



# Supreme Court of Tennessee

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## **MEMORANDUM** (12/15/2020)

This memorandum lists the instructions the Tennessee Pattern Jury Instruction Committee (Criminal) changed or created after the 24<sup>th</sup> edition of the book was published in 2020. The Administrative Office of the Courts' website includes Word "without comments and footnotes" versions of the instructions at issue. The "with comments and footnotes" version of newly-created and/or substantially revised instructions, are attached to the memorandum which appears on the AOC's website. If the committee changed a comment and/or footnote but did not change the text of an instruction, the instruction will be listed below but it will not be posted on the AOC's website.

### **1.00– Preliminary jury instructions**

- a) Add a new footnote after the lines "It is your job to determine what the facts are from the evidence. You must then apply the law in my instructions to the facts, and from that application you will arrive at a verdict." Those can be found at the end of the 2<sup>nd</sup> paragraph on Page 7 of the current book. Renumber subsequent footnotes accordingly.
- b) The text of the new footnote should read as follows:

*State v. Black*, 815 S.W.2d 166, 185-187 (Tenn. 1991). *See also Scott v. State*, 338 S.W.2d 581, 584 (Tenn. 1960), *overruled on other grounds by State v. Collier*, 411 S.W.3d 886 (Tenn. 2013).

### **1.08 – Jury: Judges of facts and law**

- a) Add the following language to the beginning of existing footnote 1:

*State v. Black*, 815 S.W.2d 166, 185-187 (Tenn. 1991). *See also Scott v. State*, 338 S.W.2d 581, 584 (Tenn. 1960), *overruled on other grounds by State v. Collier*, 411 S.W.3d 886 (Tenn. 2013).

### **6.01 – Assault**

- a) Add the following language as a new paragraph to the end of existing Comment 1:

For offenses committed on or after 7/1/20, 2020 Public Chapter 756 amended the Assault statute to state that "in addition to any other punishment that may be imposed, if

the relationship between the defendant and the victim of the assault is such that the victim is a domestic abuse victim as defined in § 36-3-601, and if, as determined by the court, the defendant possesses the ability to pay a fine in an amount not in excess of two hundred dollars (\$200), then the court shall impose a fine at the level of the defendant's ability to pay, but no less than one hundred dollars (\$100) and not in excess of two hundred dollars (\$200).” In the opinion of the Committee, this additional fine, to be assessed by the trial judge without an additional finding of fact made by the jury, is unconstitutional pursuant to *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Blakely v. Washington*, 542 U.S. 296 (2004) and *United States v. Booker*, 543 U.S. 220 (2005).

#### **6.08 – Domestic assault (for offenses committed on or after 4/10/08)**

- a) Amend the language of the first paragraph of Comment 1 to read as follows:

Domestic assault is a Class A misdemeanor, unless the offense is committed under Part C, in which event assault is a Class B misdemeanor. T.C.A. §§ 39-13-111(c)(1) and 39-13-101(b). A third offense bodily injury domestic assault is an E felony if the defendant had a certain relationship with the victim. T.C.A. § 39-13-111(c). T.C.A. § 39-13-111(c)(5) allows the trial judge to assess an additional fee to fund family violence shelters and shelter services under certain circumstances of up to \$225. In the opinion of the Committee, this additional fine, to be assessed by the trial judge without an additional finding of fact made by the jury, is unconstitutional pursuant to *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Blakely v. Washington*, 542 U.S. 296 (2004) and *United States v. Booker*, 543 U.S. 220 (2005).

#### **10.08(a) – Promoting prostitution of a [minor] [person with an intellectual disability]**

- a) Add the following language to the end of existing Comment 1:

If committed on or after 3/20/20, promoting the prostitution of a minor as described in § 39-13-515(c)(1) is no longer an offense which qualifies for judicial diversion. T.C.A. § 40-35-313(a)(1)(B)(ii).

