
NO. _____

IN THE UNITED STATES SUPREME COURT

_____ TERM

LEE YERKES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX

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820 Fed.Appx. 334

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 6th Cir. Rule 32.1. United States Court of Appeals, Sixth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Lee YERKES, Defendant-Appellant.

No. 19-5768

FILED July 10, 2020

Synopsis

Background: Defendant was convicted in the United States District Court for the Eastern District of Tennessee, Harry S. Mattice, J., of being felon in possession of firearm and ammunition, and was sentenced pursuant to Armed Career Criminal Act (ACCA). Defendant appealed sentence, arguing that his prior Tennessee aggravated burglary and Georgia simple burglary convictions did not qualify as predicate offenses under ACCA.

Holdings: The Court of Appeals, Griffin, Circuit Judge, held that:

[1] “entry” element of Tennessee aggravated robbery was not overbroad so as to disqualify crime from being ACCA predicate;

[2] “entry” element of defendant's Georgia simple burglary convictions was not overbroad so as to disqualify convictions from being ACCA predicates; and

[3] defendant had committed burglary offenses on different occasions within meaning of ACCA.

Affirmed.

Moore, Circuit Judge, filed dissenting opinion.

Procedural Posture(s): Appellate Review.

West Headnotes (3)

[1] **Sentencing and Punishment** 🔑 Particular offenses

Tennessee aggravated robbery qualifies as an Armed Career Criminal Act (ACCA) predicate violent felony; the crime's “entry” element is not overbroad. 18 U.S.C.A. § 924(e)(2)(B)(ii); Tenn. Code Ann. § 39-14-403.

1 Cases that cite this headnote

[2] **Sentencing and Punishment** 🔑 Particular offenses

“Entry” element of federal defendant's prior Georgia simple burglary convictions was not overbroad so as to disqualify convictions from being Armed Career Criminal Act (ACCA) predicate violent felonies; at time of convictions, Georgia law had provided that person committed burglary when, without authority and with intent to commit felony or theft therein, he entered or remained in dwelling house of another or building, vehicle, railroad car, watercraft, or other such structure designed for use as dwelling of another or entered or remained in any other building, railroad car, aircraft, or any room or part thereof. 18 U.S.C.A. § 924(e)(2)(B)(ii); Ga. Code Ann. § 16-7-1(a) (1980).

1 Cases that cite this headnote

[3] **Sentencing and Punishment** 🔑 Convictions counted as separate

Defendant had committed prior burglary offenses on different occasions within meaning of Armed Career Criminal Act (ACCA), as required for offenses to qualify as discrete ACCA predicates; each burglary count specified different residence or business location burglarized. 18 U.S.C.A. § 924(e)(1).

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

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BEFORE: MOORE, SUTTON, and GRIFFIN, Circuit Judges.

Opinion

GRIFFIN, Circuit Judge:

*335 After defendant Lee Yerkes pleaded guilty to a federal gun charge, the district court found him eligible for a mandatory minimum sentence of fifteen years under the Armed Career Criminal Act (“ACCA”) and sentenced him accordingly. On appeal, Yerkes argues that his previous convictions for burglary under Tennessee and Georgia law do not qualify as ACCA predicates and that the district court erred by finding otherwise. We disagree and therefore affirm.

In 2018, Yerkes pleaded guilty to being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. § 922(g)(1). At the time, he had seven prior convictions for burglary: two for aggravated burglary in Tennessee and five for simple burglary in Georgia. *See* Tenn. Code Ann. § 39-14-403 (1990); Ga. Code Ann. § 16-7-1(a) (1980). Based on those convictions, the district court found that Yerkes qualified as an armed career criminal under 18 U.S.C. § 924(e)(1), which imposes a mandatory minimum sentence of fifteen years if the defendant has at least three prior convictions “for a violent felony or a serious drug offense, or both.” The district court imposed a sentence of 180 months of incarceration followed by five years of supervised release. Yerkes timely appealed his sentence.

I.

The government argues that Yerkes’ prior convictions qualify as ACCA predicates under the Act’s enumerated-offense clause. *See* 18 U.S.C. § 924(e)(2)(B)(ii). That clause

provides that certain previous felony convictions, including those for “burglary,” constitute “violent felon[ies].” To determine whether a past conviction qualifies as burglary under the ACCA, we employ the “categorical approach” and “compare the elements of the statute forming the basis of the defendant’s conviction with the elements of the ‘generic’ crime—*i.e.*, the offense as commonly understood.”

Descamps v. United States, 570 U.S. 254, 257, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013). Yerkes’ prior convictions count as ACCA predicates “only if the statute’s elements are the same as, or narrower than, those of the generic offense.”

Id.

“[T]he contemporary understanding of ‘burglary’ has diverged a long way from its commonlaw roots.” *Taylor v. United States*, 495 U.S. 575, 593, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990). “So the proper setting for examining the contours of generic burglary is not its understanding at common law, but rather its understanding at the time the ACCA was passed, as evidenced in the criminal codes of the states.” *Greer v. United States*, 938 F.3d 766, 771 (6th Cir. 2019). With this frame of reference in mind, the Supreme Court has clarified that “the generic, contemporary meaning of burglary contains at least the following elements: an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime.” *Taylor*, 495 U.S. at 598, 110 S.Ct. 2143.

