

NO. _____

IN THE UNITED STATES SUPREME COURT

_____ **TERM**

DAVID EARL BROWN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

APPENDIX

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

957 F.3d 679

United States Court of Appeals, Sixth Circuit.

UNITED STATES of America, Plaintiff-Appellant,

v.

David Earl BROWN, Defendant-Appellee.

No. 18-5356

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Decided and Filed: April 24, 2020

Synopsis

Background: Defendant who was originally sentenced under the Armed Career Criminal Act (ACCA) to 180 months in prison upon conviction of being a felon in possession of a firearm, affirmed at 443 Fed.Appx. 956, moved to vacate his sentence. The United States District Court for the Eastern District of Tennessee, Harry S. Mattice, J.,  2016 WL 207681, denied the motion. Defendant appealed. Following change in caselaw, under which defendant's Tennessee aggravated-burglary convictions no longer qualified as violent felonies under the ACCA, the United States Court of Appeals for the Sixth Circuit, 2017 WL 7116969, vacated and remanded. After defendant was resentenced to 63-month term on remand, caselaw again changed so that Tennessee aggravated-burglary conviction categorically qualified as violent felony under the ACCA, and government appealed.

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

[1] defendant's three prior convictions under Tennessee's aggravated burglary statute qualified as violent felonies under the Armed Career Criminal Act (ACCA), and

[2] defendant's prior convictions were committed on occasions different from each other.

Vacated and remanded.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

West Headnotes (9)

[1] Sentencing and Punishment Particular offenses

The categorical approach for determining whether a defendant's prior conviction under a state's burglary statute qualifies as a conviction for "burglary" as a predicate violent felony offense for 15-year mandatory minimum sentence under the Armed Career Criminal Act (ACCA) directs courts to compare a state statute's elements of burglary to the elements of a generic definition of burglary that the Supreme Court adopted.  18 U.S.C.A. §§ 924(e)(1),  924(e)(2)(B)(ii).

8 Cases that cite this headnote

[2] Sentencing and Punishment Particular offenses

If a state burglary statute sweeps in more conduct than the generic definition of the crime as adopted by the Supreme Court, convictions under the state statute will not qualify as convictions for "burglary" as a predicate violent felony offense for 15-year mandatory minimum sentence under the Armed Career Criminal Act (ACCA).  18 U.S.C.A. §§ 924(e)(1),  924(e)(2)(B)(ii).

1 Cases that cite this headnote

[3] Criminal Law Scope and Effect of Objection

United States preserved its argument that defendant's prior Tennessee aggravated-burglary convictions qualified as violent felonies under the Armed Career Criminal Act (ACCA), although it allegedly presented the argument in perfunctory manner in the District Court, where it properly conceded that Court of Appeals caselaw foreclosed the argument, but preserved that issue for future review should the Supreme

Court see things differently.  18 U.S.C.A. § 924(e)(2)(B)(ii).

7 Cases that cite this headnote

[4] **Sentencing and Punishment** Particular offenses

Defendant's three prior convictions under Tennessee's aggravated burglary statute qualified as violent felonies under the Armed Career Criminal Act (ACCA), and, thus, defendant was subject to 15-year mandatory minimum sentence upon his conviction of being a felon in possession of a firearm, even if Tennessee's burglary statute covered conduct that did not fall within definition of burglary at common law, that is, entry with instrument, where ACCA's generic definition of burglary encompassed Tennessee's broader entry-by-instrument rule.

 18 U.S.C.A. §§ 924(e)(1),  924(e)(2)(B)(ii);  Tenn. Code Ann. § 39-14-402(b).

19 Cases that cite this headnote

[5] **Burglary** Nature and Elements of Offenses

At common law, burglary was confined to unlawful breaking and entering a dwelling at night with the intent to commit a felony.

[6] **Sentencing and Punishment** Particular offenses

The generic definition of “burglary” under the Armed Career Criminal Act (ACCA) covers all convictions under a given state burglary statute or it covers none of them.  18 U.S.C.A. § 924(e)(2)(B)(ii).

2 Cases that cite this headnote

[7] **Sentencing and Punishment** Particular offenses

Defendant's three prior convictions under Tennessee's aggravated burglary statute qualified as violent felonies under the Armed Career Criminal Act (ACCA), and, thus, defendant

was subject to 15-year mandatory minimum sentence upon his conviction of being a felon in possession of a firearm, even though one subsection of Tennessee's burglary statute required only reckless conduct while generic burglary required defendant to have intent to commit crime when unlawfully entering or remaining in a building, where Tennessee's burglary statute was divisible, and defendant was convicted under subsection prohibiting unlawful entry with intent to commit theft.  18 U.S.C.A.

§§ 924(e)(1),  924(e)(2)(B)(ii);  Tenn. Code Ann. §§ 39-14-402(a)(1),  39-14-402(a)(3).

