NO. _____

IN THE UNITED STATES SUPREME COURT

_____ TERM

PHILLIP L. GILLIAM,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

APPENDIX

Erin P. Rust
Assistant Federal Defender
FEDERAL DEFENDER SERVICES
OF EASTERN TENNESSEE, INC.
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NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
File Name: 20a0263n.06

Case No. 18-5050

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
May 11, 2020
DEBORAH S. HUNT, Clerk

PHILLIP L. GILLIAM,	)	
	)	
Petitioner-Appellee,	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE
	)	
v.	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent-Appellant.	)	O P I N I O N
	)	

BEFORE: COLE, Chief Judge; CLAY and NALBANDIAN, Circuit Judges.

COLE, Chief Judge. In 2012, Phillip Gilliam pleaded guilty to one count of possessing a firearm as a convicted felon in violation of 18 U.S.C. § 922(g). Based on five prior convictions for aggravated burglary under Tennessee law, the district court deemed Gilliam an armed career criminal under the Armed Career Criminal Act ("ACCA"). This finding relied on then-existing Sixth Circuit precedent, *United States v. Nance*, 481 F.3d 882, 887–88 (6th Cir. 2007), which held that Tennessee aggravated burglary fits the definition of generic burglary, and therefore categorically qualifies as an enumerated "violent felony" under the ACCA. The district court sentenced Gilliam to the mandatory minimum of 15 years' imprisonment. *See* 18 U.S.C. § 924(e)(1).

Subsequently, in *United States v. Stitt* (*Stitt I*), 860 F.3d 854, 858–62 (6th Cir. 2017) (en banc), our court, sitting en banc, overruled *Nance*, deciding that Tennessee's aggravated-burglary statute is indivisible and sweeps more broadly than generic burglary because it includes burglary of vehicles used for overnight accommodation. Our holding in *Stitt I* meant that Gilliam's convictions for aggravated burglary under Tennessee law no longer qualified as predicate offenses for purposes of the ACCA. *See id.* at 862. Accordingly, the district court granted Gilliam's motion under 28 U.S.C. § 2255 and vacated his 15-year sentence. On December 15, 2017, the district court resentenced Gilliam to time served and issued an amended judgment. The government filed a timely notice of appeal on January 16, 2018. *See* Fed. R. App. P. 26(a). We then held the appeal in abeyance pending a decision by the Supreme Court on the government's petition for certiorari in *Stitt I*.

The Supreme Court granted certiorari and reversed our decision in *Stitt I*, holding that burglary of vehicles used for overnight accommodation falls within the scope of generic burglary. *United States v. Stitt* (*Stitt II*), 139 S. Ct. 399, 406–08 (2018). Following *Stitt II*, a panel of our court decided that because the Supreme Court reversed the rationale by which we overruled *Nance*, *Nance*'s holding "is once again the law of this circuit." *Brumbach v. United States*, 929 F.3d 791, 794 (6th Cir. 2019), *cert. denied*, 140 S. Ct. 974 (2020). Under *Nance*, Gilliam's prior convictions for aggravated burglary under Tennessee law are predicate offenses, and he once again qualifies as an armed career criminal under the ACCA. *See Nance*, 481 F.3d at 888. In recent cases raising the same issue, we have consistently instructed the district court to reinstate the original sentence. *E.g.*, *Brumbach*, 929 F.3d at 795; *United States v. Bateman*, 780 F. App'x 355, 357 (6th Cir. 2019); *Greer v. United States*, 780 F. App'x 352, 353 (6th Cir. 2019); *United States v. Crutchfield*, 785 F. App'x 321, 324 (6th Cir. 2019); *United States v. Bawgus*, 782 F. App'x 408, 410 (6th Cir. 2019);

United States v. Hamilton, 774 F. App'x 283, 283 (6th Cir. 2019) (per curiam); *Bell v. United States*, 773 F. App'x 832, 833 (6th Cir. 2019); *Mann v. United States*, 773 F. App'x 308, 309 (6th Cir. 2019) (per curiam).