#### **10.10 – Patronizing prostitution**

- a) Add the following language to the end of existing Comment 1:

If committed on or after 3/20/20, patronizing prostitution from a person who is younger than eighteen (18) years of age or has an intellectual disability, as described in § 39-13-514(b)(3), is no longer an offense which qualifies for judicial diversion. T.C.A. § 40-35-313(a)(1)(B)(ii).

#### **10.12 – [Aggravated] rape of a child [Aggravated rape of a child effective for offenses committed on or after July 1, 2006]**

- a) Amend element (2)(c) to read as follows:

that the alleged victim was eight (8) years of age or less [for offenses committed prior to 7/1/20: three (3) years of age or less];

#### **10.17 – Violation of sex offender residential or work restrictions (for offenses committed on or after August 17, 2009)**

- a) Amend the 2<sup>nd</sup> full paragraph after 2(n) to read as follows:

[It is a defense to *[residing where a minor resides]* *[being alone with a minor]* **[only for offenses committed on or after July 1, 2019: conducting an overnight visit at a residence where a minor resided or was present]** if the defendant is a parent of the minor *[unless the offender's parental rights have been or were in the process of being terminated as provided by law]* **[only for offenses committed on or after July 1, 2019: unless the offender had been convicted of a sexual offense or violent sexual offense the victim of which was a child under twelve (12) years of age]** *[unless any minor or adult child of the offender was a victim of [ \_\_\_\_\_ ] committed by the offender]* **[only for offenses committed on or after July 1, 2020: unless the offender has been convicted of \_\_\_\_\_, the victim of the sexual offense was a minor twelve years of age or less, and a circuit court, exercising its jurisdiction over civil matters, has found by clear and convincing evidence that the offender presents a danger of substantial harm to the minor.]***[Insert in this blank space a criminal offense or offenses listed in Tenn. Code Ann. § 40-39-202 under the definition of “Sex Offender” or “Violent Sex Offender.” See Comment 2.]*

- b) Add a footnote to the new language that is added before the last bracketed sentence which begins ...”[only for offenses committed on or after July 1, 2020....”. Renumber subsequent footnotes accordingly. The text of the footnote should read as follows:

T.C.A. § 40-39-211(c).

#### **10.24 – Continuous sexual abuse of a child**

- a) Add the following language to the end of existing Comment One:

If committed on or after 3/20/20, this offense is no longer an offense which qualifies for judicial diversion. T.C.A. § 40-35-313(a)(1)(B)(ii).

#### **11.03(c) – Fixing aggregate value**

- a) Insert attachment one to this memorandum as a new instruction numbered 11.03(c).

#### **11.03(d) – Fixing aggregate apparent value**

- a) Insert attachment two to this memorandum as a new instruction numbered 11.03(d).

#### **11.08 – Organized retail crime**

- a) After the heading “Part A” add the phrase (Only for offenses committed prior to 7/1/20) in bold so that it reads as follows:

[Part A **(Only for offenses committed prior to 7/1/20):**

- b) After the heading “Part B” add the phrase (Only for offenses committed prior to 7/1/20) in bold so that it reads as follows:

[Part B **(Only for offenses committed prior to 7/1/20):**

- c) Add the following as new Part C. Before the new addition, add the word “or” centered. The new addition should read as follows:

or

[Part C **(Only for offenses committed on or after 7/1/20):**

(1) That the defendant acted in concert with one (1) or more individuals to commit theft of any merchandise with a value greater than one thousand dollars (\$1,000) aggregated over a ninety-day period;

and

(2) (a) That the defendant did so with the intent to *[sell] [barter] [trade]* the merchandise for monetary or other gain;

or

(b) That the defendant did so with the intent to fraudulently return the merchandise to a retail merchant

or

(c) That the defendant *[received] [possessed] [sold] [purchased]* by physical or electronic means any *[merchandise] [stored value cards]* obtained from a fraudulent return with the knowledge that the property was obtained by *[theft] [theft of merchandise]*.

[and

(3) that the defendant exercised organizational, supervisory, financial or management authority over the activity of one (1) or more persons in furtherance of the offense.]