16 Cases that cite this headnote

[8] **Sentencing and Punishment** Particular offenses

Sentencing and Punishment  Convictions counted as separate

Defendant's three prior convictions under Tennessee's aggravated burglary statute were committed on occasions different from each other, and, thus, they qualified as violent felonies under the Armed Career Criminal Act (ACCA), subjecting defendant to 15-year mandatory minimum sentence upon his conviction of being a felon in possession of a firearm; state court indictments showed that burglaries happened at different residences, items stolen from those residences were different, and one burglary was committed with another person while another was committed alone.  18 U.S.C.A. § 924(e)(1); Tenn. Code Ann. § 39-14-403(a).

[9] **Criminal Law** Burden of proof

The movant bears the burden of proof on a motion to vacate.  28 U.S.C.A. § 2255.

*681 Appeal from the United States District Court for the Eastern District of Tennessee at Chattanooga. Nos. 1:06-

cr-00078-1; 1:12-cv-00362—Harry S. Mattice, Jr., District Judge.

Attorneys and Law Firms

ON BRIEF: Debra A. Breneman, Luke A. McLaurin, UNITED STATES ATTORNEY'S OFFICE, Knoxville, Tennessee, for Appellant. Erin P. Rust, FEDERAL DEFENDER SERVICES OF EASTERN TENNESSEE, INC., Chattanooga, Tennessee, for Appellee.

Before: SUHRHEINRICH, BUSH, and MURPHY, Circuit Judges.

OPINION

MURPHY, Circuit Judge.

The Armed Career Criminal Act increases the sentence for felons who possess firearms from a 10-year maximum to a 15-year minimum if the defendant has three prior convictions that qualify as “violent felonies.” 18 U.S.C. § 924(a)(2), (e). The Act defines “violent felony” to include “burglary.” *Id.* § 924(e)(2)(B)(ii). The Supreme Court has long used a “categorical approach” to determine whether a state burglary conviction counts as a conviction for “burglary” under the Act—an approach some Justices have come to recognize is “difficult to apply.” *Quarles v. United States*, — U.S. —, 139 S. Ct. 1872, 1881, 204 L.Ed.2d 200 (2019) (Thomas, J., concurring); *cf.* *United States v. Burris*, 912 F.3d 386, 390 (6th Cir. 2019) (en banc) (principal op.). This case shows how the difficulties answering this esoteric legal question can affect real people's lives. In 2007 a jury convicted David Brown of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). *United States v. Brown*, 443 F. App'x 956, 958 (6th Cir. 2011). At that time our caselaw treated Brown's three Tennessee aggravated-burglary convictions as violent felonies, so we upheld his 180-month sentence under the Act. *Id.* at 959–60. Years later the parties agreed that changes to our caselaw showed that Brown's burglary convictions did not, in fact, qualify as violent felonies. The district court thus granted Brown relief under 28 U.S.C. § 2255. He was resentenced and released from prison. Since his release, however, the Supreme Court has intervened and changed our caselaw yet again. While Brown says that his convictions still do not qualify as violent

felonies, we disagree. So we must reverse the district court's decision granting Brown relief under § 2255 and remand for the court to reinstate his original sentence.

I

[1] [2] The Armed Career Criminal Act defines the phrase “violent felony” to mean, among other things, “burglary.”

18 U.S.C. § 924(e)(2)(B)(ii). To decide if a defendant's prior conviction under a state's burglary statute qualifies as a conviction for “burglary” under this federal Act, the Supreme Court adopted the so-called “categorical approach” in *Taylor v. United States*, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990). See *United States v. Stitt*, — U.S. —, 139 S. Ct. 399, 405, 202 L.Ed.2d 364 (2018). That approach directs courts to compare a state statute's elements of burglary to the elements of a “generic” definition of burglary that the Supreme Court adopted. *Id.* The Court in *Taylor* “defined the elements of generic ‘burglary’ as ‘an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime.’” *Id.* at 405–06 (quoting *Taylor*, 495 U.S. at 598, 110 S.Ct. 2143). If a state burglary statute sweeps in more conduct than this generic definition of the crime, convictions under the state statute will not qualify as convictions for “burglary” under the federal Act. See *Mathis v. United States*, — U.S. —, 136 S. Ct. 2243, 2247–48, 195 L.Ed.2d 604 (2016).

These ground rules have been easier to articulate than apply. Our own experience with Tennessee's aggravated-burglary statute proves the point. Tennessee law defines “aggravated burglary” as “burglary of a habitation.” Tenn. Code Ann. § 39-14-403(a). It goes on to define both “burglary” and “habitation.” A person commits the crime of burglary under Tennessee law if that person, “without the effective consent of the property owner,” takes one of four actions. *Id.* § 39-14-402(a)(1)–(4). Those actions include: (1) “[e]nter[ing] 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) “[r]emain[ing] concealed, with the intent to commit a felony, theft or assault, in a building”; or (3) “[e]nter[ing] a building and commit[ting] or attempt[ing] to commit a felony, theft or assault.” *Id.* § 39-14-402(a)(1)–(3). Tennessee law next defines “habitation” to cover, among

other things, “any structure, including buildings, module units, mobile homes, trailers, and tents, which is designed or adapted for the overnight accommodation of persons[.]” *Id.* § 39-14-401(1)(A).