In Tennessee, “[a]ggravated burglary is burglary of a habitation.” Tenn. Code Ann. § 39-14-403(a). “Burglary” means, among other things, “[e]nter[ing] a building ... (or any portion thereof) not open to the public, with intent to commit a felony, theft or assault.” Tenn. Code Ann. § 39-14-402(a)(1); *see also* Tenn. Code Ann. § 39-14-401(1) (defining “habitation”). At the time of Yerkes’ Georgia burglary convictions, the statute defined “burglary” thus:

A person commits the offense of burglary when, without authority and with the intent to commit a felony or theft therein, *336 he enters or remains within the dwelling house of another or any building, vehicle, railroad car, watercraft, or other such structure designed for use as the dwelling of another or enters or

remains within any other building, railroad car, aircraft, or any room or any part thereof.

 Ga. Code Ann. § 16-7-1(a) (1980).

A.

Yerkes argues that his previous burglary convictions in Tennessee and Georgia state court do not qualify as generic burglary offenses because the “entry” elements in those state statutes are overbroad. In *United States v. Brown*, the defendant had previously been convicted of aggravated burglary under Tennessee Code § 39-14-403 and raised the same nuanced argument Yerkes makes here. 957 F.3d 679, 683 (6th Cir. 2020). We summarized that argument as follows:

Brown's argument hinges on a subtle common-law distinction. The common law defined burglary narrowly and required more elements than most modern burglary statutes: “At common law, burglary was confined to unlawful breaking and entering a dwelling at night with the intent to commit a felony.”  *Quarles v. United States*, — U.S. —, 139 S. Ct. 1872, 1877, 204 L.Ed.2d 200 (2019). The common law nevertheless defined the “entry” element of this narrow crime broadly: “As for the entry, any the least degree of it, with any part of the body, or with an instrument held in the hand is sufficient.” 4 William Blackstone, *Commentaries on the Law of England* 227 (1770).

Despite the breadth of a common-law “entry,” some authorities eventually distinguished the entry of a *body part* (a foot or finger) from the entry of an *instrument* (a hook or firearm). “[I]f any part of the body be within the house, hand or foot; this at common law [was] sufficient[.]” 2 Edward H. East, *Pleas of the Crown* 490 (1806). A person thus “entered” a home merely by reaching an arm into it, whether that reach was designed to steal money or unlock a door. See Rollin M. Perkins, *Criminal Law* 155–56 (1957); see also *Rex v. Perkes*, 171 Eng. Rep. 1204, 1204 (1824). If only an instrument entered a home, by contrast, whether that entry sufficed depended on the reason for the entry. If a person used the instrument to commit the intended felony (for example, the person stuck a hook into the home to grab jewelry or a rifle into it to commit a robbery), both Edward Coke and William Blackstone treated the entry of

that instrument alone as a burglary. Blackstone, *supra*, at 227; 3 Edward Coke, *Institutes of the Laws of England* 64 (1648). But later cases held that if a person used an instrument merely to undertake the “breaking” and did not also use it to commit the additional felony (for example, the person used a drill bit only to drill through a door), the entry of that instrument alone did not suffice. See *Rex v. Hughes*, 168 Eng. Rep. 305, 305 (1785); 1 William Hawkins, *Pleas of the Crown* 162 (6th ed. 1788).

Brown asks us to incorporate this “entry-by-instrument” distinction into the Armed Career Criminal Act's generic definition of burglary, which covers the unlawful “entry into, or remaining in, a building or structure, with intent to commit a crime.”  *Taylor*, 495 U.S. at 599, 110 S.Ct. 2143 (emphasis added). He adds that Tennessee law defines “enter” to include not just the “[i]ntrusion of any part of the body” but also the “[i]ntrusion of any object in physical contact with the body or any object controlled by remote control, electronic or otherwise.”

 Tenn. Code Ann. § 39-14-402(b). *337 Brown thus thinks that Tennessee law adopts a broader view of “entry” than the common-law view because it reaches *any* object—even one used only to gain access to a home. (No state decision, as far as we are aware, has answered this question about  § 39-14-402(b)'s scope, and caselaw from before that provision's enactment did not clearly answer the question either. See *State v. Crow*, 517 S.W.2d 753, 753–55 (Tenn. 1974).) Since Brown's view of this state definition would cover more than his generic definition of “entry,” he concludes that Tennessee's definition of “enter” disqualifies all Tennessee burglary convictions from the Armed Career Criminal Act's reach.

Id. (alterations in original) (parallel citations omitted).

Brown thoroughly analyzed the merits of this argument, see *id.* at 684–89, and concluded that the Supreme Court would not “adopt Brown's view of generic ‘entry,’ ” *id.* at 684. For starters, “we know that Congress did not view the entry element as a demanding one” because even at common law, little was required to prove an entry: “Sticking a hand or finger through a window sufficed, as did drilling a hole into the walls of a granary to cause the grain to fall out.” *Id.* at 685 (citations and internal quotation marks omitted). And the Supreme Court has “refused to read the [ACCA] as *limited* to the common-law rules.” *Id.* As mentioned above, the contemporary understanding of burglary is quite different, and the “arcane distinctions embedded in the commonlaw

definition have little relevance to modern law enforcement concerns.”  *Taylor*, 495 U.S. at 593, 110 S.Ct. 2143.

