the court concluded that it lacked jurisdiction over Norris's request for relief. Finally, the court declined to issue a COA.

Norris now appeals. In his COA application, he argues that, *Stitt II* notwithstanding, his Tennessee aggravated-burglary convictions cannot be considered violent felonies under the ACCA's enumerated-offenses clause because the statute defines the "entry" element of burglary more broadly than generic burglary by including intrusions by instrument that are the functional

equivalent of attempted burglary. He makes the same argument with respect to his Georgia burglary convictions.

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-offenses 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*, 135 S. Ct. 2551, 2563 (2015), the Supreme Court struck down the ACCA's residual clause as unconstitutionally vague.

In his § 2255 motion, Norris challenged only whether his Tennessee aggravated-burglary convictions qualified as predicate convictions under the ACCA. But as the district court explained, after the filing of his motion, the Supreme Court reversed this court's decision in *Stitt I* with regard to Tennessee's aggravated-burglary statute. *See Stitt II*, 139 S. Ct. at 406–07. Norris now argues that *Stitt II* does not preclude the issuance of a COA because it did not address the "entry" requirement of Tennessee's burglary statute and did not determine how, in general, an aggravated-burglary conviction in Tennessee must be classified. He notes that this issue is currently under

consideration in two cases pending before this court, *Carter v. United States*, No. 19-5814 (6th Cir. Oct. 4, 2019) (order), where, in an appeal from the denial of a § 2255 motion, this court granted a COA on the issue of whether the entry element of Tennessee second-degree burglary matches that of generic burglary, and *United States v. Buie*, No. 18-6185, where the defendant has raised this issue in his appeal from his ACCA sentence.

Norris's argument is unavailing for two reasons. First, unlike in *Carter* and *Buie*, Norris did not raise this issue concerning the entry element in the district court. Nor did he even challenge the use of his Georgia burglary convictions as ACCA predicate offenses. Generally, this court will not consider new issues raised for the first time on appeal. *See Cradler v. United States*, 891 F.3d 659, 665 (6th Cir. 2018); *United States v. Ellison*, 462 F.3d 557, 560 (6th Cir. 2006). Although an exception to this rule can be made "for 'exceptional cases' or if failing to consider the argument would result in a 'plain miscarriage of justice,'" no such circumstances are present here. *Ellison*, 462 F.3d at 560 (citations omitted). Second, this court recently held that its decision in *United States v. Nance*, 481 F.3d 882, 888 (6th Cir. 2007), which held that Tennessee's aggravated-burglary statute comported with the definition of generic burglary and thus constituted a violent felony for purposes of the ACCA, "is once again the law of this circuit." *Brumbach v. United States*, 929 F.3d 791, 794 (6th Cir. 2019). Even if Norris's new argument warranted further discussion, "a panel of this court cannot overrule *Nance*['s]" holding that a Tennessee conviction for aggravated burglary is a violent felony for purposes of the ACCA. *See id*. at 795 (declining to consider the same argument concerning the entry element in light of *Nance*); *United States v. Elbe*, 774 F.3d 885, 891 (6th Cir. 2014) ("[A] published prior panel decision 'remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision.'" (quoting *Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985))). Reasonable jurists could not debate the district court's denial of § 2255 relief.

Nor could reasonable jurists debate the denial of Norris's motion for concurrent sentencing. Because the motion challenged the manner in which his sentence is being served in relation to his

state sentence and not the imposition of the sentence itself, it could be considered only under § 2241. *See Charles v. Chandler*, 180 F.3d 753, 756 (6th Cir. 1999) (per curiam). Such motions must be brought "in the court having jurisdiction over the prisoner's custodian," *see id.*, which here was the Western District of Tennessee. The district court therefore properly concluded that it lacked jurisdiction over Norris's motion for § 2241 relief.

Accordingly, Norris's application for a COA 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 DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

MARK NORRIS,	)	
	)	
Petitioner,	)	
	)	
v.	)	No.: 1:18-CV-66-HSM
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

MEMORANDUM OPINION

Federal inmate Mark Norris has filed a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. Respondent has filed a motion requesting to defer ruling, and Norris has moved to strike his response to the motion to defer. Having considered the pleadings and the record, along with the relevant law, the Court finds that there is no necessity for an evidentiary hearing[1], and Norris' § 2255 motion will be denied.

I. BACKGROUND FACTS AND PROCEDURAL HISTORY

On June 25, 2015, Norris pleaded guilty to possessing a firearm as a felon in violation of 18 U.S.C. § 922(g) [Docs. 17 and 18 in No. 1:15-CR-25]. Norris was on parole for multiple State offenses at the time he committed his federal offense, and his State parole was revoked prior to federal sentencing [Doc. 25 ¶ 84 in No. 1:15-CR-25]. A federal presentence investigation revealed that based on his two prior Georgia burglary convictions and over three dozen Tennessee

[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).

aggravated burglary convictions, Norris was an armed career criminal under the Armed Career Criminal Act ("ACCA") and was subject to an enhanced mandatory minimum of 180 months' imprisonment [Doc. 25 in No. 1:15-CR-25]. The United States moved for a downward departure, however, and in December 2015, the Court sentenced Norris to 151 months' imprisonment [Doc. 42 in No. 1:15-CR-25]. Norris did not appeal.