In 2007 we held that an aggravated-burglary conviction under Tennessee law categorically counts as a burglary under the Supreme Court's generic definition and so falls within the Armed Career Criminal Act.  *United States v. Nance*, 481 F.3d 882, 888 (6th Cir. 2007). In 2017, after further guidance from the Supreme Court on its categorical approach, *see*  *Mathis*, 136 S. Ct. at 2247–48;  *Descamps v. United States*, 570 U.S. 254, 260–65, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013), we reversed course. Our en banc court held that  *Nance* had “misapplied the categorical approach” and that “a violation of Tennessee's aggravated-burglary statute is not categorically a violent felony.”  *United States v. Stitt*, 860 F.3d 854, 861 (6th Cir. 2017) (en banc). That state of things did not last long. In December 2018 the Supreme Court unanimously reversed our en banc decision.  *Stitt*, 139 S. Ct. at 403–04. We have since decided that “ *Nance*'s holding” that a Tennessee aggravated-burglary conviction categorically qualifies as a violent felony under the Armed Career Criminal Act “is once again the law of this circuit.” *Brumbach v. United States*, 929 F.3d 791, 794 (6th Cir. 2019).

The uncertainty in our caselaw has translated into uncertainty in people's lives. David Brown's is unfortunately one of them. When a jury first convicted him in 2008 of being a felon in possession of a firearm,  *Nance* was good law. The district court sentenced Brown to a 180-month term as an armed career criminal because of his three Tennessee aggravated-burglary convictions. *Brown*, 443 F. App'x at 959–60. After our  *Stitt* decision overruled  *Nance*, however, the parties agreed in collateral proceedings under  28 U.S.C. § 2255 that Brown no longer qualified as an *683 armed career criminal. In February 2018, the district court resentenced Brown to a 63-month term. He was immediately released from prison because he had already served longer than that term, and he has since completed a two-year term of supervised release. But the United States appealed the district court's grant of  § 2255 relief to preserve its ability to argue for the original sentence if the Supreme Court overruled our  *Stitt* decision. Now that the Supreme Court has done so, the

United States asserts that we must reimpose Brown's original 180-month sentence.

II

Because  *Nance* is “once again the law of this circuit,” we normally would vacate the district court's order granting relief under  § 2255 and remand for the court to reimpose Brown's original sentence under the Armed Career Criminal Act. *See Brumbach*, 929 F.3d at 794–95. We have done just that for many other defendants in Brown's situation. *See, e.g., Sesson v. United States*, 2020 WL 773049, at *2 (6th Cir. Jan. 30, 2020) (order); *White v. United States*, 2020 WL 773056, at *3 (6th Cir. Jan. 21, 2020) (order); *Barnett v. United States*, 2019 WL 7946346, at *2 (6th Cir. Dec. 12, 2019) (order); *Bearden v. United States*, 2019 WL 7882516, at *2 (Nov. 6, 2019) (order); *Greer v. United States*, 780 F. App'x 352, 353 (6th Cir. 2019); *United States v. Bateman*, 780 F. App'x 355, 357 (6th Cir. 2019); *Hill v. United States*, 2019 WL 7602328, at *1 (Oct. 10, 2019) (order); *United States v. Crutchfield*, 785 F. App'x 321, 324 (6th Cir. 2019);  *United States v. Bawgus*, 782 F. App'x 408, 410 (6th Cir. 2019); *United States v. Hamilton*, 774 F. App'x 283, 283 (6th Cir. 2019) (per curiam); *Mann v. United States*, 773 F. App'x 308, 309 (6th Cir. 2019) (per curiam); *Bell v. United States*, 773 F. App'x 832, 833 (6th Cir. 2019).

Brown, however, offers four reasons why we should nevertheless affirm the district court's order granting him  § 2255 relief. None distinguishes him from these other defendants.

A

[3] Brown starts by suggesting that the United States forfeited its argument because it presented the argument in a perfunctory manner in the district court. We disagree. The government properly conceded that our en banc decision in  *Stitt* foreclosed any argument that Brown's aggravated-burglary convictions were violent felonies, but preserved that issue for future review should the Supreme Court see things differently. At sentencing the district court itself recognized that the United States had “preserved [its] rights on  *Stitt*.”

Cf.  *United States v. Vonner*, 516 F.3d 382, 385, 391 (6th Cir. 2008) (en banc).

B

[4] Turning to the merits, Brown argues that Tennessee aggravated burglary cannot qualify as a “burglary” under the Armed Career Criminal Act because, even after  *Stitt*, Tennessee’s version of burglary is still broader than the Supreme Court’s generic version. That is so, Brown contends, because Tennessee’s definition of “enter” for its burglary statute covers conduct that would qualify only as attempted burglary at common law. But, as Brown candidly concedes, we rejected this argument in *Brumbach*. 929 F.3d at 795. We did so because “a panel of this court cannot overrule  *Nance*.” *Id.* (citing  *Salmi v. Sec’y of Health and Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985)). We have also repeatedly rejected the argument since *Brumbach*. See, e.g., *United States v. Burrus*, 808 Fed.Appx. 370, 372–73 (6th Cir. Apr. 14, 2020); *White*, 2020 WL 773056, at *2. As in these *684 other cases, Brown should direct his argument to our en banc court or the Supreme Court. Yet we think Brown’s argument weighty enough to warrant a response from this court on the merits too.