#### **12.04 – Cruelty to animals**

- a) Add the following language to the end of the existing Comment:

For offenses committed on or after July 1, 2020, in addition to any other penalty imposed, the court shall prohibit the defendant from having custody of any companion animal, as defined in § 39-14-212(b), for a period of at least two (2) years from the date of conviction and may impose a lifetime prohibition. The court shall prohibit any person convicted of a second or subsequent offense from having custody of any companion animal for the person's lifetime. T.C.A. § 39-14-203(c)(1). This prohibition was discretionary for offenses committed prior to that date.

#### **12.04(a) – Aggravated cruelty to animals**

- a) Add the following language to the end of existing Comment One:

For offenses committed on or after July 1, 2020, in addition to any other penalty imposed, the sentencing court shall order the defendant to surrender custody and forfeit all companion animals as defined in § 39-14-212(b)(2), and may award custody of the animals to the agency presenting the case. The court shall prohibit the defendant from having custody of companion animals for at least two (2) years from the date of conviction and may impose a lifetime prohibition. The court may also impose any other reasonable restrictions on the person's custody of other animals as is necessary for the protection of the animals. The court shall prohibit any person convicted of a second or subsequent offense from having custody of any companion animal for the person's lifetime. T.C.A. § 39-14-212(e).

#### **12.10- Sexual activity with an animal**

- a) Add the following language to the end of existing Comment One:

The court shall prohibit the convicted person from having custody of any companion animal, as defined in § 39-14-212(b), for a period of at least two (2) years from the date of conviction and may impose a lifetime prohibition. The court shall prohibit any person convicted of a second or subsequent offense under this section from having custody of any companion animal for the person's lifetime. T.C.A. § 39-14-214(c).

### **13.01 – Arson**

- a) Amend Element One to read as follows:

that the defendant knowingly damaged [*a structure*] [*a place of worship*] [*farm equipment*] by means of fire or explosion;

- b) Add the following two new definitions in order after element 2(b) and before the definition for “Place of worship”:

“Farm equipment” means any farm tractor, farm implement designed to be operated with a farm tractor, and motorized farm machinery used in the commercial production of farm products or nursery stock.

“Farm tractor” means every motor vehicle designed and used primarily as a farm implement, for drawing plows, mowing machines, and other implements of husbandry.

- c) Add a footnote to the new definition for “Farm equipment” and renumber subsequent footnotes accordingly. The text of the footnote should read as follows:

T.C.A. § 39-14-301(c)(1).

- d) Add a footnote to the new definition for “Farm tractor” and renumber subsequent footnotes accordingly. The text of the footnote should read as follows:

T.C.A. § 55-1-104(a).

- e) Add a footnote to the existing definition for “Places of worship” and renumber subsequent footnotes accordingly. The text of the footnote should read as follows:

T.C.A. § 39-14-301(c)(2).

### **27.05(a)- Evading arrest**

- a) Add the following language to the end of the existing Comment:

For offenses occurring on or after 7/1/20, the court shall order a person who commits evading arrest and, in doing so, recklessly damages government property, including, but not limited to, a law enforcement officer's uniform or motor vehicle, to pay restitution to the appropriate government agency for the value of any property damaged. T.C.A. § 39-16-603(c).

### **27.05(b) – Evading arrest while operating motor vehicle**

- a) Add the following language to the end of the existing Comment:

For offenses occurring on or after 7/1/20, the court shall order a person who commits evading arrest and, in doing so, recklessly damages government property, including, but not limited to, a law enforcement officer's uniform or motor vehicle, to pay restitution to the appropriate government agency for the value of any property damaged. T.C.A. § 39-16-603(c).

### **31.02 – Counterfeit controlled substance**

- a) Amend Part A, element (3) to read as follows:

that the substance was similar in color, shape, size, and markings or lack thereof, to [specify controlled substance], a Schedule [insert schedule number] substance;

- b) Amend Part B, element (2) to read as follows:

that the defendant intended that such substance imitate in color, shape, size, and markings or lack thereof, the physical appearance of [specify controlled substance], a Schedule [insert schedule number] substance;

- c) Amend Part C, element (3) to read as follows:

that the substance was similar in color, shape, size, and markings or lack thereof, to [specify controlled substance], a Schedule [insert schedule number] substance;

- d) After Part C, element (4), add the following sentence as a new paragraph:

[\_\_\_\_\_] is a Schedule [\_\_\_\_\_] controlled substance.