In August 2017, Norris was convicted in a Tennessee state court for aggravated burglary and was sentenced to serve a term of 10 years' imprisonment, with the sentence to run concurrently with his previously imposed federal sentence [Doc. 60 p. 5 in No. 1:15-CR-25]. On December 18, 2017, Norris filed a motion seeking to reduce his federal sentence, which the Court construed as a § 2255 motion [Doc. 45 in No. 1:15-CR-25]. Counsel was appointed to assist Norris, and the Court provided Norris an opportunity to consent to the recharacterization of his motion, or to withdraw or amend his original pleading [Docs. 48 and 49 in No. 1:15-CR-25]. Norris consented to the characterization of his pleading as a § 2255 motion, requesting relief from his armed career criminal classification pursuant to the Sixth Circuit's decision in *United States v. Stitt*, 860 F.3d 854 (6th Cir. 2017), which held that aggravated burglary is not a violent felony for purposes of the ACCA [Doc. 54 in No. 1:15-CR-25]. The United States was ordered to respond to Norris' motion, and it filed a motion to defer ruling pending a decision in *Stitt* by the United States Supreme Court [Doc. 56 in No. 1:15-CR-25].

Norris initially did not oppose the motion to defer ruling [Doc. 58 in No. 1:15-CR-25] but later moved to strike his response, arguing that the Court should resentence Norris based on *Stitt*'s then-controlling precedent [Doc. 59 in No. 1:15-CR-25]. Thereafter, in December 2018, Norris, who is housed in a State prison, filed a pro se motion requesting that his federal sentence be ordered to run concurrently with his State sentence. The Court finds these matters ripe for review.

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. DISCUSSION

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.

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 Supreme Court has held that aggravated burglary under Tennessee law 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, Norris' convictions for aggravated burglary qualify as ACCA predicates, and he is properly classified as an armed career criminal.

IV. MOTION FOR CONCURRENT SENTENCES

The Court finds that Norris' motion for concurrent sentencing must be considered pursuant to 28 U.S.C. § 2241 rather than as part of the instant § 2255 action, as it challenges the execution of his sentence, rather than the sentence itself. *See Pack v. Yusuff*, 218 F.3d 448, 451 (5th Cir. 2000) ("A section 2241 petition on behalf of a sentenced prisoner attacks the manner in which a sentence is carried out or the prison authorities' determination of its duration[.]"). Such a motion must be filed in the "same district where the prisoner is incarcerated." *Id*. Inasmuch as Norris is currently housed at the Northwest Correctional Complex in Tiptonville, Tennessee, which is in the judicial district for the Western District of Tennessee, this Court has no jurisdiction over his claim. Therefore, the Court will deny Norris' motion for concurrent sentencing for want of jurisdiction.[2]

V. 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. Norris 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 reasonable jurists would find the district court's assessment of the constitutional claims debatable

[2] The Court notes that the Bureau of Prisons ("BOP") has discretionary authority to designate a prisoner's place of incarceration and "indirectly award credit for time served in state prison by designating *nunc pro tunc* the state prison as the place in which the prisoner serves a portion of his federal sentence." *Pierce v. Holder*, 614 F.3d 158, 160 (5th Cir. 2010); *see also* 18 U.S.C. § 3621(b). Norris must file a request with the BOP to make a *nunc pro tunc* designation of his State correctional facility as the place to serve his federal sentence and thereby exhaust his available remedies prior to seeking habeas relief under § 2241. *See id*. (noting habeas petition is not ripe until BOP makes final decision on *nunc pro tunc* request).

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.

VI. CONCLUSION

For the reasons stated herein, Norris has failed to establish any basis upon which § 2255 relief could be granted, and his § 2255 motion will be **DENIED**. A COA from the denial of his § 2255 motion will be **DENIED**. The United States' motion to defer ruling, and Norris' motion to strike his response to that motion, will be **DENIED**. Norris' motion for concurrent sentencing will be **DISMISSED** for want of jurisdiction.

An appropriate Judgment Order will enter.

/s/ Harry S. Mattice, Jr.
HARRY S. MATTICE, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

MARK NORRIS,	)	
	)	
Petitioner,	)	
	)	
v.	)	Nos.: 1:15-CR-25-HSM-SKL; 1:18-CV-66-HSM
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

JUDGMENT ORDER

In accordance with the Memorandum Opinion entered today, it is **ORDERED** that Petitioner's § 2255 motion [Doc. 1 in 1:18-CV-66; Doc. 54 in No. 1:15-CR-25] 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* U.S.C. § 2255(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The United States' motion to defer ruling [Doc. 4 in 1:18-CV-66], and Norris' motion to strike his response to that motion [Doc. 7 in No. 1:18-CV-66] are **DENIED**. Norris' motion for concurrent sentencing [Doc. 8 in No. 1:18-CV-66] is **DISMISSED** for want of jurisdiction. 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. P. 24. Therefore, Petitioner is **DENIED** leave to proceed *in forma pauperis* on appeal. Fed. R. App. P. 24.

ENTER:

/s/ Harry S. Mattice, Jr.
HARRY S. MATTICE, JR.
UNITED STATES DISTRICT JUDGE

ENTERED AS A JUDGMENT
/s/ 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

DONALD J. HALL

Professor of Law
Vanderbilt University School of Law

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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.