[5] 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). 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.

We do not believe the Supreme Court would adopt Brown’s view of generic “entry,” so we need not decide whether he correctly interprets Tennessee law. We begin *685 where  *Taylor* did. The Court recognized that “common-law burglary is the core, or common denominator, of the contemporary usage of the term” under the Armed Career Criminal Act.  *Taylor*, 495 U.S. at 592, 110 S.Ct. 2143;

cf. *Stokeling v. United States*, — U.S. —, 139 S. Ct. 544, 550–52, 202 L.Ed.2d 512 (2019). Because the Act covers “at least the ‘classic’ common-law definition” of burglary, *Taylor*, 495 U.S. at 593, 110 S.Ct. 2143, we know that Congress did not view the “entry” element as a demanding one. Sticking a hand or finger through a window sufficed, see *Rex v. Davis*, 168 Eng. Rep. 917, 917–18 (1823); *Rex v. Bailey*, 168 Eng. Rep. 835, 835–36 (1818), as did drilling a hole into the walls of a granary to cause the grain to fall out, see *State v. Crawford*, 8 N.D. 539, 80 N.W. 193, 194–95 (1899); *Walker v. State*, 63 Ala. 49, 51–52 (Ala. 1879). Did Congress nevertheless mean to exclude any state burglary statute that also treated as a legally sufficient “entry” a burglar’s insertion of a tool into a home merely to gain an entry point, not to commit the theft? The Supreme Court’s caselaw in this context leads us to think not.

For one thing, while *Taylor* recognized that the Act covered common-law burglary, it refused to read the Act as *limited* to the common-law rules. *Taylor*, 495 U.S. at 593–96, 110 S.Ct. 2143. When Congress enacted the Armed Career Criminal Act in 1986, “the contemporary understanding of ‘burglary’ ha[d] diverged a long way from its commonlaw roots.” *Id.* at 593, 110 S.Ct. 2143. And the “arcane distinctions embedded in the common-law definition have little relevance to modern law enforcement concerns.” *Id.* *Taylor* noted that Congress included burglary in the Act because it “viewed burglary as an inherently dangerous crime[.]” *Stitt*, 139 S. Ct. at 406 (citing *Taylor*, 495 U.S. at 588, 110 S.Ct. 2143). A burglary “creates the possibility of a violent confrontation between the offender and an occupant, caretaker, or some other person who comes to investigate.” *Quarles*, 139 S. Ct. at 1879 (quoting *Taylor*, 495 U.S. at 588, 110 S.Ct. 2143).

Brown’s entry-by-instrument distinction represents perhaps the prototypical “arcane distinction” that *Taylor* would disavow. That distinction has no relevance to Congress’s underlying reason for passing the Act. See *id.* 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), cf. *Davis*, 168 Eng. Rep. at 917–18, or the one who violently chops at a door with an axe that intrudes into the home (which

would not qualify under his rule)? Cf. *Taylor*, 495 U.S. at 594, 110 S.Ct. 2143.

For another thing, we must interpret the word “burglary” in the Armed Career Criminal Act in light of its statutory context—as a universal term governing the entire country.

When *Taylor* proposed its generic burglary definition, it conceded that the “exact formulations” of the generic elements that it identified “var[ied]” from state to state.

Taylor, 495 U.S. at 598, 110 S.Ct. 2143. We think the Court meant for its definition to be capacious enough to cover the states’ varied formulations of those elements. Cf. *Quarles*, 139 S. Ct. at 1879. As the Court has said for another provision of the Act, “[w]here, as here, the applicability of a federal criminal statute requires a state conviction, [the Court has] repeatedly declined to construe the statute in a way that would render it inapplicable in many States.” *Stokeling*, 139 S.

Ct. at 552. To be sure, *Taylor* did not give states carte blanche to redefine the crime of “burglary.” When disavowing such an anything-goes approach, *Taylor* highlighted how a California law defined burglary “so broadly” as to cover even “shoplifting” *686 without *any unlawful entry*. *Taylor*, 495 U.S.

at 591, 110 S.Ct. 2143; see *Descamps v. United States*, 570 U.S. 254, 264–65, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013). Setting aside idiosyncratic state laws, though, the Court’s precedent instructs us not to interpret the word “burglary” in a way that would disqualify a significant number of state burglary statutes from the Act’s reach. The Court made this precise point in another context when it broadly interpreted the word “force” so as not to render a federal statute tied to state convictions “ineffectual in at least 10 States[.]”

United States v. Castleman, 572 U.S. 157, 167, 134 S.Ct. 1405, 188 L.Ed.2d 426 (2014).