- e) Add the following language after the existing text of footnote 5:

For definitions of “administer” and “dispense”, see T.C.A. § 39-17-402(a)(1) and T.C.A. § 39-17-402(a)(7), respectively.

#### **31.12(a) – Supplemental instruction: Drug-free zone**

- a) Insert attachment three to this memorandum as substantially amended instruction 31.12(a).

#### **36.02- Carrying weapons during judicial proceedings**

- a) Add the following language as a new paragraph at the end of the instruction:

**[Only for offenses committed on or after 7/1/20:** It is an exception to this offense that the defendant was in the actual discharge of official duties as *[an elected official of any county or municipality] [the county attorney of any county in the state]*, was authorized to carry a handgun pursuant to T.C.A. § 39-17-1351, and was not in the room in which judicial proceedings were in progress.]

- b) Add a footnote to the new paragraph. The text of the footnote should read as follows:

T.C.A. § 39-17-1306(c)(4).

#### **40.03 – Defense: Duress**

- a) Add the following quote as new Comment 3 to the instruction:

State v. Kavaris Lequan Kelso, No. M2018-00494-CCA-R3-CD, 2020 WL 2109530 (Tenn. Crim. App., Nashville, 5/4/20) provides as follows:

Tennessee’s courts have noted several times that duress is not a defense to homicide. *See, e.g., State v. Robinson*, 622 S.W.2d 62, 73 (Tenn. Crim App. 1980) (stating that the trial judge “would have been justified in instructing the jury that . . . duress is not a defense to the crime of homicide”); *Mallicoat v. State*, 539 S.W.2d 54, 56 (Tenn. Crim App. 1976) (discussing the inapplicability of duress as a defense to murder); *Leach v. State*, 42 S.W. 195, 197 (Tenn. 1897) (holding that if a defendant was threatened with death if he did not murder the victim, “it was his duty to spare [the victim]” and that he “could not with any degree of legal palliation elect a course absolutely safe to himself, and slay an innocent man, rather than take some risk to himself in an equal combat with a relentless companion”).

The Defendant urges this court to conclude that the duress defense is not per se inapplicable to homicide offenses. However, in order to establish duress, a defendant must demonstrate that “the desirability and urgency of avoiding the harm” outweighed, “according to ordinary standards of reasonableness, the harm sought to be prevented by the law proscribing” the criminal offense committed. Tenn. Code Ann. § 39-11-504(a). The danger of death cannot reasonably outweigh the harm of causing a death; therefore, duress in a homicide case cannot be fairly raised by the proof, regardless of whether the Defendant was being threatened at the time he shot the victim.

### **Index**

- a) Under the heading of ANIMALS, remove the notation for “Cock and animal fighting. See COCK AND ANIMAL FIGHTING”.

**T.P.I. – CRIM. 11.03(c)**

**FIXING AGGREGATE VALUE**

**[Use 11.03(d) for forgery and criminal simulation offenses]**

If you find the defendant guilty of Count \_\_\_\_\_ beyond a reasonable doubt, you must go further and fix the range of value of the *[property]* *[services]*.

(A) Value is:

- (1) the fair market value of the *[property]* *[services]* at the time and place of the offense; or
- (2) if the fair market value of the property cannot be ascertained, the cost of replacing the property within a reasonable time after the offense.

[(B) The value of documents, other than those having a readily ascertainable fair market value, is:

- (1) the amount due and collectible at maturity less any part that has been satisfied, if the document constitutes evidence of a debt; or
- (2) the greatest amount of economic loss that the owner might reasonably suffer by virtue of loss of the document, if the document is other than evidence of a debt.]