Gilliam argues that we nevertheless should affirm his amended sentence—or at minimum remand for further consideration—based on grounds the district court did not have occasion to consider. Even Gilliam acknowledges, however, that binding precedent forecloses these alternative arguments.

First, Gilliam raises an alternative reason as to why aggravated burglary under Tennessee law is broader than generic burglary: the definition of "entry" under Tennessee's aggravated-burglary statute, he argues, is broader than a generic "entry," such that a mere attempted burglary may be treated as a burglary under the Tennessee statute. In *Brumbach*, however, we rejected an identical argument as foreclosed by *Nance*. 929 F.3d at 795. And we have consistently rejected the argument in similar cases since *Brumbach*. *E.g.*, *United States v. Brown*, —F.3d—, No. 18-5356, 2020 WL 1966845, at *3–7 (6th Cir. Apr. 24, 2020) (providing an extended discussion of the entry argument raised here and rejecting it on the merits); *White v. United States*, No. 17-5967/5969, 2020 WL 773056, at *2 (6th Cir. Jan. 21, 2020) (order); *Bearden v. United States*, No. 17-5927, 2019 WL 7882516, at *2 (6th Cir. Nov. 6, 2019) (order); *Bateman*, 780 F. App'x at 356; *Crutchfield*, 785 F. App'x at 324; *Bawgus*, 782 F. App'x at 409. Gilliam provides no reason to conclude that precedent does not bind us here.

Second, Gilliam argues that the government cannot establish that his predicate offenses for ACCA purposes were "committed on occasions different from one another." *See* 18 U.S.C. § 924(e)(1). Specifically, Gilliam contends that a court may not consider non-elemental facts when conducting a different-occasions analysis, and time and location are not elements of

aggravated burglary in Tennessee. This argument is foreclosed by our decision in *United States v. Hennessee*, 932 F.3d 437 (6th Cir. 2019), *cert. denied*, 140 S. Ct. 896 (2020). In *Hennessee*, we held that there is no elemental-facts-only limitation in the different-occasions analysis, and therefore, "a district court may consider both elemental and non-elemental facts contained in *Shepard*-approved documents" when conducting a different-occasions analysis. *Id.* at 444. The *Shepard*-approved documents here show that Gilliam committed at least three burglaries on three separate occasions.[1]

We therefore vacate Gilliam's amended sentence and remand with instructions for the district court to reinstate his original sentence.

[1] Gilliam filed a motion to take judicial notice of certain state court documents and pattern jury instructions. Federal Rule of Evidence 201 allows us to take judicial notice of facts that are "not subject to reasonable dispute," including facts contained within *Shepard* documents. *See* Fed. R. Evid. 201(b); *see also United States v. Ferguson*, 681 F.3d 826, 834 (6th Cir. 2012). We grant in part Gilliam's motion to take judicial notice, taking notice of the *Shepard* documents' description of dates on which Gilliam committed his prior offenses. We otherwise deny the motion.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

PHILLIP ROSS GILLIAM, *Petitioner*, v. UNITED STATES OF AMERICA, *Respondent*.	)))))))))	Case No. 1:11-CR-108; 1:14-CV-194 Judge Travis R. McDonough Magistrate Judge Susan K. Lee

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MEMORANDUM OPINION

Before the Court are a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 and a supplemental § 2255 motion filed by Phillip Ross Gilliam ("Petitioner") which challenge his enhanced sentence as an armed career criminal under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), pursuant to *Johnson v. United States*, 135 S. Ct. 2551 (2015).[1] In light of both *Johnson* and the recent *en banc* decision of the Sixth Circuit Court of Appeals in *United States v. Stitt*, 860 F.3d 854 (6th Cir. 2017), it now is undisputed that Petitioner no longer qualifies as an armed career criminal under the ACCA. Accordingly, Petitioner's § 2255 motion [Doc. 28] and supplemental § 2255 motion [Doc. 35] will be **GRANTED**.