The court characterized the entry-by-instrument issue as “perhaps the prototypical ‘arcane distinction’ that  *Taylor* would disavow.” *Brown*, 957 F.3d at 685 (quoting  *Taylor*, 495 U.S. at 593, 110 S.Ct. 2143). Congress’s chief concern in passing the ACCA was the risk of a violent encounter inherent in certain crimes—for burglary, “between the offender and an occupant, caretaker, or some other person who comes to investigate.”  *Taylor*, 495 U.S. at 588, 110 S.Ct. 2143. And the entry-by-instrument distinction has “no relevance” to that purpose. *See Brown*, 957 F.3d at 685 (“Which burglar creates the greater risk of a violent encounter with a startled homeowner? The one who reaches a finger between a window and an inner shutter before fleeing (which would qualify as an entry under *Brown*’s common-law rule), or the one who violently chops at a door with an axe that intrudes into the home (which would not qualify under his rule)?” (citation omitted)).

The court also examined the criminal codes of the states at the time of the ACCA’s enactment, noting that it appears “that the majority of jurisdictions that had examined this question had retained the narrower common-law rule and limited an entry by instrument to the situation where the instrument is used to remove property from the premises or injure or threaten an occupant.” *Id.* at 688 (citation and internal quotation marks omitted). But this fact was not dispositive, the court stated, because Supreme Court precedent tells us that “if several state burglary statutes had modestly departed from a common-law rule of burglary when Congress passed the Armed Career Criminal Act, courts should interpret the Act’s generic definition of burglary to cover those state statutes.” *Id.* at 689. Every state statute need not be identical to qualify as generic burglary; states are instead entitled to some “breathing space.” *Id.* at 687. Because the departure at issue was slight and “did not completely redefine the crime of ‘burglary,’” the court found that the entry-by-instrument distinction did not make the *338 Tennessee statute broader than generic burglary. *Id.* at 688.

B.

Yerkes argues that we are not obligated to follow *Brown* here because its discussion of the entry-by-instrument distinction

is nonbinding dicta. That is, the court in *Brown* recognized that a prior case, *Brumbach v. United States*, 929 F.3d 791, 795 (6th Cir. 2019), rejected the entry-by-instrument argument because “a panel of this court cannot overrule  [*United States v.*] *Nance*.”  *Nance* held that “Tennessee aggravated burglary represents a generic burglary capable of constituting a violent felony for ACCA purposes.”¹  481 F.3d 882, 888 (6th Cir. 2007). Recognizing the authority of  *Nance* and *Brumbach*, the court in *Brown* stated that “*Brown* should direct his argument to our en banc court or the Supreme Court.” 957 F.3d at 683–84. Even so, the court thought “*Brown*’s argument weighty enough to warrant a response from this court on the merits too.” *Id.* at 684.

1  *Nance*’s holding was, for a time, overruled by this court’s en banc decision in  *United States v. Stitt*, 860 F.3d 854, 861 (6th Cir. 2017) (en banc). After the Supreme Court granted certiorari and reversed, *see*  *United States v. Stitt*, — U.S. —, 139 S. Ct. 399, 408, 202 L.Ed.2d 364 (2018), we recognized that “ *Nance*’s holding ... is once again the law of this circuit,” *Brumbach*, 929 F.3d at 794.

[1] [2] Yerkes also points out that he has only two prior convictions for Tennessee aggravated burglary, and *Brown*, *Brumbach*, and  *Nance* do not discuss the statute of his Georgia convictions.² But even if we are not bound by it, we find *Brown*’s discussion—and rejection on the merits—of the entry-by-instrument argument persuasive. Yerkes offers no reason for us to treat the Georgia statute differently from the Tennessee statute in this respect, and upon examining the two, we find none. Accordingly, we reject his argument that the statutes are overbroad based on their “entry” elements.

2 We addressed the statute of Yerkes’ Georgia burglary convictions in  *Richardson v. United States*, 890 F.3d 616 (6th Cir. 2018), *cert. denied*, — U.S. —, 139 S. Ct. 349, 202 L.Ed.2d 246 (2018). There, the court determined that the statute is divisible and that the elements of the defendant’s convictions—“(1) an unlawful entry (2) into a dwelling house or building (3) with intent to commit a crime therein”—“substantially conform to the generic definition of burglary announced by

the Supreme Court.”  *Id.* at 629. As discussed below, the  *Shepard* documents here similarly show that in all five Georgia burglary counts, Yerkes pleaded guilty to burgling either a dwelling house or a building.

II.

[3] Yerkes offers another reason why his prior burglary convictions should not count as ACCA predicates. He claims that the government failed to prove that his burglary offenses were “committed on occasions different from one another.”

See  18 U.S.C. § 924(e)(1).

[T]wo offenses are committed on different occasions under the Act if: (1) it is possible to discern the point at which the first offense is completed, and the subsequent point at which the second offense begins; (2) it would have been possible for the offender to cease his criminal conduct after the first offense, and withdraw without committing the second offense; or (3) the offenses are committed in different residences or business locations.

United States v. Paige, 634 F.3d 871, 873 (6th Cir. 2011) (citation and internal quotation marks omitted).

 *Shepard* documents provide the following information.

See  *339 *Shepard v. United States*, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005). One indictment in the Catoosa County, Georgia Superior Court charged Yerkes with four counts of burglary of a “dwelling house.” Each count listed a different address and owner for the burgled dwelling house in question. The first count alleged a commission date of August 22, 2008, while the other three listed a commission date of September 25, 2008. A separate indictment charged Yerkes with burgling a “business premises” on July 14, 2008, and listed its name and address. Two “final disposition” documents show that Yerkes pleaded guilty to all five burglary counts. Two indictments in the Hamilton County, Tennessee Criminal Court charged Yerkes with aggravated burglaries

of two different “habitation[s],” each with a different owner. Each indictment listed a different commission date for the aggravated burglaries: July 7, 2008, and July 14, 2008. Two criminal judgments show that Yerkes pleaded guilty to these two aggravated burglary charges.

