NO. _____

IN THE UNITED STATES SUPREME COURT

_____ TERM

JUAN MORRIS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

APPENDIX

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Case Nos. 18-5183/5197

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
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DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellant,	)	ON APPEAL FROM THE
	)	UNITED STATES DISTRICT
v.	)	COURT FOR THE EASTERN
	)	DISTRICT OF TENNESSEE
JUAN MORRIS,	)	
	)	
Defendant-Appellee.	)	

O P I N I O N

BEFORE: MOORE, McKEAGUE, and READLER, Circuit Judges.

McKeague, Circuit Judge. Juan Morris pled guilty to violating federal drug and firearm laws. When he entered his plea, he had prior convictions under Tennessee law, including one for aggravated burglary. Because of these prior convictions, Mr. Morris got a higher federal sentence under the Armed Career Criminal Act (ACCA).

This court, sitting en banc, later held that Tennessee aggravated burglary was too broad to qualify as a predicate offense for ACCA enhancements. Based on this en banc decision, the district court subsequently reduced Morris's sentence. But our en banc decision was later reversed by the Supreme Court. So now, the government wants Morris's old, ACCA-enhanced sentence reinstated. Morris, for his part, offers some new reasons for keeping the reduced sentence. We are not persuaded by his new reasons, so we VACATE the judgment of the district court and REMAND for the court to reinstate Morris's original sentence.

I. Background and Procedural History

In 2009, Juan Morris pled guilty to one count of conspiring to distribute at least 500 grams of cocaine, in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(B), and one count of possessing a firearm as a felon, in violation of 18 U.S.C. § 922(g)(1). At the time of the guilty plea, Morris had one Tennessee conviction for aggravated burglary and two Tennessee convictions for robbery. Based on those prior convictions, Morris was eligible for a sentence enhancement under the Armed Career Criminal Act, 18 U.S.C. § 924(e). Applying the ACCA enhancement, the district court sentenced Morris to two concurrent terms of 235 months' imprisonment.

Then in 2016, Morris filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255. He alleged that, among other things, he was no longer eligible for an ACCA enhancement after *Johnson v. United States* invalidated ACCA's residual clause. 135 S. Ct. 2551, 2563 (2015). Specifically, he claimed that Tennessee aggravated burglary was not generic "burglary" under ACCA because its definition of "habitation" was too broad. The district court stayed the proceedings related to Morris's § 2255 motion, pending this court's resolution of this exact issue in *Stitt*.

In *United States v. Stitt*, this court, in a divided en banc decision, held that Tennessee aggravated burglary did not categorically constitute "burglary" for ACCA purposes. 860 F.3d 854, 858 (6th Cir. 2017) (en banc) (*Stitt I*). Drawing on Supreme Court precedents on ACCA burglary, the court concluded that the Tennessee statute was too broad because it defined "habitation" to include mobile homes, trailers, tents, and self-propelled vehicles that were "designed or adapted for the overnight accommodation of persons." *Id.* (quoting Tenn. Code Ann. § 39-14-401(1)).

After our court's decision in *Stitt I*, the district court granted Morris's § 2255 motion and reduced his sentence to 115 months. The government acknowledged that Morris was eligible for

relief under *Stitt I*, but it maintained that *Stitt I* was wrongly decided and was continuing to litigate the issue. The government noted its objection in order to preserve it for appellate review, in the event that the Supreme Court reversed the Sixth Circuit decision in *Stitt*.

It did. The Supreme Court unanimously held that the relevant provision of the Tennessee aggravated burglary statute—the definition of "habitation"—fell within the scope of generic burglary under ACCA. *United States v. Stitt*, 139 S. Ct. 399, 406 (2018) (*Stitt II*). Thus, the Court vacated the en banc decision that formed the entire basis for the district court's granting of Morris's § 2255 motion. The government had appealed Morris's modified sentence—again anticipating a possible *Stitt* reversal. Unsurprisingly, the government now requests that Morris's original sentence be reinstated. Morris concedes that *Stitt* no longer provides him relief, but he provides several alternative grounds for affirming the reduced sentence.