[1] The Supreme Court has determined that *Johnson*, which invalidated the residual clause of the ACCA as unconstitutionally vague, announced a new "substantive rule that has retroactive effect in cases on collateral review." *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016); *see also In Re Watkins*, 810 F.3d 375, 381-85 (6th Cir. 2015).

I. BACKGROUND

On November 22, 2011, a grand jury in the Eastern District of Tennessee returned a one-count indictment charging Petitioner with possession of a firearm and ammunition by a convicted felon, in violation of 18 U.S.C. § 922(g) [Doc. 1]. On April 4, 2012, Petitioner entered a plea of guilty as to Count One [Doc. 16].

The presentence investigation report ("PSIR") identified five previous convictions for a violent felony that qualified Petitioner as an armed career criminal under the ACCA. All five of these convictions were for aggravated burglary under Tennessee law [PSIR ¶¶ 21, 23, 24 (three counts)].[2] As an armed career criminal, Petitioner was subject to a statutory mandatory minimum incarceration sentence of 15 years to a maximum of life, and his advisory guideline sentencing range under the United States Sentencing Guidelines ("USSG") was 180 to 210 months [PSIR ¶¶ 57, 58]. On July 19, 2012, Petitioner was sentenced to a term of imprisonment of 180 months on count one of the indictment and a term of supervised release of three years [Doc. 27 pp. 2–3]. Petitioner did not file a direct appeal.

[2] The ACCA requires three previous convictions committed "on occasions different from one another." 18 U.S.C. § 924(e)(1). The Sixth Circuit has held that "under the ACCA, a career criminal is one who has been convicted of three criminal 'episodes.'" *United States v. Hockenberry*, 730 F.3d 645, 667 (6th Cir. 2013) (quoting *United States v. McCauley*, 548 F.3d 440, 448 (6th Cir. 2008)). "Although related to the entire course of events, an episode is a punctuated occurrence with a limited duration." *McCauley*, 548 F.3d at 448. Accordingly, crimes that a defendant commits against different victims, in different places, and at different times, will generally be separate offenses. *Hockenberry*, 730 F.3d at 667. Thus, "even when convictions 'were sentenced on the same day, they count separately for purposes of calculating an ACCA enhancement.'" *Id*. (quoting *United States v. Kearney*, 675 F.3d 571, 575 n. 5 (6th Cir. 2012)).

On June 20, 2014, Petitioner, through court-appointed counsel, filed a § 2255 motion challenging his armed career criminal status based on the Supreme Court's decision in *Descamps v. United States*, 133 S. Ct. 2276 (2013) [Doc. 28]. On June 1, 2016, Petitioner, again through court-appointed counsel, filed a supplemental § 2255 motion raising an additional challenge to his armed career criminal status based on the Supreme Court's invalidation of the ACCA residual clause in *Johnson* [Doc. 35].

The government's motion to defer ruling on Petitioner's motions pending an *en banc* decision from the Sixth Circuit in *United States v. Stitt*, 646 F. App'x 454 (6th Cir. 2016), was granted by the Court on March 7, 2017 [Doc. 37]. On June 27, 2017, the Sixth Circuit issued its *en banc* decision holding that a conviction of aggravated burglary under Tennessee law does not qualify as a violent felony predicate offense under the ACCA. *Stitt*, 860 F.3d at 856. On July 27, 2017, the parties filed a joint status report agreeing that Petitioner no longer qualifies as an armed career criminal in light of *Johnson* and *Stitt* [Doc. 38].

II. ANALYSIS

A. TIMELINESS

Section 2255(f) places a one-year period of limitation on all petitions for collateral relief under § 2255, which runs from the latest of: (1) the date on which the judgment of conviction becomes final; (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action; (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral

review; or (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence. 28 U.S.C. § 2255(f).