Because each of the seven counts specified a “different residence[] or business location[],” *Paige*, 634 F.3d at 873, the  *Shepard* documents show that Yerkes committed the burglary offenses (or at very least, three of them) on different occasions. But Yerkes contends that “the  *Shepard*-approved evidence does not establish that he necessarily *admitted* that he committed the burglaries on occasions different from one another.” (Emphasis added.) That is, aside from one “reference to one specific individual (including her address for purposes of restitution)[,]” nothing in the judgment identifies the date/location of any offense, nor does anything else in the judgment indicate that Mr. Yerkes necessarily admitted the time or location of any burglary.” Because “[t]he time or location of the crime, then, is merely a fact – not an element,” Yerkes argues that relying on the above information from the indictments would violate his Sixth Amendment rights. See  *United States v. King*, 853 F.3d 267, 272 (6th Cir. 2017).

United States v. Hennessee forecloses this argument. 932 F.3d 437, 444 (6th Cir. 2019), *cert. denied*, — U.S. —, 140 S. Ct. 896, 205 L.Ed.2d 471 (2020). “[A] district court may consider both elemental and non-elemental facts contained in

 *Shepard*-approved documents to determine whether prior felonies were committed on occasions different from one another for purposes of the ACCA.” *Id.* The district court here properly did so, and correctly imposed an ACCA-enhanced sentence.

III.

For these reasons, we affirm the district court’s judgment.

KAREN NELSON MOORE, Circuit Judge, dissenting.

The majority opinion departs from well-established principles regarding the application of the categorial approach to burglary convictions in Armed Career Criminal Act (“ACCA”) cases as set forth by the Supreme Court. The majority applies the entry-issue analysis from *United States*

v. *Brown*, 957 F.3d 679 (6th Cir. 2020), to reject Yerkes's arguments. But the *Brown* analysis is not binding because it is dicta, nor is it persuasive due to its significant errors.

Proper application of the categorical approach from *Taylor* v. *United States*, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), demonstrates that Yerkes's Georgia burglary convictions are not categorical matches for generic burglary because Georgia's entry element of burglary is broader than the entry element of generic burglary.

We review de novo “[w]hether a defendant is a career offender.” *340 *United States v. Cooper*, 739 F.3d 873, 877 (6th Cir. 2014). We apply the categorical approach to determine whether a defendant's prior conviction for burglary is an ACCA predicate offense. *Greer v. United States*, 938 F.3d 766, 770–71 (6th Cir. 2019).¹ Under the categorical approach, we “compare the elements of the statute forming the basis of the defendant's conviction with the elements of the ‘generic’ crime.” *Id.* at 771 (quoting *Descamps* v. *United States*, 570 U.S. 254, 257, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013)). If the elements of the state criminal statute “are broader than those of generic burglary,” a prior state conviction under that statute does not qualify as generic burglary under the ACCA. *United States v. Stitt*, — U.S. —, 139 S. Ct. 399, 405, 202 L.Ed.2d 364 (2018) (quoting *Mathis v. United States*, — U.S. —, 136 S. Ct. 2243, 2257, 195 L.Ed.2d 604 (2016)).

¹ We classify a defendant as an armed career criminal if he is convicted under 18 U.S.C. § 922(g)(1) for possessing a firearm as a convicted felon and if he “has three previous convictions ... for a violent felony or a serious drug offense, or both, committed on occasions different from one another.” 18 U.S.C. § 924(e)(1). A “violent felony” is any crime punishable by imprisonment for a term exceeding one year ... that—

- (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
- (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

§ 924(e)(2)(B). “We refer to § 924(e)(2)(B) (i) as the ‘use of force clause,’ the list of offenses in § 924(e)(2)(B)(ii) as the “enumerated offenses” clause, and the remaining “portion of § 924(e)(2)(B)(ii) ... as the ‘residual clause.’” *United States v. Mitchell*, 743 F.3d 1054, 1058 (6th Cir. 2014). Here, we consider “burglary” under the enumerated offense clause. The residual clause was ruled unconstitutional in *Johnson v. United States*, — U.S. —, 135 S. Ct. 2551, 2563, 192 L.Ed.2d 569 (2015).

Yerkes contends that entry for Georgia burglary is broader than generic entry. Specifically, he argues that the generic definition of “entry” with an instrument is when an instrument crosses the threshold *and* the instrument is used or intended to be used to commit a further felony inside (instrument-for-crime approach). Appellant Br. at 8; Reply Br. at 2 & n.1. Georgia penalizes as an entry when an instrument simply crosses the threshold of the structure (any-instrument approach). Appellant Br. at 8; Reply Br. at 2 & n.2. Under the generic definition of entry, Yerkes argues, Georgia penalizes mere attempted entries, and therefore criminalizes attempted burglaries, which is broader than generic burglary. Appellant Br. at 8. Thus, it is necessary to determine (1) the definition of generic entry and (2) whether Georgia burglary is broader than generic burglary based on the entry element.