Here too, Brown’s reading would mean that Congress immediately excluded several state burglary statutes from the Act’s reach. We cannot know the precise number of states because many had no caselaw on this technical topic at the time of the statute’s enactment. Cf. *Quarles*, 139 S. Ct. at 1878. Even so, several states had already departed from Brown’s entry-by-instrument distinction by allowing *any* entry of an instrument to satisfy the state burglary law’s “entry” element. Some state courts departed from Brown’s distinction by broadly interpreting the word “entry.” A New Mexico court reasoned that “[b]urglary is an offense against

the security of the building” and that this “security is breached by the penetration of an instrument into the building” no matter its purpose. *State v. Tixier*, 89 N.M. 297, 551 P.2d 987, 989 (Ct. App. 1976); *see also Mullinnix v. State*, 177 Ga.App. 168, 338 S.E.2d 752, 753 (1985). Likewise, a California court found “no plausible reason for holding that an entry by instrument must be for the purpose of removing property.” *People v. Osegueda*, 163 Cal.App.3d Supp. 25, 210 Cal. Rptr. 182, 186 (Dep’t Super. Ct. 1984); *People v. Davis*, 18 Cal.4th 712, 76 Cal.Rptr.2d 770, 958 P.2d 1083, 1085–86 (1998).

In other states, the legislatures changed their burglary laws by redefining “entry” broadly. In Texas, for example, the state courts had adopted Brown’s entry-by-instrument distinction, but the legislature disapproved of that rule by defining entry to cover the intrusion of “any physical object connected with the body.” Tex. Penal Code Ann. 30.02(b)(2) (1974); *Hayes v. State*, 656 S.W.2d 926, 927–28 (Tex. App. 1983). Likewise, Arizona’s legislature defined entry to “mean[] the intrusion of any part of any instrument ... inside the external boundaries of a structure or unit of real property.” Ariz. Rev. Stat. § 13-1501 (1977); *see* *State v. Kindred*, 232 Ariz. 611, 307 P.3d 1038, 1040–41 (Ct. App. 2013). *See also* Utah Code Ann. § 76-6-201(4)(b) (1973); 11 Del. Code Ann. § 829(b) (1972); *cf. Bailey v. State*, 231 A.2d 469, 469–70 (Del. 1967). Congress likely did not mean to render the Act’s burglary provision “ineffectual” in all of these states (and any others that would later adopt the same broad interpretation of “entry” after the Act’s passage). *Castleman*, 572 U.S. at 167, 134 S.Ct. 1405; *see* *Quarles*, 139 S. Ct. at 1879; *see also, e.g., Adams v. Commonwealth*, 2013 WL 1701467, at *6 (Ky. Ct. App. Apr. 19, 2013).

[6] Keep in mind, too, that Congress adopted a yes-or-no categorical approach for the Act. Its generic definition covers *all* convictions under a given state burglary statute or it covers *none* of them. *See* *Taylor* 495 U.S. at 599–601, 110 S.Ct. 2143. That fact has also led the Supreme Court to adopt a generic definition of burglary that gives the states greater flexibility in how they define their state burglary offenses. *See* *Quarles*, 139 S. Ct. at 1879. If we adopted Brown’s view, for example, a perhaps once-in-a-century burglary conviction for entering only with an instrument *687 under a state statute that follows the broader entry-by-instrument rule

would disqualify all convictions under that statute from the Armed Career Criminal Act’s reach. That is so, even though the vast majority of the convictions under that statute would be for ordinary burglaries with ordinary entries. “That result not only would defy common sense, but also would defeat Congress’ stated objective of imposing enhanced punishment on armed career criminals who have three prior convictions for burglary or other violent felonies.” *Id.*

The Supreme Court’s concern with giving states “breathing space” in defining their burglary offenses extends well beyond Brown’s specific argument. Inventive lawyers can always imagine hypothetical convictions under which a state statute would categorically fall outside the Act because it does not comport with some nuanced common-law rule. *Cf.* *Moncrieffe v. Holder*, 569 U.S. 184, 205–06, 133 S.Ct. 1678, 185 L.Ed.2d 727 (2013). Consider, for example, that Blackstone defined an entry as sufficient for burglary if the entry was “with an instrument *held in the hand*” (like a firearm reaching through a window). Blackstone, *supra*, at 227 (emphasis added). Should a bullet shot from *outside* a home qualify as an entry even though the bullet is not in the “hand” when it enters? Matthew Hale apparently had his doubts. *See Perkins, supra*, at 156 n.62. If Hale were right, should this fact exclude all statutes that count the bullet (or another object thrown into a home) as an entry? *See, e.g., State v. Decker*, 239 Ariz. 29, 365 P.3d 954, 958 (Ct. App. 2016); *Commonwealth v. Cotto*, 52 Mass.App.Ct. 225, 752 N.E.2d 768, 771–72 (2001); *State v. Williams*, 127 Or.App. 574, 873 P.2d 471, 473–74 (1994).

Our continuing experience with Tennessee’s burglary statute also shows why the Supreme Court would give states leeway in how they define burglary. We have repeatedly confronted different nuanced arguments for why that statute should categorically fall outside the Supreme Court’s generic definition. Our en banc court initially held that no conviction under this statute could qualify as a burglary under the Act because the Tennessee statute covered an entry into a vehicle adopted for overnight accommodation, whereas the Act’s generic definition of burglary required an entry into a building. *See* *United States v. Stitt*, 860 F.3d 854, 857–59 (6th Cir. 2017) (en banc). Immediately after the Supreme Court rejected that narrow reading of generic burglary, *see* *Stitt*, 139 S. Ct. at 403–04, Victor Stitt argued that the Tennessee statute was still too broad because its requirement that an entry be “without the effective consent of the owner”

covered passive acts of deception, whereas the Act's generic definition of burglary required an affirmative act equivalent to a "breaking." And once we rejected that argument, *see United States v. Stitt*, 780 F. App'x 295, 298–301 (6th Cir. 2019), we are now told again that the statute is categorically overbroad (again disqualifying all convictions) because it defines "entry" too broadly.