Claims based on the Supreme Court's opinion in *Johnson* satisfy the third sub-category—the assertion of a newly recognized right made retroactively applicable to cases on collateral review. *Welch*, 136 S. Ct. at 1268 (*Johnson* constitutes a new substantive rule of constitutional law made retroactively applicable on collateral review); *In Re Watkins*, 810 F.3d at 381–85. The one-year limitation period for filing a motion to vacate based on a right newly recognized by the Supreme Court runs from the date on which the Supreme Court initially recognized the right asserted, not from the date on which the right asserted was made retroactively applicable. *Dodd v. United States*, 545 U.S. 353, 357 (2005). Accordingly, *Johnson* triggered a renewed one-year period of limitation beginning on the date of that decision, June 26, 2015, and running until June 26, 2016.

In this case, Petitioner filed a supplemental § 2255 motion raising a *Johnson* claim on June 1, 2016, which falls safely within the one-year window for requesting collateral relief under *Johnson*.

B. STANDARD OF REVIEW

To obtain relief under 28 U.S.C. § 2255, a petitioner must demonstrate "(1) an error of constitutional magnitude; (2) a sentence imposed outside the statutory limits; or (3) an error of fact or law . . . so fundamental as to render the entire proceeding invalid." *McPhearson v. United States*, 675 F.3d 553, 558–59 (6th Cir. 2012) (quoting *Mallett v. United States*, 334 F.3d 491, 496–97 (6th Cir. 2003)). He "must clear a significantly higher hurdle than would exist on direct appeal" and establish a "fundamental defect in the proceedings which necessarily results in

a complete miscarriage of justice or an egregious error violative of due process." *Fair v. United States*, 157 F.3d 427, 430 (6th Cir. 1998).

C. PETITIONER'S *JOHNSON* CLAIM

A felon who possesses a firearm normally faces a maximum penalty of 10 years' imprisonment, 18 U.S.C. § 924(a)(2), and 3 years' supervised release, 18 U.S.C. §§ 3559(a)(3) and 3583(b)(2). However, if that felon possesses the firearm after having sustained three prior convictions "for a violent felony or serious drug offense, or both," the ACCA requires a 15-year minimum sentence, 18 U.S.C. § 924(e)(1), and increases the maximum supervised release term to 5 years, 18 U.S.C. §§ 3559(a)(1) and 3583(b)(1). 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 "use-of-physical-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*, the Supreme Court determined that the residual clause of the ACCA is unconstitutionally vague and concluded "that imposing an increased sentence under the residual clause . . . violates the Constitution's guarantee of due process." 135 S. Ct. at 2563. *Johnson* did not automatically invalidate all ACCA sentences, however, emphasizing that its holding "d[id] not call into question application of the Act to the four enumerated offenses, or the remainder of the Act's definition of a violent felony." *Id.*; *see also United States v. Kemmerling*, 612 F. App'x 373, 376 (6th Cir. 2015) (explicitly finding that *Johnson* did not affect the ACCA's use-of-physical-force clause). Thus, under *Johnson*, an ACCA sentence only raises due process

concerns, and thus is invalid, if it necessarily was based on predicate violent felonies that qualified as such only under the ACCA's residual clause.

In this case, all five of Petitioner's predicate offenses were convictions for aggravated burglary in violation of Tenn. Code. Ann. § 39-14-403 [PSIR ¶¶ 21, 23, 24 (three counts)]. Petitioner contends, *inter alia*, that aggravated burglary could qualify as a predicate offense only under the stricken residual clause of the ACCA. In response, the government initially cited then-binding Sixth Circuit precedent holding that a conviction for aggravated burglary under the Tennessee statute qualifies as an ACCA predicate under the enumerated-offense clause. *United States v. Nance*, 481 F.3d 882, 888 (6th Cir. 2007).