[(C) If the *[property]* *[service]* has value that cannot be ascertained by the criteria set forth in parts (A) or (B), the property or service is deemed to have a value of less than fifty dollars (\$50).]



- [(D) If the defendant gave consideration for or had a legal interest in the *[property] [services]* which *[is] [are]* the object of the offense, the amount of consideration or value of the interest shall be deducted from the value of the *[property] [services]* ascertained under part (A), (B), or (C) to determine value.]
- [(E) If the animal killed was a police dog, fire dog, search and rescue dog, service animal or police horse, the jury shall consider the value of the police dog, fire dog, search and rescue dog, service animal or police horse as both the cost of the animal and any specialized training the animal received.]
- [(F) In determining the value of the property vandalized, the value of the property shall be fixed at the amount of the damage, the reasonable cost of repairing the damage to the property, or the cost of replacement of the property vandalized.]
- [(G) In determining the value of the destruction or interference, the value of the destruction shall be fixed at the amount of the damage or the cost of replacement of the property. The value of the interference shall be fixed at the amount of the interference to the railroad.]
- [(H) [For a violation of 16.01 and 16.03 and a violation of some provisions in 16.02 only] Value includes *[the face value of the creation of or amount of alteration to any financial instrument or of an electronic transfer of funds]* *[the cost of any alteration, damage, destruction or disruption to any computer, computer system, computer network, computer software,*

*program, or data] [the market value of any unauthorized copy, in any form, including, but not limited to, any printed or electronic form of computer data, computer programs, or computer software residing in, communicated by, or produced by a computer or computer network] [the amount of any proceeds received, concealed or used].]*

The state has the burden of proving this value beyond a reasonable doubt as defined in these instructions.

If you find the defendant guilty of only one of the criminal acts as set out in Count \_\_\_\_\_ beyond a reasonable doubt, you must go further and identify that criminal act and fix the range of value of the property in that one criminal act only.

If you find the defendant guilty of more than one criminal act as set out in Count \_\_\_\_\_ beyond a reasonable doubt, you must go further and identify each criminal act and fix the range of aggregated value<sup>1</sup> of the property.

“Aggregated” means collected into one sum.<sup>2</sup>

The monetary value of the property from multiple criminal acts which are charged in a single count shall be aggregated to establish value if you find, beyond a reasonable doubt, that the multiple criminal acts arose from a common scheme, a common purpose, a common intent, or a common enterprise. You may aggregate only the values of the property used to commit those criminal acts that arose from a common scheme, a common purpose, a common intent, or a common enterprise.<sup>3</sup>

A “common scheme” involves multiple criminal acts committed pursuant to a systematic plan or plot or that are part of a larger, continuing plan or conspiracy.

A “common purpose” involves multiple criminal acts committed pursuant to the same objective, goal, or end.

A “common intent” involves multiple criminal acts committed with the same state of mind. That state of mind is a conscious objective or desire to engage in the multiple criminal acts proven.

A “common enterprise” involves multiple criminal acts committed pursuant to a single venture.

You will fix the aggregated value of the *[property] [services] [obtained] [killed] [vandalized] [destroyed] [interfered with]* along with your verdict by indicating which of the following ranges the aggregated value falls within:

1. One thousand dollars (\$1,000) or less;
2. More than one thousand dollars (\$1,000), but less than two thousand five hundred dollars (\$2,500);
3. Two thousand five hundred dollars (\$2,500) or more, but less than ten thousand dollars (\$10,000);
4. Ten thousand dollars (\$10,000) or more, but less than sixty thousand dollars (\$60,000);
5. Sixty thousand dollars (\$60,000) or more [**only for offenses committed on or after 7/1/12:** , but less than two hundred fifty thousand dollars (\$250,000);
6. Two hundred fifty thousand dollars (\$250,000) or more].]

If you find the defendant guilty of only one of the criminal acts set out in Count \_\_\_\_\_, your verdict shall be “We, the jury, unanimously find the defendant guilty of the act of \_\_\_\_\_, and set the value of the property at \_\_\_\_\_.