Our experience with these types of continuing nuanced arguments has not been unique. The en banc Fifth Circuit held that Texas's burglary statute was categorically overbroad because it permitted a conviction when the intent to commit the crime came after the illegal entry or the decision to illegally remain. *See United States v. Herrold*, 883 F.3d 517, 531–36 (5th Cir. 2018) (en banc), *vacated by* — U.S. —, 139 S. Ct. 2712, 204 L.Ed.2d 1107 (2019). After the Supreme Court rejected that view, *see Quarles*, 139 S. Ct. at 1875, Michael Herrold made the argument that the Texas statute was still overbroad because it covered passive acts of entry. The Fifth Circuit rejected that argument too. *See* *688 *United States v. Herrold*, 941 F.3d 173, 180–81 (5th Cir. 2019) (en banc). And it is safe to say that the Fifth Circuit will confront Brown's entry argument soon, since Texas also defines "entry" broadly. *See* Tex. Penal Code Ann. 30.02(b)(2); *Hayes*, 656 S.W.2d at 927–28. As these examples show, many state statutes might be read to depart from common-law burglary in some distinct way. If we used each departure to disqualify each statute, that circumscribed reading of the word "burglary" in the Act could have the net effect of disqualifying many states' burglary statutes from its coverage one-by-one. *See Quarles*, 139 S. Ct. at 1879.

All of this said, we concede that this case is different from the Supreme Court's two most recent decisions on this topic — *Quarles* and *Stitt* — in one important respect. In both cases, the Court said that most of the state decisions at the time of the Act's passage had incorporated into their burglary statutes the legal rule that the Court incorporated into the Act's generic burglary definition. *See Quarles*, 139 S. Ct. at 1878; *Stitt*, 139 S. Ct. at 406. The same cannot be said in this case. One nearly contemporaneous source suggested 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." *State v. Ison*, 744 P.2d 416, 419 (Alaska

Ct. App. 1987); *see 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); *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, 15–16 (1954); *People v. Tragni*, 113 Misc.2d 852, 449 N.Y.S.2d 923, 927–28 (N.Y. Sup. Ct. 1982); *see also* Nev. Rev. Stat. § 193.0145 (1973); Wash. Rev. Code § 9A.52.010(2) (1975). That rule was also identified as the law in well-known treatises. *See, e.g.,* Wayne R. LaFare & Austin W. Scott, *Substantive Criminal Law* § 8.13(b), at 467–68 (1986).

This fact does not change our minds. As we explained, other states had adopted the broader "minority" position on entries by instrument at the time of the Act's passage. *Ison*, 744 P.2d at 419. Congress would not have rendered the Act's burglary provision "ineffectual" in these states (and others that would later adopt their view). *Castleman*, 572 U.S. at 167, 134 S.Ct. 1405. The other factors relied on by *Stitt* and *Quarles* also fully apply in this case, including "Congress' recognition of the dangers of burglary[] and Congress' stated objective of imposing increased punishment on armed career criminals who had committed prior burglaries." *Quarles*, 139 S. Ct. at 1879.

The minority view also diverged only subtly from the majority view; it did not completely redefine the crime of "burglary." *Cf. Taylor*, 495 U.S. at 591, 110 S.Ct. 2143. All courts agreed that an "entry" did not require much. They held that "entry by instrument" could qualify as burglary when a burglar used the instrument to commit the intended felony, *see Ison*, 744 P.2d at 419, and they held that the entry of any body part, such as a hand, sufficed, *see Burke*, 467 N.E.2d at 849. The minority view also departed from the traditional entry-by-instrument distinction for a reason relevant to the Supreme Court's generic definition of burglary. By ensuring that a burglar used an instrument for more than gaining access to a home, that traditional distinction kept burglary's "breaking" element separate from its "entry" element. *See Hughes*, 168 Eng. Rep. at 305–06; *see, e.g.,* *689 *Burke*, 467 N.E.2d at 847–50; *O'Leary*, 107 A.2d at 15–16; *Crawford*, 80 N.W. at 194–95. Courts that disavowed

this distinction did so partially because they had done away with any separate “breaking” element. See *Tixier*, 551 P.2d at 989. By the time of the Act’s passage, most states had also done away with that element. See *Taylor*, 495 U.S. at 593, 110 S.Ct. 2143. The Supreme Court thus refused to incorporate a “breaking” element into the Act’s generic definition, *id.* at 598, 110 S.Ct. 2143, and courts need not worry about keeping it distinct from the generic definition’s “entry” element.