II. Standard of Review

The district court granted Morris's motion under 28 U.S.C. § 2255(a), which allows a sentencing court to "vacate, set aside or correct the sentence" if, among other things, "the sentence was in excess of the maximum authorized by law." When presented with a district court's grant of a § 2255 motion, we review the district court's factual determinations for clear error and its legal conclusions de novo. *Davis v. United States*, 900 F.3d 733, 735 (6th Cir. 2018). Whether a prior conviction qualifies as an ACCA predicate offense is just such a legal conclusion. *Id.*

III. Discussion

Morris provides several alternative grounds for affirming his reduced sentence, citing our authority to affirm for other reasons supported by the record. *Loftis v. United Parcel Serv., Inc.*, 342 F.3d 509, 514 (6th Cir. 2003). First, he claims the "invited error" doctrine hamstrings the government's *Stitt* argument. Second, he offers two non-*Stitt* reasons why Tennessee aggravated

burglary is broader than ACCA generic burglary. Finally, he argues that there is insufficient evidence that his ACCA predicate offenses occurred on different occasions. Each argument fails.

A. *The "Invited Error" Doctrine*

Morris first claims that the "invited error" doctrine should preclude the government from relying on the Supreme Court's decision in *Stitt*. Under the invited-error doctrine, a party generally cannot "complain on appeal of errors that he himself invited or provoked the court or the opposite party to commit." *United States v. Howard*, 947 F.3d 936, 945 (6th Cir. 2020) (quoting *United States v. Sharpe*, 996 F.2d 125, 129 (6th Cir. 1993)). Put differently, you can't complain about a result you caused. 21 Kenneth W. Graham, Jr., *Federal Rules of Evidence: Federal Practice & Procedure* § 5039.2 (2d ed. Apr. 2020 update). According to Morris, because the government represented to the district court that Tennessee aggravated burglary was not a violent felony under ACCA, it cannot now come to the appellate court and argue the opposite.

The problem here is there was no error to invite. When the government said that Tennessee aggravated burglary was not a violent felony under ACCA, it was merely pointing out that binding precedent controlled the outcome of Morris's case. And at the time, that was true. Our court's decision in *Stitt I* did control the case and establish Morris's right to relief. But there has been an intervening change in the law in the form of *Stitt II*. Morris cites no authority for the proposition that a party "invites error" when he tells the court to apply then-binding precedent, especially where he nevertheless contends the precedent is wrongly decided and declares his intention to continue litigating the issue. Nor does Morris cite any authority for the proposition that we now have to ignore an intervening change in the law. Thus, his invited-error argument fails.

B. *Tennessee Aggravated Burglary and ACCA Generic Burglary*

Putting *Stitt* to the side, Morris provides several alternative reasons why Tennessee aggravated burglary is not an ACCA predicate offense. He first argues that Tennessee's definition of "entry" in its aggravated burglary statute makes the offense broader than generic burglary under ACCA. He then argues that Tennessee burglary is too broad to constitute generic ACCA burglary because it covers merely reckless conduct. Our precedent forecloses both arguments.

We begin with the basic framework for these types of challenges. Under ACCA, certain defendants can have their sentences enhanced if they have three prior convictions for a "violent felony." 18 U.S.C. § 924(e). The statute enumerates some offenses that count as violent felonies: "burglary, arson, [and] extortion." *Id.* § 924(e)(2)(B)(ii). This is often called the "enumerated offense clause." To determine whether a prior conviction counts as an ACCA predicate under the enumerated offense clause, we use the "categorical approach." *Descamps v. United States*, 570 U.S. 254, 257 (2013). That means we "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." *Id.* So, for Tennessee aggravated burglary, we would compare the elements of the Tennessee statute to the elements of "generic" burglary, which the Supreme Court has defined as "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Taylor v. United States*, 495 U.S. 575, 599 (1990). A conviction for Tennessee aggravated burglary "qualifies as an ACCA predicate only if the statute's elements are the same as, or narrower than, those of" generic burglary under *Taylor*. *Descamps*, 570 U.S. at 257.