I. Generic entry is defined as the majority, instrument-for-crime approach

Taylor did not define the entry element of generic burglary, but it did give federal courts the method for discerning the generic definition of entry. See *Taylor*, 495 U.S. at 598, 110 S.Ct. 2143. The Supreme Court determined that “Congress meant by ‘burglary’ the generic sense in which the term is now used in the criminal codes of most States.” *Id.* (emphasis added); see also *id.* at 589, 110 S.Ct. 2143 (“Congress, at least at that time [in 1986] had in mind a modern ‘generic’ view of burglary, roughly corresponding to the definitions of burglary in a majority of the States’ criminal codes.” (emphasis added)); *Stitt*, 139 S. Ct. at 406. Thus, the question is not what the understanding of burglary was at common law, “but rather [Congress’s] understanding *341

at the time the ACCA was passed.” *Greer*, 938 F.3d at 771. It is well established that in this circuit, we find the generic definition “by surveying how the crime is described across jurisdictions, as well as consulting sources such as the Model Penal Code.”   *Cooper*, 739 F.3d at 879 (quoting  *United States v. Rede-Mendez*, 680 F.3d 552, 556 (6th Cir. 2012)); see also *Keeley v. Whitaker*, 910 F.3d 878, 882 (6th Cir. 2018); *Greer*, 938 F.3d at 771;   *United States v. Yates*, 866 F.3d 723, 733 (6th Cir. 2017). In its two most recent ACCA-burglary cases, the Supreme Court followed  *Taylor*, adopting the majority state view as the generic definition of certain aspects of burglary. See  *Quarles v. United States*, — U.S. —, 139 S.Ct. 1872, 1878, 204 L.Ed.2d 200 (2019) (intent for remaining-in burglary);  *Stitt*, 139 S. Ct. at 406 (locational element).

In 1986, the majority rule among the states was the instrument-for-crime approach; nineteen states had adopted the instrument-for-crime approach and eight had adopted the any-instrument approach. See Nev. Rev. Stat. § 193.0145 (1985); Wash. Rev. Code § 9A.52.010(2) (1985);  *Walker v. State*, 63 Ala. 49, 51–52 (1879); *Sears v. State*, 713 P.2d 1218, 1220 (Alaska Ct. App. 1986); *Thompson v. State*, 252 Ark. 1, 477 S.W.2d 469, 471–72 (1972); *Foster v. State*, 220 So.2d 406, 407 (Fla. Dist. Ct. App. 1969);  *People v. Davis*, 3 Ill.App.3d 738, 279 N.E.2d 179, 181 (1972);  *Mattox v. State*, 179 Ind. 575, 101 N.E. 1009, 1009 (1913);  *State v. Ervin*, 223 Kan. 201, 573 P.2d 600, 601 (1977)²; *Stamps v. Commonwealth*, 602 S.W.2d 172, 173 (Ky. 1980); *State v. Liberty*, 280 A.2d 805, 808 (Me. 1971);  *Commonwealth v. Burke*, 392 Mass. 688, 467 N.E.2d 846, 849 (1984);  *State v. Hodges*, 575 S.W.2d 769, 772 (Mo. Ct. App. 1978);  *State v. O’Leary*, 31 N.J.Super. 411, 107 A.2d 13, 15 (N.J. Super. Ct. App. Div. 1954); *State v. Tragni*, 113 Misc.2d 852, 449 N.Y.S.2d 923, 928 (N.Y. Sup. Ct. 1982);  *State v. Sneed*, 38 N.C.App. 230, 247 S.E.2d 658, 659 (1978); *State v. Crawford*, 8 N.D. 539, 80 N.W. 193, 194 (1899); *State v. Chappell*, 185 S.C. 111, 193 S.E. 924, 924–25 (1937);  *Mirich v. State*, 593 P.2d 590, 593 n.4 (Wyo. 1979) (all applying the instrument-for-crime approach).³ But see Ariz. Rev. Stat. Ann. § 13-1501(2) (1978);  11 Del. Code Ann. § 829(b) (1972); Tex. Code Ann. § 30.02(b)(2) (1973); Utah Code

Ann. § 76-6-201(4)(b) (1973);  *People v. Osegueda*, 163 Cal.App.3d Supp. 25, 210 Cal. Rptr. 182, 185–87 (Cal. App. Dep’t Super. Ct. 1984); *Mullinnix v. State*, 177 Ga.App. 168, 338 S.E.2d 752, 753 (1985);  *State v. Tixier*, 89 N.M. 297, 551 P.2d 987, 988–89 (N.M. Ct. App. 1976); *State v. Crow*, 517 S.W.2d 751, 754–55 (Tenn. 1974) (all applying the any-instrument approach). Contemporary commentators recognized that the instrument-for-crime approach was the majority rule, including Professors LaFave, Scott, Perkins, and Boyce. See 2 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 8.13(b) (1986); Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 254–55 (3d ed. 1982) (“But in any event the rule became firmly established that the insertion of a tool or instrument does not constitute an entry, within the law of burglary, *342 if it is used merely to effect a breaking.”). Tellingly, neither the government nor the majority disputes that the majority rule in 1986 was the instrument-for-crime approach. See Appellee Br. at 18–19; Majority Op. at —. The instrument-for-crime approach thus defines generic entry.

- 2 The government argues that Kansas should be counted along with the states following the any-instrument approach, citing  *State v. Martin*, 232 Kan. 778, 658 P.2d 1024 (1983), in support. Appellee Br. at 19.  *Martin* addresses the Kansas state crime of eavesdropping, however.  658 P.2d at 1026.
- 3 The government characterizes some of these states as merely having “language in their jurisprudence suggesting that they endorsed” the instrument-for-crime approach, Appellee Br. at 21 n.7, but this is an understatement. Each state cited has set forth the instrument-for-crime approach as its definition of entry.