In sum, 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. And because the broader view of “entry by instrument” falls within this principle, the Act’s generic definition should encompass that broader entry-by-instrument rule, not Brown’s narrower one.

C

[7] Brown next provides another reason why Tennessee aggravated burglary should not qualify as a “burglary” under the Armed Career Criminal Act. Generic burglary, Brown argues, requires a defendant to have an “intent to commit a crime” when the defendant unlawfully enters or remains in a building. See *Taylor*, 495 U.S. at 599, 110 S.Ct. 2143. But Brown says that one of the ways in which a person can commit Tennessee burglary—“[e]nter[ing] a building and commit[ting] or attempt[ing] to commit a felony, theft or assault,” Tenn. Code Ann. § 39-14-402(a)(3)—requires only *reckless* conduct. This argument provides Brown no grounds for relief either.

As an initial matter, it is not clear under our precedent that we may rely on this new argument to conclude that all Tennessee aggravated-burglary convictions fall outside the Act. Our cases have “held, broadly, that ‘convictions under subsections (a)(1), (a)(2), and (a)(3)’ ” of the Tennessee burglary statute “‘fit within the generic definition of burglary and are therefore violent felonies’ ” for purposes of the Armed Career Criminal Act. *Brumbach*, 929 F.3d at 794 (quoting *United States v. Ferguson*, 868 F.3d 514, 515 (6th Cir. 2017)). And we have previously rejected other attempts to bring new arguments challenging those prior holdings. See *id.* at 795. If our cases prohibited Brian Brumbach from raising his new “entry”

argument, those cases may well foreclose David Brown from raising his new “intent” argument.

Regardless, this argument fails for a case-specific reason that we highlighted on Brown’s direct appeal. *Brown*, 443 F. App’x at 959–60. Tennessee burglary convictions are not all the same, and Tennessee’s burglary statute is divisible. It criminalizes four different offenses set out in subsections (a)(1), (a)(2), (a)(3), and (a)(4). Tenn. Code. Ann. §§ 39-14-402(a), 39-14-403; see *United States v. Frazier*, 742 F. App’x 81, 84 (6th Cir. 2018). Brown was indicted for and convicted of violating the (a)(1) version, not the (a)(3) version. Although his indictments do not explicitly cite a subsection, each charged that Brown “did unlawfully enter the habitation of [his victims] without [their] effective consent, not open to the public, with intent to commit theft, in violation of T.C.A. 39-14-402[.]” That language mirrors the language of § 39-14-402(a)(1). Brown thus was convicted of violating the (a)(1) version of Tennessee aggravated burglary. See *United States v. Hibbit*, 514 F. App’x 594, 597–98 (6th Cir. 2013). That (a)(1) version contains the “intent” requirement that Brown *690 claims the (a)(3) version lacks: It forbids a person, without “the effective consent of the property owner,” to “[e]nter[] a [habitation] (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), 39-14-403. This text also tracks the Supreme Court’s definition of generic burglary: the “unlawful or unprivileged entry into” “a building or other structure, with intent to commit a crime.” *Stitt*, 139 S. Ct. at 405–06 (citation omitted). So Brown’s aggravated-burglary convictions qualified as violent felonies under the Armed Career Criminal Act.

D

[8] The Armed Career Criminal Act applies only if a defendant has three prior convictions for violent felonies that were “committed on occasions different from one another.” 18 U.S.C. § 924(e)(1). Brown lastly makes a broad argument and a narrow argument for the claim that his three burglary convictions were not committed on occasions different from each other. He broadly argues that we may never look to the dates and locations listed in his state-court records to decide whether a defendant committed the burglaries on different occasions. That is so, he says, because

those facts do not qualify as elements of the crime of burglary in Tennessee. And he interprets  *Shepard v. United States*, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005), to allow courts to examine state-court records in this context *only* to identify the elements of the defendant's crime, not to identify time and location facts. As Brown again candidly concedes, our precedent forecloses this broad argument, at least as to state-court charging documents. *See United States v. Hennessee*, 932 F.3d 437, 444 (6th Cir. 2019). So he must also direct this argument either to our en banc court or to the Supreme Court. *See Greer*, 780 F. App'x at 353.

[9] Brown more narrowly argues that his state-court records do not show that his three burglaries happened on different occasions. The United States says that he procedurally defaulted this argument, but we find it easier to resolve Brown's claim on the merits. *Cf.*  *Storey v. Vasbinder*, 657 F.3d 372, 380 (6th Cir. 2011). A petitioner bears the burden of proof in a  § 2255 proceeding, so Brown must show by a preponderance of the evidence that his three aggravated-burglary convictions did not occur on different occasions.  *Packett v. United States*, 738 F. App'x 348, 352 (6th Cir. 2018);  *Potter v. United States*, 887 F.3d 785, 787–88 (6th Cir. 2018). This he cannot do.