Definition of "Entry." First, Morris argues that Tennessee aggravated burglary is broader than generic burglary under ACCA because its definition of "entry" is so broad that even some attempted burglaries are criminalized under it. But that exact argument was presented to and

rejected by this court in *Brumbach v. United States*, 929 F.3d 791, 795 (6th Cir. 2019), *cert. denied* 140 S. Ct. 974 (2020). Morris even admits this. *Brumbach* reaffirmed that Tennessee aggravated burglary qualifies as generic burglary under ACCA. *Id.* And we as a panel cannot overturn that decision. *See, e.g.*, *United States v. Brown*, --- F.3d ---, No. 18-5356, 2020 WL 1966845, at *3 (6th Cir. Apr. 24, 2020); *Ogle v. Ohio Civil Serv. Emps. Ass'n*, 951 F.3d 794, 796 (6th Cir. 2020) (per curiam).

Mens Rea for Tennessee Burglary. Next, Morris argues that Tennessee's definition of burglary is broader than ACCA generic burglary because it can cover merely reckless conduct. This would be a problem, according to Morris, because the individual would never form the "intent" to commit a crime, as is required under *Taylor*. The argument refers to Tennessee's generic burglary statute:

> (a) A person commits burglary who, without the effective consent of the property owner:
>
> (1) Enters a building other than a habitation (or any portion thereof) not open to the public, with intent to commit a felony, theft or assault;
>
> (2) Remains concealed, with the intent to commit a felony, theft or assault, in a building;
>
> (3) Enters a building and commits or attempts to commit a felony, theft or assault; or
>
> (4) Enters any freight or passenger car, automobile, truck, trailer, boat, airplane or other motor vehicle with intent to commit a felony, theft or assault or commits or attempts to commit a felony, theft or assault.

Tenn. Code Ann. § 39-14-402(a). Granted, Morris was convicted of aggravated burglary. But Tennessee aggravated burglary incorporates the generic burglary statute: "Aggravated burglary is burglary of a habitation as defined in [Tenn. Code Ann.] §§ 39-14-401 and 39-14-402." Tenn. Code Ann. § 39-14-403(a).

Morris directs his argument at subsections (a)(1), (a)(2), and (a)(3). Once again, he runs headlong into binding precedent. We have already examined that exact statutory language and

concluded that all three variants count as ACCA burglary under *Taylor*. *United States v. Priddy*, 808 F.3d 676, 684–85 (6th Cir. 2015) ("We find that the first three variants of Tennessee burglary, i.e., Tenn. Code Ann. § 39–14–402(a)(1), (a)(2), and (a)(3), qualify as generic burglary . . . ."). And we have reaffirmed this holding after *Stitt II*. *Brumbach*, 929 F.3d at 794–95. So that argument fails, too.

C. *Different Occasions*

Morris's last argument is that there is insufficient evidence to conclude that the three convictions forming the basis of his ACCA enhancement occurred on separate occasions. The government argues that this argument is untimely. But even if it were timely, it's meritless.

ACCA requires that the three predicate convictions be "committed on occasions different from one another." 18 U.S.C. § 924(e)(1). Under Sixth Circuit precedent, we can examine certain state court documents, including charging documents, to determine whether ACCA predicate offenses occurred on different occasions. *Brown*, 2020 WL 1966845, at *8; *United States v. King*, 853 F.3d 267, 273 (6th Cir. 2017); *see also Shepard v. United States*, 544 U.S. 13, 26 (2005). And based on the charging documents, Morris did commit the aggravated burglary and two robberies on three different occasions. The aggravated burglary occurred on October 31, 1995. The two robberies occurred on July 2, 2001 and July 14, 2001.[1]

Morris does not claim the dates on these charging documents are inaccurate. Instead, he argues that we are required to ignore the dates. According to this view, we can examine things like charging documents only to determine "elemental facts"—that is, the facts that the state court necessarily found as elements of the conviction. And because the date of the offense is not an

[1] These state court records were not before the district court, but it is proper for us to take judicial notice of them. *See United States v. Ferguson*, 681 F.3d 826, 834–35 (6th Cir. 2012).

element of aggravated burglary under Tennessee law, according to Morris, the court cannot rely on the dates listed on the documents to enhance his sentence under ACCA.