The majority follows the analysis in *Brown*, which concluded that the definition of generic entry is the minority, any-instrument approach. Majority Op. at — — —; see also *Brown*, 957 F.3d at 683–89. This analysis is not binding, however, because *Brown*, a Tennessee-aggravated-burglary case, held that *Brumbach v. United States*, 929 F.3d 791 (6th Cir. 2019), *cert. denied*, — U.S. —, 140 S. Ct. 974, 206 L.Ed.2d 130 (2020), foreclosed the defendant’s entry argument. *Brown*, 957 F.3d at 683–84. In any event, the majority’s reiteration of the *Brown* analysis is unpersuasive because it makes four significant errors.

First, the majority bucks binding Supreme Court precedent,  *Taylor*, by adopting a commonlaw approach to defining the contours of generic burglary. Majority Op. at ———. It is true that Congress “had in mind at least the ‘classic’ common-law definition when [it] considered the inclusion of burglary as a predicate offense.”  *Taylor*, 495 U.S. at 593, 110 S.Ct. 2143. But the Court has been explicit: “[W]e made clear in  *Taylor* that Congress intended the definition of ‘burglary’ to reflect ‘the generic sense in which the term [was] used in the criminal codes of most States’ at the time the [ACCA] was passed.”  *Stitt*, 139 S. Ct. at 406 (second alteration in original) (quoting  *Taylor*, 495 U.S. at 598, 110 S.Ct. 2143). Crucially,  *Taylor* expressly declined to adopt a common-law-only focus.  *Taylor*, 495 U.S. at 593–96, 110 S.Ct. 2143. The majority and *Brown* reject the clear dictates of  *Taylor* by failing to define generic entry as the majority state rule in 1986.

Second, even following a common-law-only focus, the majority and *Brown* erroneously define generic entry. The common-law rule is the same as the modern, generic rule—the instrument-for-crime approach. Wayne R. LaFave, 3 *Substantive Criminal Law* § 21.1(b), 210 n.36 (2d ed. 2003) (“Today, the majority view is ‘that an entry can occur if an instrument, “being used to commit the felony intended,” passes the line of the threshold, regardless of whether the instrument was used in the breaking,’ while the minority position is ‘that an entry can occur if any instrument, whether or not intended for use to commit a felony, crosses the threshold.’ ” (citation omitted)). As Professor LaFave explained, though common-law commentators such as William Blackstone, Edward Coke, and Matthew Hale did not expressly distinguish between entry with an instrument with and without the intent to use the instrument to commit a crime within a structure, “it might be implied from their examples.” *Id.* Upon further examination of these examples, it is clear that Blackstone, Coke, and Hale viewed entry by instrument in a manner consistent with the instrument-for-crime approach. See 4 William Blackstone, *Commentaries on the Law of England* 227 (1769) (“As for the entry, any the least degree of it, with any part of the body, or *with an instrument held in the hand*, is sufficient: as, to step over the threshold, to put a hand *or a hook in at the window to draw out goods, or a pistol to demand one's money, are all of them burglarious entries.*”) (emphasis added); 1 Matthew Hale, *The History*

of the Pleas of the Crown 555 (1736) (reiterating the hook and pistol examples); 3 Edward Coke, *Institutes of the Laws of England* 64 (1644) (same). The same is true of other common-law sources; though the two approaches are not expressly distinguished, *343 the examples relied upon are consistent with the instrument-for-crime approach. See *Rex v. Hughes*, 168 Eng. Rep. 305, 305 (1785); 2 Edward H. East, *Pleas of the Crown* 490 (1806); 1 William Hawkins, *Pleas of the Crown* 162 (6th ed. 1788). The government omits this crucial context, Appellee Br. 17, as did the panel in *Brown*, 957 F.3d at 684. Upon closer scrutiny, not one common-law authority from the government's brief can be said to support its contention that the common-law rule was the any-instrument approach. See Appellee Br. at 17–19. And *Brown* does not cite a single common-law example following the any-instrument approach. The panel in *Brown* merely inferred a broad approach to entry at common law by citing cases addressing physical, bodily entries, 957 F.3d at 685, and cases that followed the instrument-for-crime approach, *id.* (citing  *Walker*, 63 Ala. at 51–52; *Crawford*, 80 N.W. at 194–95).⁴ Given the authorities discussed above, the majority's conclusion that the traditional rule was the any-instrument approach is confounding.

- 4 The *Brown* panel relies on two state cases adopting the instrument-for-crime approach. In  *Walker*, the Supreme Court of Alabama expressly stated that “the intrusion of the instrument is not, of itself, an entry.”  63 Ala. at 52. Rather, the instrument must be “necessary to the consummation of the criminal intent.”  *Id.* The Supreme Court of North Dakota cited the same rule in *Crawford* and concluded that an entry had occurred because the defendant had used a tool to bore a hole into the granary, knowing that the tool “set the law of gravitation in motion,” *i.e.* caused the grain to spill through the hole. 80 N.W. at 194 (“When the auger was withdrawn from the aperture made with it, the corn ran into the sack he used in its asportation. There was a breaking and entry”).