If you find the defendant guilty of more than one of the offenses set out in Count \_\_\_\_\_, your verdict shall be in the following form: “We, the jury, unanimously find the defendant guilty beyond a reasonable doubt of the following criminal acts, and further unanimously find that they each arose from a common scheme, a common purpose, a common intent, or a common enterprise:

1. The act of \_\_\_\_\_ with a value of \_\_\_\_\_;
  2. The act of \_\_\_\_\_ with a value of \_\_\_\_\_;
  - [3]. The act of \_\_\_\_\_ with a value of \_\_\_\_\_;
  - [4]. The act of \_\_\_\_\_ with a value of \_\_\_\_\_;
  - [5]. The act of \_\_\_\_\_ with a value of \_\_\_\_\_ ; and
- further find that the total aggregate value of the property is in the following range: \_\_\_\_\_ .

## FOOTNOTES

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1. Tenn. Code Ann. § 39-14-105(b) and *State v. Odom*, 64 S.W.3d 370, 374 (Tenn. Crim. App. 2001).

2. Dictionary.com.

3. The definitions of these four terms are taken from *State v. Denton Jones*, 589 S.W.3d 747 (Tenn. 2019).

**T.P.I. – CRIM. 11.03(d)**

**FIXING APPARENT AGGREGATE VALUE**

**[to be used only in forgery or criminal simulation cases]**

If you find the defendant guilty of Count \_\_\_\_\_ beyond a reasonable doubt, you must go further and fix the range of apparent value of the property.

"Apparent Value" is the apparent fair market value of the property at the time and place of the offense. The state has the burden of proving this apparent value beyond a reasonable doubt as defined in these instructions.

"Apparent" means visible, manifest or obvious.<sup>1</sup>

If you find the defendant guilty of only one of the criminal acts of *[forgery]* *[criminal simulation]* as set out in Count \_\_\_\_\_ beyond a reasonable doubt, you must go further and identify that criminal act and fix the range of apparent value of the property in that one criminal act only.

If you find the defendant guilty of more than one criminal act as set out in Count \_\_\_\_\_ beyond a reasonable doubt, you must go further and identify each criminal act and fix the range of apparent aggregated value<sup>2</sup> of the property.

"Aggregated" means collected into one sum.<sup>3</sup>

The apparent monetary value of the property from multiple criminal acts which are charged in a single count shall be aggregated to establish value if you find, beyond a reasonable doubt, that the multiple criminal acts arose from a common scheme, a common purpose, a common intent, or a common enterprise. You may aggregate only

the apparent values of the property used to commit those criminal acts that arose from a common scheme, a common purpose, a common intent, or a common enterprise.<sup>4</sup>

A “common scheme” involves multiple criminal acts committed pursuant to a systematic plan or plot or that are part of a larger, continuing plan or conspiracy.

A “common purpose” involves multiple criminal acts committed pursuant to the same objective, goal, or end.

A “common intent” involves multiple criminal acts committed with the same state of mind. That state of mind is a conscious objective or desire to engage in the multiple criminal acts proven.

A “common enterprise” involves multiple criminal acts committed pursuant to a single venture.

You will fix the apparent value of the property along with its verdict by indicating which of the following ranges the apparent value falls within:

1. One thousand dollars (\$1,000) or less;
2. More than one thousand dollars (\$1,000), but less than two thousand five hundred dollars (\$2,500);
3. Two thousand five hundred dollars (\$2,500) or more, but less than ten thousand dollars (\$10,000);
4. Ten thousand dollars (\$10,000) or more, but less than sixty thousand dollars (\$60,000);
5. Sixty thousand dollars (\$60,000) or more [**only for offenses committed on or after 7/1/12:** , but less than two hundred fifty thousand dollars (\$250,000);

6. Two hundred fifty thousand dollars (\$250,000) or more].]

If you find the defendant guilty of only one of the criminal acts set out in Count \_\_\_\_\_, your verdict shall be “We, the jury, unanimously find the defendant guilty of the act of \_\_\_\_\_, and set the apparent value of the property at \_\_\_\_\_.