Yet again, binding precedent controls this issue. Confronted with this exact question, we held in *United States v. Hennessee* that "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." 932 F.3d 437, 444 (6th Cir. 2019), *cert. denied* 140 S. Ct. 896 (2020). Again, Morris recognizes this. Considering the facts in the charging documents, as is allowed under *Hennessee*, we conclude that Morris's offenses were committed on different occasions.

IV. Conclusion

After *Stitt II*, Mr. Morris is again eligible for a sentencing enhancement under the Armed Career Criminal Act. For the reasons outlined above, we VACATE the judgment of the district court and REMAND for the court to reimpose the original sentence.

KAREN NELSON MOORE, Circuit Judge, concurring. I recognize that we are bound by *Brumbach v. United States*, 929 F.3d 791 (6th Cir. 2019), *cert. denied*, 140 S. Ct. 974 (2020), which resuscitated the sweeping holding in *United States v. Nance*, 481 F.3d 882 (6th Cir. 2007), that Tennessee aggravated burglary is within the definition of generic burglary—even if a defendant raises arguments that we have never considered. *See Brumbach*, 929 F.3d at 794. Indeed, panels of this court have wielded *Brumbach* to parry such arguments, asserting that *Brumbach* forecloses their consideration. *See e.g.*, *United States v. Burrus*, --- F. App'x ---, No. 19-6090, 2020 WL 1862308, at *2 (6th Cir. Apr. 14, 2020). This court recently offered its own riposte to the onslaught of post-*Stitt*[1] appeals, invoking *Brumbach* to rebuff the defendant's arguments, identical to those raised by Defendant-Appellee Juan Morris, but then proceeding in dicta to evaluate those arguments on the merits. *See United States v. Brown*, --- F.3d ---, No. 18-5356, 2020 WL 1966845, at *3 (6th Cir. Apr. 24, 2020). I maintain that *Brumbach* was wrong the day it was decided, warranting en banc review. But as long as *Brumbach* is the law of the circuit, we must consistently apply it.

Powerful constitutional principles and jurisprudential considerations establish that we are bound only by holdings, not dicta. *See Wright v. Spaulding*, 939 F.3d 695, 700–01 (6th Cir. 2019). As I have stated before, *Nance* lacked binding force over the entry issue until *Brumbach* reinvigorated *Nance* because this issue and any other novel arguments were at best "questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon." *United States v. Bawgus*, 782 F. App'x 408, 412 (6th Cir. 2019) (Moore, J., concurring in judgment) (quoting *Rinard v. Luoma*, 440 F.3d 361, 363 (6th Cir. 2006)); *United States v. Hamilton*, 774 F. App'x 283, 285 (6th Cir. 2019) (Moore, J., concurring in judgment) (same).

[1] *United States v. Stitt*, 139 S. Ct. 399 (2018).

In *Wright*, the panel recently reaffirmed this rule, 939 F.3d at 702 (quoting *Rinard*, 440 F.3d at 363), to the extent that a rule so well-established needs reaffirmance, *see Cohens v. Virginia*, 19 U.S (6 Wheat.) 264, 399–400 (1821) (explaining that if statements "go beyond the case, they may be respected, but ought not to control the judgment of a subsequent suit when the very point is presented for decision"). Yet in *Brumbach* we concluded that we are bound by *Nance*'s overbroad announcement of its holding without considering what issues were actually decided in *Nance*.