The third error—and the crux of the majority's argument—is the conclusion that the difference between the instrument-for-crime and any-instrument approaches is insignificant. The difference between the instrument-for-crime and the any-instrument approaches is not an “arcane distinction[]” from common law that does not fit within the generic

definition of burglary,  *Taylor*, 495 U.S. at 593, 110 S.Ct. 2143; Majority Op. at —, nor is Yerkes “seizing on modest state-law deviations from the generic definition of burglary,”  *Quarles*, 139 S. Ct. at 1880; see Majority Op. at — — —. The instrument-for-crime approach criminalizes only entries that were committed with an instrument intended to be used to commit a crime inside the structure. When an instrument crosses the threshold without this intent, it constitutes an attempted entry. Therefore, the any-instrument approach criminalizes attempted burglaries. Attempted burglary is inconsistent with the generic definition of burglary. In  *James v. United States*, the Court expressly concluded that attempted burglary does not “qualify as one of the specific crimes enumerated in clause (ii) because it does not meet the definition of burglary under ACCA that this Court set forth in  *Taylor*.”  550 U.S. 192, 197, 127 S.Ct. 1586, 167 L.Ed.2d 532 (2007), *overruled on other grounds by*  *Johnson v. United States*, — U.S. —, 135 S. Ct. 2551, 192 L.Ed.2d 569 (2015). Neither the majority nor *Brown* addresses  *James*. The difference between these two approaches is *not* a distinction without a difference.

The final error made by the majority is its conclusion that the instrument-for-crime approach does not satisfy “Congress’s chief concern in passing the ACCA,” “the risk of a violent encounter” inherent in burglaries. Majority Op. at —. Relatedly, the government contends that defining generic entry under the instrument-for-crime approach will mean that Congress intended to enact a “self-defeating statute” because if the instrument-for-crime approach were the definition of generic *344 entry, then burglary convictions in states that *today* have not spoken on the issue or that have adopted the any-instrument approach would no longer serve as ACCA predicates. Appellee Br. at 25 (quoting  *Quarles*, 139 S. Ct. at 1879). These arguments are misguided.

Adopting the instrument-for-crime approach to generic entry will not undermine Congress’s purpose in passing the ACCA. The majority is correct insofar as attempted burglary implicates congressional intent in including dangerous crimes as predicates in the ACCA. The Court concluded in  *James* that Congress believed attempted burglary presented a high risk of violence and thus intended the ACCA to include attempted burglary convictions. See  *James*, 550 U.S. at 203–07, 127 S.Ct. 1586. But these concerns did not motivate

Congress to include attempted burglary in the enumerated offenses clause—instead, they motivated Congress to cover attempted burglary through the residual clause. See  *id.* at 197, 209, 127 S.Ct. 1586. The Court later held that Congress exceeded constitutional restraints when it did so, however.  *Johnson*, 135 S. Ct. at 2563 (“We hold that imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution’s guarantee of due process.”). Thus, properly applying  *Taylor* to discern the contours of the entry element of generic burglary does not undermine congressional intent as to the inclusion of burglary in the enumerated offenses clause.

As for the government, it aims at the wrong targets. We look to the *majority* rule of the states *when the ACCA was enacted*.  *Stitt*, 139 S. Ct. at 406. Therefore, the government’s focus on the *minority* of states’ approaches *today* is misdirected. Additionally, there is no basis for the government’s assertion that determining that generic entry is defined by the instrument-for-crime approach will necessarily impact the jurisdictions that have yet to address the issue or that this concern should drive our analysis. In  *Quarles*, only five states had addressed the issue in 1986, and the fact that the vast majority of the states presently had not spoken on the issue did not stop the Court from adopting the majority approach of the few states. See  *Quarles*, 139 S. Ct. at 1878 & n.1. The government provides no authority for its implied proposition that a state that is silent on the entry rule will be considered to have adopted the minority, any-instrument approach. The government cites  *Stokeling v. United States*, — U.S. —, 139 S. Ct. 544, 552, 202 L.Ed.2d 512 (2019), and  *United States v. Castleman*, 572 U.S. 157, 167, 134 S.Ct. 1405, 188 L.Ed.2d 426 (2014), for the general proposition that Congress would not enact a provision that excludes many state statutes. In  *Stokeling*, “it [was] clear that many States’ robbery statutes would not qualify as ACCA predicates under Stokeling’s reading” because his reading impacted other robbery offenses.  139 S. Ct. 544, 552 (2019). The government outlines no such ripple effect here. And both  *Stokeling* and  *Castleman* were non-burglary cases, meaning neither had to contend with  *Taylor*. See  *Stokeling*, 139 S. Ct. at 551–52 (robbery);  *Castleman*, 572 U.S. at 163, 134 S.Ct. 1405 (domestic violence). Given

the clarity of  *Taylor*'s exposition of congressional intent, it is difficult to see why declining to follow  *Taylor* would better follow congressional intent under these circumstances.

In sum,  *Taylor* is clear, binding precedent that compels one conclusion—the majority, instrument-for-crime approach provides the definition of the entry element of generic burglary.

II. Georgia burglary criminalizes conduct broader than generic burglary

Once the generic definition is determined, we compare the elements of the *345 state offense to those of the generic offense, focusing on “[t]he minimum culpable conduct criminalized by the state statute ... to which there is a ‘realistic probability, not a theoretical possibility, that the state would apply the statute.’”   *Yates*, 866 F.3d at 728 (quoting  *Moncrieffe v. Holder*, 569 U.S. 184, 191, 133 S.Ct. 1678, 185 L.Ed.2d 727 (2013)). Though the Georgia statute does not define entry, see  Ga. Code Ann. § 16-7-1(a) (1980), Georgia courts have interpreted “entry” to mean “ ‘break[ing] the plane’ of the structure.” *Mullinnix*, 338 S.E.2d at 753 (quotations in original); see also  *Meadows v. State*, 264 Ga.App. 160, 590 S.E.2d 173, 177–78 (2003). Georgia applies the any-instrument approach, and therefore the minimum culpable conduct under the Georgia burglary statute is attempted burglary based on an attempted entry.