However, in the *en banc Stitt* decision, the Sixth Circuit overruled *Nance* and expressly held that aggravated burglary is not a violent felony for purposes of the ACCA. 860 F.3d at 860–61. Applying a categorical approach, the Court determined that the Tennessee aggravated burglary statute "sweeps more broadly than generic burglary" and thus cannot qualify as a violent felony under the enumerated-offense clause. *Id*. at 861. Because the statute categorically is not a violent felony, and is indivisible, the Sixth Circuit concluded that a conviction under the Tennessee aggravated burglary statute does not count as a violent felony under the ACCA. *Id*. at 862.

Because a conviction for aggravated burglary does not qualify as a violent felony under the first two clauses of § 924(e)(2)(B),[3] and *Johnson* invalidated the residual clause, Petitioner's aggravated burglary convictions under the Tennessee statute can no longer be used as predicate

[3] The parties acknowledge that aggravated burglary does not have as an element the use, attempted use or threatened use of force and therefore cannot qualify as a violent felony under the "use-of-physical-force" clause of the ACCA [Doc. 38 p. 2].

offenses under the ACCA. Furthermore, absent those convictions, Petitioner no longer has the requisite three prior convictions of a violent felony or a serious drug offense necessary to subject him to the ACCA's enhanced penalties.

Accordingly, the *Johnson* and *Stitt* decisions dictate that Petitioner can no longer be designated an armed career criminal under § 924(e). As a result, the 180-month term of imprisonment imposed by the Court exceeds the maximum authorized sentence of not more than 10 years' imprisonment for a non-ACCA offender convicted of a violation of § 922(g)(1). *See* 18 U.S.C. § 924(a)(2). Under these circumstances, the Court finds a clear entitlement to § 2255 relief, as Petitioner has been subjected to "a sentence imposed outside the statutory limits." *McPhearson*, 675 F.3d at 559.

Where a § 2255 claim has merit, a district court "shall vacate and set the judgment aside" and, "as may appear appropriate," shall either "discharge the prisoner or resentence him or grant a new trial or correct the sentence." 28 U.S.C. § 2255(b); *see also Ajan v. United States*, 731 F.3d 629, 633 (6th Cir. 2013).

Here, although the parties are in agreement that Petitioner is entitled to § 2255 relief, they disagree as to the most appropriate form of that relief. The government submits that the appropriate relief would be to correct and reduce Petitioner's sentence to 120 months' imprisonment, the applicable statutory maximum for a violation of § 922(g)(1) for a non-armed career criminal [Doc. 38 p. 3]. Petitioner, however, submits that his advisory guideline sentencing range as a non-ACCA offender under the current version of the USSG would be 33 to 41 months and contends that a sentence of 120 months would far exceed what is sufficient to satisfy the sentencing factors set forth in 18 U.S.C. § 3553(a) [*Id.*].

Due to the significant disparity in the parties' proposed resolutions, the Court believes that the most appropriate form of relief in this case is to resentence Petitioner following a full resentencing hearing. The Court will direct the Probation Office to prepare an Addendum containing a re-calculation of Petitioner's advisory guideline sentencing range under the current Guidelines Manual and detailing Petitioner's post-sentencing conduct. A resentencing hearing will be set, and the parties will be given an opportunity to submit sentencing memoranda prior to the hearing.

III. CONCLUSION

For the reasons set forth herein, the Court finds that Petitioner is entitled to relief under § 2255 and will grant his § 2255 motion [Doc. 28] and supplemental § 2255 motion [Doc. 35]. The Judgment imposed by the Court on July 19, 2012 [Doc. 27], will be vacated and a resentencing hearing will be set. The United States Probation Office will be directed to provide the Court with information necessary for sentencing. The Clerk of Court will be directed to close the civil case at No. 1:14-CV-194.

AN APPROPRIATE ORDER WILL ENTER.

/s/ Travis R. McDonough
TRAVIS R. MCDONOUGH
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE CHATTANOOGA DIVISION

UNITED STATES OF AMERICA

v.