Nevertheless, *Brumbach* binds us and thus requires us to reject outright previously unconsidered arguments that aggravated burglary in Tennessee is not a generic burglary. In *Brown*, the panel appeared to apply *Brumbach* to reject the same entry argument that we found to be foreclosed by *Nance* in *Brumbach*. *Brown*, 2020 WL 1966845, at *2. But the panel continued, stating that the presented arguments were "weighty enough to warrant a response from this court on the merits too." *Id.* at *3. The fact that the defendant in *Brown* pointed to the Tennessee aggravated-burglary statute was all that was required to reject his appeal pursuant to *Brumbach*. *Cf. Wright*, 939 F.3d at 701 (distinguishing between cases "in which a court *decides* one issue and merely *opines* about another"). Indeed, we do no more in this case. Until this court grants en banc review, we must follow *Brumbach*, no matter how "weighty" the underlying substantive issues or how thoughtfully the issues are addressed.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

JUAN MORRIS,	)	
	)	
Petitioner,	)	
	)	
v.	)	Nos. 1:09-CR-142-CLC-SKL-3 &
	)	1:10-CR-133-CLC-SKL-1
	)	1:16-CV-71-CLC & 1:16-CV-223-CLC
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

JUDGMENT ORDER

For the reasons expressed in the accompanying memorandum opinion filed herewith, it is **ORDERED** and **ADJUDGED** that Petitioner's motion to file a supplemental § 2255 motion at No. 1:09-CR-142-3 [Doc. 200 at No. 1:09-CR-142-3] be and hereby is **GRANTED** and that Petitioner's supplemental § 2255 motion [Doc. 202 at No. 1:09-CR-142-3] and § 2255 motion [Doc. 12 at No. 1:10-CR-133] be and hereby are **GRANTED**. The Judgment imposed on February 24, 2011 [Doc. 165 at No. 1:09-CR-142-3 and Doc. 8 at No. 1:10-CR-133], is **VACATED** and it hereby is **ORDERED** that a resentencing hearing is **SCHEDULED** for November 29, 2017 at 2:00 p.m. in Knoxville, Tennessee. The United States Probation Office is **DIRECTED** to provide the Court with information necessary for sentencing. In accordance with E.D. Tenn. L.R. 83.9(j), the parties shall file all sentencing motions or sentencing memoranda at least 14 days before the resentencing hearing.

In the absence of a waiver of appearance at sentencing, it also hereby is **ORDERED** that the Bureau of Prisons relinquish custody of Juan Morris [Register No. 08515-025] to the United States Marshal, and that the United States Marshal transport Mr. Morris from USP Atlanta in

Atlanta, Georgia, to this district on or before November 29, 2017 in order for him to meet with his attorney and prepare for his hearing.

It also hereby is **ORDERED** that Petitioner's pro se § 2255 motion [Doc. 195 at No. 1:09-CR-142-3] be and hereby is **DISMISSED**. The Clerk's Office is **DIRECTED** to close the civil cases at Docket Nos. 1:16-CV-71 and 3:16-CV-223.

SO ORDERED.

ENTER:

/s/
CURTIS L. COLLIER
UNITED STATES DISTRICT JUDGE

ENTERED AS A JUDGMENT
s/ Debra C. Poplin
CLERK OF COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

JUAN MORRIS,	)	
	)	
Petitioner,	)	
	)	
v.	)	Nos. 1:09-CR-142-CLC-SKL-3 &
	)	1:10-CR-133-CLC-SKL-1
	)	1:16-CV-71-CLC & 1:16-CV-223-CLC
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

MEMORANDUM OPINION

Presently before the Court are a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 filed at No. 1:10-CR-133 and a supplemental § 2255 motion[1] filed at No. 1:09-CR-142-3 by Juan Morris ("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).[2]

[1] Petitioner's counseled motion to file a supplemental § 2255 motion raising a *Johnson* claim [Doc. 200 at No. 1:09-CR-142-3] will be granted. However, Petitioner's pro se § 2255 motion [Doc. 195 at No. 1:09-CR-142-3], which seeks to raise a challenge to the voluntariness of his guilty pleas, will be dismissed. The Sixth Circuit Court of Appeals explicitly held on direct appeal that petitioner's guilty pleas were voluntary [Doc. 170 p. 2 at No. 1:09-CR-142-3]. As a result, by Order dated April 25, 2016, Petitioner was granted 15 days to show cause as to why his pro se § 2255 motion should not be dismissed for failure to state a claim upon which relief may be granted [Doc. 197 at No. 1:09-CR-142-3]. Petitioner never responded to the show cause order. Accordingly, his original pro se § 2255 motion will be dismissed for failure to state a claim upon which relief may be granted and for failure to comply with the Court's show cause order.