As Brown concedes, we may look to his state-court indictments to decide whether his burglaries were committed on different occasions. *See*  *United States v. King*, 853 F.3d

267, 275–76 (6th Cir. 2017). In one indictment, Brown alone was charged with burglarizing Claude Suttles's residence in August 1991 and James Goins's residence in December 1991. That indictment indicates that Brown stole a VCR and TV from Goins. In a second indictment, Brown and another person were charged with burglarizing Teresa Chambless's residence on December 27, 1991. That indictment indicates that Brown and the other person stole a weed eater, lantern, and heaters from Chambless. The “terms of the charging document[s],”  *id.* at 276 (citation omitted), thus show that the two December 1991 burglaries happened on different occasions: the burglaries were of different residences, the items stolen from those residences were different, and one burglary was committed with another person while the other was committed alone. *See Hennessee*, 932 F.3d at 444–45;  *United States v. Southers*, 866 F.3d 364, 369–70 (6th Cir. 2017). Brown thus cannot meet *691 his burden of proving that two of his convictions occurred on the same occasion.

* * *

We grant Brown's motion to take judicial notice, vacate the district court's order granting him release, and remand with instructions to reinstate his original sentence.

All Citations

957 F.3d 679

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE CHATTANOOGA DIVISION

UNITED STATES OF AMERICA

AMENDED JUDGMENT IN A CRIMINAL CASE

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

v.

Case Number: **1:06-CR-00078-HSM-CHS(1)**

DAVID EARL BROWN

USM#41565-074

Date of Original Judgment: 11/23/2010

Reason for Amendment:

Erin Alix Phillippi Rust*

Defendant's Attorney

- | | |
|---|--|
| ☒ Correction of sentence on remand pursuant to <i>Stitt</i>
☐ 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) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))
☐ Direct Motion to District Court Pursuant to ☐ 28 U.S.C. § 2255 or ☐ 18 U.S.C. § 3559(c)(7)
☐ Modification of Restitution Order (18 U.S.C. § 3664) |
|---|--|

THE DEFENDANT:

- ☐ pleaded guilty to count(s):
- ☐ pleaded nolo contendere to count(s) which was accepted by the court.
- ☒ was found guilty on count(s) One of the Indictment 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) Felon in Possession of a Firearm	4/16/2006	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.

February 26, 2018

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

2/26/2018

Date

DEFENDANT: DAVID EARL BROWN
CASE NUMBER: 1:06-CR-00078-HSM-CHS(1)

Judgment - Page 2 of 7

IMPRISONMENT

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

63 months.*

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

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

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

☐ at ☐ a.m. ☐ p.m. on

☐ as notified by the United States Marshal.

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

☐ before 2 p.m. on .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on

to ,

at ,

with a certified copy of this judgment.

UNITED STATES MARSHAL

By

DEPUTY UNITED STATES MARSHAL

DEFENDANT: DAVID EARL BROWN
CASE NUMBER: 1:06-CR-00078-HSM-CHS(1)

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SUPERVISED RELEASE*

Upon release from imprisonment, the defendant shall be on supervised release for a term of **two (2) years**. *

MANDATORY CONDITIONS

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

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

DEFENDANT: DAVID EARL BROWN
CASE NUMBER: 1:06-CR-00078-HSM-CHS(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: DAVID EARL BROWN
CASE NUMBER: 1:06-CR-00078-HSM-CHS(1)

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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.

DEFENDANT: DAVID EARL BROWN
CASE NUMBER: 1:06-CR-00078-HSM-CHS(1)

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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: DAVID EARL BROWN
CASE NUMBER: 1:06-CR-00078-HSM-CHS(1)

Judgment - Page 7 of 7

SCHEDULE OF PAYMENTS

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

- A** ☒ Lump sum payments of \$ 100.00 due immediately, balance due
☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B** ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C** ☐ Payment in equal _____ (*e.g., weekly, monthly, quarterly*) installments of \$ _____ over a period
of _____ (*e.g., months or years*), to commence _____ (*e.g., 30 or 60 days*) after the date of this judgment; or
- D** ☐ Payment in equal _____ (*e.g., weekly, monthly, quarterly*) installments of \$ _____ over a period
of _____ (*e.g., months or years*), to commence _____ (*e.g., 30 or 60 days*) after release from imprisonment to a term of
supervision; or
- E** ☐ Payment during the term of supervised release will commence within _____ (*e.g., 30 or 60 days*) after release from
imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F** ☐ Special instructions regarding the payment of criminal monetary penalties:

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

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

- ☐ Joint and Several
See above for Defendant and Co-Defendant Names and Case Numbers (*including defendant number*), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.
☐ Defendant shall receive credit on his restitution obligation for recovery from other defendants who contributed to the same loss that gave rise to defendant's restitution obligation.
- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

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

TENNESSEE PATTERN JURY INSTRUCTIONS

Volume 7

CRIMINAL

[T.P.I.—CRIM.]

SECOND EDITION

Prepared and Edited by

THE COMMITTEE ON PATTERN JURY
INSTRUCTIONS (CRIMINAL)

OF THE
TENNESSEE JUDICIAL CONFERENCE

REPORTER

DONALD J. HALL

Professor of Law

Vanderbilt University School of Law

ST. PAUL, MINN.
WEST PUBLISHING CO.

1988

CHAPTER 11.00

BURGLARY

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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).

4. Tenn. Code Ann. § 39-3-402 (1982).

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

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).

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

2. *Id.*

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

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.