PHILLIP ROSS GILLIAM
USM#44447-074
Date of Original Judgment:
Reason for Amendment:

AMENDED JUDGMENT IN A CRIMINAL CASE
(For Offenses committed on or after November 1, 1987)

Case Number: **1:11-CR-00108-TRM-SKL(1)**

Jackson Whetsel
Defendant's Attorney

- ☐ Correction of sentence on remand (18 U.S.C. 3742(f)(1) and (2))
- ☐ Reduction of Sentence for Changed Circumstances (Fed.R.Crim.P.35(b))
- ☐ Correction of Sentence by Sentencing Court (Fed.R.Crim.P.36)
- ☐ Correction of Sentence for Clerical Mistake (Fed.R.Crim.P.36)
- ☐ Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))
- ☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
- ☒ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) top the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))
- ☐ Direct Motion to District Court Pursuant ☐ 28 U.S.C. § 2255 or ☐ 18 U.S.C. § 3559(c)(7)
- ☐ Modification of Restitution Order (18 U.S.C. § 3664)

THE DEFENDANT:

- ☐ pleaded guilty to count(s):
- ☐ pleaded nolo contendere to count(s) which was accepted by the court.
- ☐ was found guilty on count(s) after a plea of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section and Nature of Offense	Date Violation Concluded	Count
18:922(G)(5)(A) and 924(A)(2) Illegal Alien In Possession Of A Firearm	03/23/2011	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 and 18 U.S.C. § 3553.

- ☐ The defendant has been found not guilty on count(s) .
- ☐ All remaining count(s) as to this defendant are dismissed upon motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and the United States attorney of any material change in the defendant's economic circumstances.

December 15, 2017
Date of Imposition of Judgment

/s/ Travis R. McDonough
Signature of Judicial Officer

Travis R McDonough , United States District Judge
Name & Title of Judicial Officer

December 15, 2017
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of **TIME SERVED**.

.

☐ The court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at ☐ a m. ☐ p m. on

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p m. on .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on

to ,

at ,

with a certified copy of this judgment.

UNITED STATES MARSHAL

By

DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **3 YEARS**.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (*check if applicable*)
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentencing of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. (*check if applicable*)
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. (*check if applicable*)
7. ☐ You must participate in an approved program for domestic violence. (*check if applicable*)

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the mandatory, standard, and any special conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall participate in a program of testing and treatment for drug and/or alcohol abuse, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer.

The defendant shall participate in a program of mental health treatment, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer. The defendant shall waive all rights to confidentiality regarding mental health treatment in order to allow release of information to the supervising United States Probation Officer and to authorize open communication between the probation officer and the mental health treatment provider.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments sheet of this judgment.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$100.00	$.00	$.00	$.00

☐ The determination of restitution is deferred until An *Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

☐ Restitution amount ordered pursuant to plea agreement $

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options under the Schedule of Payments sheet of this judgment may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☒ Lump sum payments of $100.00 due immediately, balance due
☐ not later than , or
☒ in accordance with ☐ C, ☐ D, ☐ E, or ☒ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal *(e.g., weekly, monthly, quarterly)* installments of $ over a period of *(e.g., months or years)*, to commence *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal *(e.g., weekly, monthly, quarterly)* installments of $ over a period of *(e.g., months or years)*, to commence *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the **U.S. District Court, 900 Georgia Avenue, Joel W. Solomon Federal Building, United States Courthouse, Chattanooga, TN, 37402**. Payments shall be in the form of a check or a money order, made payable to U.S. District Court, with a notation of the case number including defendant number.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several
See above for Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.
☐ Defendant shall receive credit on his restitution obligation for recovery from other defendants who contributed to the same loss that gave rise to defendant's restitution obligation.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA Assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

TENNESSEE PATTERN JURY INSTRUCTIONS

Volume 7

CRIMINAL

[T.P.I.—CRIM.]

SECOND EDITION

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Prepared and Edited by

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

REPORTER

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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]

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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.