[2] 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).

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. 12 at No. 1:10-CR-133] and supplemental § 2255 motion [Doc. 202 at No. 1:09-CR-142-3] will be **GRANTED**.

I. BACKGROUND

On August 25, 2009, a grand jury sitting in the Eastern District of Tennessee returned a multi-count, multi-defendant indictment charging various controlled substance offenses. Petitioner was one of six defendants charged at Count One of that indictment with conspiracy to distribute 500 grams or more of cocaine, in violation of 21 U.S.C. §§ 846 and 841(a)(1) and (b)(1)(B) [Doc. 2 at No. 1:09-CR-142-3]. On January 21, 2010, a grand jury sitting in the Southern District of Illinois returned a one-count indictment charging Petitioner with possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e) [Doc. 1 pp. 5–6 at No. 1:10-CR-133]. After consenting to a transfer of jurisdiction of the felon-in-possession case from the Southern District of Illinois to the Eastern District of Tennessee [Doc. 1 p. 3 at No. 1:10-CR-133], Petitioner entered a plea of guilty to both count one of the indictment at No. 1:09-CR-142-3 and count one of the indictment at No. 1:10-CR-133 on October 6, 2010 [Doc. 151 at No. 1:09-CR-142-3 and Doc. 2 at No. 1:10-CR-133].

The presentence investigation report ("PSIR") identified five previous convictions for a violent felony, committed on occasions different from one another, that qualified Petitioner as an armed career criminal under the ACCA: (1) a November 5, 1997, conviction for aggravated

burglary in the Hamilton County, Tennessee, Criminal Court [PSIR ¶ 47]; (2) two convictions[3] on May 22, 2000, for accessory after the fact to aggravated burglary in the Hamilton County, Tennessee, Criminal Court [PSIR ¶ 48]; and (3) two qualifying convictions on January 28, 2003, for robbery in the Hamilton County, Tennessee, Criminal Court [PSIR ¶ 50]. As an armed career criminal, Petitioner was subject to a statutory mandatory minimum sentence of 15 years to a maximum of life at count one of the indictment at No. 1:10-CR-133[4] and his advisory guideline sentencing range under the United States Sentencing Guidelines ("USSG") was 188 to 235 months [PSIR ¶¶ 74, 75].

On February 24, 2011, Petitioner was sentenced to a term of imprisonment of 235 months, consisting of 235 months on each of count one of the indictment at No. 1:09-CR-142-3 and count one of the indictment at No. 1:10-CR-133, to be served concurrently, and a term of supervised release of 5 years, consisting of 5 years on each of count one of the indictment at No. 1:09-CR-142-3 and count one of the indictment at No. 1:10-CR-133, to run concurrently [Doc. 165 at No. 1:09-CR-142-3 and Doc. 8 at No. 1:10-CR-133]. Petitioner's conviction and sentence were affirmed by the Sixth Circuit Court of Appeals on September 14, 2011 [Doc. 170 at No. 1:09-CR-142-3].

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[3] 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)).

[4] Petitioner's authorized statutory term of imprisonment on count one of the indictment at No. 1:09-CR-142-3 was not less than 5 and not more than 40 years [PSIR ¶ 74].

On June 20, 2016, Petitioner, through court-appointed counsel, filed the pending § 2255 motion at No. 1:10-CR-133 and supplemental § 2255 motion at No. 1:09-CR-142-3 challenging his armed career criminal status based on the Supreme Court's invalidation of the ACCA residual clause in *Johnson* [Doc. 202 at No. 1:09-CR-142-3 and Doc. 12 at No. 1:10-CR-133].