There is a realistic probability that Georgia would apply its burglary statute to attempted entries. The most common method of demonstrating a realistic probability is for a defendant to “point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues.”  *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193, 127 S.Ct. 815, 166 L.Ed.2d 683 (2007). But that is not the only method. For example, we have relied on the plain text of a statute to hold that there is a realistic probability that the state would apply its statute to the minimum culpable conduct in question. See  *United States v. Camp*, 903 F.3d 594, 602 (6th Cir. 2018), *cert. denied*, — U.S. —, 139 S. Ct. 845, 202 L.Ed.2d

613 (2019); see also  *United States v. Havis*, 907 F.3d 439, 446 (6th Cir. 2018) (explaining that “[i]f the text of Tennessee's attempt statute was plainly overbroad, that would be a different matter” regarding whether a defendant must supply a case to demonstrate a realistic probability), *rev'd on other grounds*,  927 F.3d 382 (6th Cir. 2019) (en banc). Like plain statutory text, pattern jury instructions may also be so clear as to demonstrate a realistic probability, not a theoretical possibility, that a state statute is applied to the least of the acts criminalized. See *United States v. Daniels*, 915 F.3d 148, 163 (3d Cir. 2019), *cert. denied*, — U.S. —, 140 S. Ct. 1264, 206 L.Ed.2d 254 (2020);  *United States v. Glass*, 904 F.3d 319, 323 (3d Cir. 2018), *cert. denied*, — U.S. —, 139 S. Ct. 840, 202 L.Ed.2d 610 (2019); *United States v. McCranie*, 889 F.3d 677, 680 (10th Cir. 2018), *cert. denied*, — U.S. —, 139 S. Ct. 1260, 203 L.Ed.2d 282 (2019).

Georgia's pattern jury instructions show a realistic probability that Georgia criminalizes any-instrument entries. Georgia Suggested Pattern Jury Instruction 2.62.31 provides, “[t]o constitute ‘entry,’ the evidence need only show a [‘]breaking of the plane’ of the structure.” 2 *Ga. Suggested Pattern Jury Instr.*, Crim. 2.62.31 (4th ed. 2020). The instruction's meaning is plain, and therefore there is a realistic probability Georgia applies its burglary statute to attempted entries. Accordingly, Georgia's entry element is broader than the generic entry element as defined by the instrument-for-crime approach, and Georgia burglary is not a categorical match for generic burglary.

III. Conclusion

For the reasons set forth above, Yerkes's Georgia burglary convictions cannot serve as ACCA predicates. Once Yerkes's five Georgia convictions are eliminated from his ACCA-predicate tally, he is left with only his two Tennessee convictions. This is insufficient for Yerkes to be classified as an armed career criminal for sentencing under the ACCA. Yerkes's sentence should be vacated, and his case remanded *346 for resentencing. For these reasons, I dissent.

All Citations

820 Fed.Appx. 334

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE CHATTANOOGA DIVISION

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

(For Offenses committed on or after November 1, 1987)

v.

Case Number: **1:18-CR-00038-HSM-SKL(1)**

LEE YERKES
USM#53194-074

Jackson Whetsel
Defendant's Attorney

THE DEFENDANT:

- ☒ pleaded guilty to count(s): One of the Indictment
☐ 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 U.S.C. § 922(g)(1) and 18 U.S.C. § 924(e) Felon in Possession of a Firearm and Ammunition	02/11/2018	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.

July 15, 2019

Date of Imposition of Judgment

/s/ Harry S. Mattice, Jr.

Signature of Judicial Officer

Harry S Mattice Jr., United States District Judge

Name & Title of Judicial Officer

7/15/2019

Date

DEFENDANT: LEE YERKES
CASE NUMBER: 1:18-CR-00038-HSM-SKL(1)

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IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

180 months as to count one.

- ☒ The court makes the following recommendations to the Bureau of Prisons: The court recommends that the defendant receive 500 hours of substance abuse treatment from the BOP Institution Residential Drug Abuse Treatment Program.
- ☒ 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

DEFENDANT: LEE YERKES
CASE NUMBER: 1:18-CR-00038-HSM-SKL(1)

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SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **five (5) 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 (34 U.S.C. § 20901, 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.

DEFENDANT: LEE YERKES
CASE NUMBER: 1:18-CR-00038-HSM-SKL(1)

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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 _____

DEFENDANT: LEE YERKES
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SPECIAL CONDITIONS OF SUPERVISION

The defendant must 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 must submit his person, property, house, residence, vehicle, papers, [computers (as defined in Title 18 U.S.C. § 1030(e)(1), other electronic communications or data storage devices or media,) or office, to a search conducted by a United States probation officer or designee. Failure to submit to a search may be grounds for revocation of release. The defendant must warn any other occupants that the premises may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that the defendant has violated a condition of his supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.

DEFENDANT: LEE YERKES
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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.

DEFENDANT: LEE YERKES
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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 **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) JVT Assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.