The government's motions 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), were granted by the Court on November 29, 2016 [Doc. 217 at No. 1:09-CR-142-3], and March 7, 2017 [Doc. 16 at No. 1:10-CR-133]. 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 joint status reports agreeing that Petitioner no longer qualifies as an armed career criminal in light of *Johnson* and *Stitt* [Doc. 219 at No. 1:09-CR-142-3 and Doc. 17 at No. 1:10-CR-133].

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 the pending § 2255 motions raising *Johnson* claims on June 20, 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, three of Petitioner's five predicate offenses were convictions for aggravated burglary, or accessory after the fact to aggravated burglary, in violation of Tenn. Code. Ann. § 39-14-403 [PSIR ¶¶ 47, 48]. 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 also 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),[5] and *Johnson* invalidated the residual clause, Petitioner's aggravated burglary and accessory after the fact to aggravated burglary convictions under the

[5] 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. 219 p. 2 at No. 1:09-CR-142-3 and Doc. 17 p. 2 at No. 1:10-CR-133].

Tennessee statute no longer can be used as predicate 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 no longer can be designated an armed career criminal under § 924(e). As a result, the 235-month term of imprisonment and 5-year term of supervised release imposed by the Court on count one of the indictment at No. 1:10-CR-133 exceed the maximum authorized sentence of not more than 10 years' imprisonment and not more than 3 years' supervised release for a non-ACCA offender convicted of a violation of § 922(g)(1). *See* 18 U.S.C. § 924(a)(2) and 18 U.S.C. §§ 3559(a)(3) and 3583(b)(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 on count one of the indictment at No. 1:10-CR-133 to 120 months' imprisonment and 3 years' supervised release, the applicable statutory maximums for a violation of § 922(g)(1) for a non-armed career criminal, but to leave unchanged Petitioner's 235-month incarceration sentence and 5-year term

of supervised release on count one of the indictment at No. 1:09-CR-142-3 [Doc. 219 p. 3 at No. 1:09-CR-142-3 and Doc. 17 p. 3 at No. 1:10-CR-133].

Petitioner, however, argues that Petitioner's ACCA enhancement had a "substantial impact on his aggregate Guidelines calculations" and therefore submits that he also is entitled to a reduction in his sentence on count one of the indictment at No. 1:09-142-3 [Doc. 219 pp. 3–4 at No. 1:09-CR-142-3 and Doc. 17 pp. 3–4 at No. 1:10-CR-133]. *See Pasquarille v. United States*, 130 F.3d 1220, 1222 (6th Cir. 1997) (courts have authority to re-evaluate entirety of aggregate sentence when a defendant is convicted of multiple counts and one count is modified on collateral review). He further submits that his advisory guideline sentencing range under the current USSG "will likely be substantially lower than 120 months" such that a sentence of 120 months on the firearms count also would be greater than necessary to satisfy the purposes of sentencing under 18 U.S.C. § 3553(a) [Doc. 219 p. 4 at No. 1:09-CR-142-3 and Doc. 17 p. 4 at No. 1:10-CR-133]. Accordingly, Petitioner seeks a full resentencing on both counts.

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. The Court will enter an order accordingly.

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. 12 at No. 1:10-CR-133] and supplemental § 2255

motion [Doc. 202 at No. 1:09-CR-142-3]. The Judgment imposed by the Court on February 24, 2011 [Doc. 165 at No. 1:09-CR-142-3 and Doc. 8 at No. 1:10-CR-133], 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 cases at Nos. 1:16-CV-71 and 1:16-CV-223.

AN APPROPRIATE ORDER WILL ENTER.

/s/
CURTIS L. COLLIER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE CHATTANOOGA DIVISION

UNITED STATES OF AMERICA

v.

JUAN MORRIS
USM#08515-025
Date of Original Judgment: November 29, 2017
Reason for Amendment: Judgments were Vacated

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

Case Number: **1:09-CR-00142-CLC-SKL(3) and 1:10-cr-133-CLC-SKL(1)**

Erin Alix Phillippi Rust
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): One in 1:09-CR-142 (3) and One in 1:10-cr-133 (1).

☐ 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
(1:09-CR-142-003)Title 21 U.S.C. §§ 846, 841(a)(1) and (b)(1)(B) Conspiracy to Distribute 500 Grams or More of Cocaine Hydrochloride	03/2009	1

The defendant is sentenced as provided in pages 2 through 8 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.

January 3, 2018
Date of Imposition of Judgment

/s/
Signature of Judicial Officer

Curtis L Collier , United States District Judge
Name & Title of Judicial Officer

January 16, 2018
Date

ADDITIONAL COUNTS OF CONVICTION

Title & Section and Nature of Offense	Offense Ended	Count
(1:10-cr-133-001) Title 18 U.S.C. §§ 922(g)(1) and 924(a)(2) Felon in Possession of a Firearm	11/4/2009	1

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of: ***115 months on each of Count One of Docket Number 1:09-CR-142-003 and Count One of Docket Number 1:10-CR-133-001, to be served concurrently.**

.

☒ The court makes the following recommendations to the Bureau of Prisons: The Court will recommend that the defendant participate in mental health treatment while in 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 five **(5) years. This term consists of a term of five (5) years on Count One of Docket Number 1:09-CR-142-003, and a term of three (3) years on Count One of Docket Number 1:10-CR-133-001, to run concurrently.**

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/or 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	$.00	$200.00	$.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 $ 200.00 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

Prepared and Edited by

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

REPORTER

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Professor of Law
Vanderbilt University School of Law

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CHAPTER 11.00

BURGLARY

Table of Instructions

Library References:

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

T.P.I.—CRIM. 11.01

BURGLARY: FIRST DEGREE

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

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

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

T.P.I. 11.01

1. Tenn. Code Ann. § 39-3-401 (1982).

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

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

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

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

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

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

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

4. Tenn. Code Ann. § 39–3–402 (1982).

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

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

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

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

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

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

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

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

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

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

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

COMMENT

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

T.P.I.—CRIM. 11.02

BURGLARY: SECOND DEGREE

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

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

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

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

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

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

T.P.I. 11.02

1. Tenn. Code Ann. § 39-3-402 (1982).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

T.P.I.—CRIM. 11.03

BURGLARY: THIRD DEGREE

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

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

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

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

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

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

T.P.I. 11.03

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

2. Tenn. Code Ann. § 39-3-404 (1982).

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

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

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

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

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

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

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

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

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

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

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

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

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

COMMENT

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

T.P.I.—CRIM. 11.04

BURGLARY: THIRD DEGREE (SAFECRACKING)

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

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

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

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

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

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

T.P.I. 11.04

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

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

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

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

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

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

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

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

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

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

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

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

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

COMMENT

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

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

T.P.I.—CRIM. 11.05

BURGLARY OF A VEHICLE

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

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

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

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

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

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

T.P.I. 11.05

1. Tenn. Code Ann. § 39-3-406 (1982).

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

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

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

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

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

COMMENT

See Comment to T.P.I.—Crim. 11.01.

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

T.P.I.—CRIM. 11.06

BURGLARY WITH EXPLOSIVES

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

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

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

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

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

T.P.I. 11.06

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

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

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

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

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

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

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

COMMENT

See Comment to T.P.I.—Crim. 11.01.

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

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

T.P.I.—CRIM. 11.07

BURGLARY: CARRYING BURGLARIOUS INSTRUMENTS

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

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

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

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

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

T.P.I. 11.07

1. Tenn. Code Ann. § 39-3-408 (1982).

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

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

4. *Id.*

T.P.I.—CRIM. 11.08

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

Part I: Manufacture or Possession

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

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

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

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

Part II: Sales

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

T.P.I. 11.08

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

2. *Id.*

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

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

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