If you find the defendant guilty of more than one of the criminal acts set out in Count \_\_\_\_\_, your verdict shall be in the following form:

“We, the jury, unanimously find the defendant guilty beyond a reasonable doubt of the following criminal acts, and further unanimously find that they each arose from a common scheme, a common purpose, a common intent, or a common enterprise:

1. The act of \_\_\_\_\_ with an apparent value of \_\_\_\_\_;
2. The act of \_\_\_\_\_ with an apparent value of \_\_\_\_\_;
- [3]. The act of \_\_\_\_\_ with an apparent value of \_\_\_\_\_;
- [4]. The act of \_\_\_\_\_ with an apparent value of \_\_\_\_\_;
- [5]. The act of \_\_\_\_\_ with an apparent value of \_\_\_\_\_ ; and

further find that the total apparent aggregate value of the property is in the following range:\_\_\_\_\_ .

## FOOTNOTES

1. *Black's Law Dictionary* (7<sup>th</sup> Ed. 1999).
2. Tenn. Code Ann. §39-14-105(b) and *State v. Odom*, 64 S.W.3d 370, 374 (Tenn. Crim. App. 2001).
3. Dictionary.com.
4. The definitions of these four terms are taken from *State v. Denton Jones*, 589 S.W.3d 747 (Tenn. 2019).

**T.P.I. -- CRIM. 31.12(a)**

**SUPPLEMENTAL INSTRUCTION: DRUG-FREE ZONE<sup>1</sup>**

If you find the defendant(s) guilty of \_\_\_\_\_ in Count \_\_\_\_\_ beyond a reasonable doubt, it will then be your duty to determine whether or not this act occurred *[on the grounds or facilities of a school]* **[only for offenses committed prior to 9/1/20: within one thousand feet (1,000')]** **[only for offenses committed on or after 9/1/20: within five hundred feet (500') of or within the area bounded by a divided federal highway, whichever is less]** of the real property that comprises a *[public] [private] [elementary school] [middle school] [secondary school] preschool] [child care agency] [public library] [recreational center] [park]*.

If you find that this act occurred *[on the grounds or facilities of a school]* **[only for offenses committed prior to 9/1/20: within one thousand feet (1,000')]** **[only for offenses committed on or after 9/1/20: within five hundred feet (500') of or within the area bounded by a divided federal highway, whichever is less]** of the real property that comprises a *[public] [private] [elementary school] [middle school] [secondary school] preschool] [child care agency] [public library] [recreational center] [park]* beyond a reasonable doubt, you will indicate in your verdict for this count "We, the jury, also find the defendant(s) guilty of committing this act *[on the grounds or facilities of a school]* **[only for offenses committed prior to 9/1/20: within one thousand feet (1,000')]** **[only for offenses committed on or after 9/1/20: within five hundred feet (500') of or within the area bounded by a divided federal highway, whichever is less]** of the real property that comprises a *[public] [private] [elementary school] [middle school] [secondary school] preschool] [child care agency] [public library] [recreational center] [park]*.



If you find the State has not proven that this act occurred *[on the grounds or facilities of a school] [only for offenses committed prior to 9/1/20: within one thousand feet (1,000')] [only for offenses committed on or after 9/1/20: within five hundred feet (500')] of or within the area bounded by a divided federal highway, whichever is less] of the real property that comprises a [public] [private] [elementary school] [middle school] [secondary school] preschool] [child care agency] [ public library] [recreational center] [park]], then you shall indicate in your verdict for this count “We, the jury do not find beyond a reasonable doubt that this act occurred *[on the grounds or facilities of a school] [only for offenses committed prior to 9/1/20: within one thousand feet (1,000')] [only for offenses committed on or after 9/1/20: within five hundred feet (500')] of or within the area bounded by a divided federal highway, whichever is less] of the real property that comprises a [public] [private] [elementary school] [middle school] [secondary school] preschool] [child care agency] [ public library] [recreational center] [park]].”**

Your verdict must be unanimous.

#### **Footnotes**

1. T.C.A. § 39-17-432.

#### **Comments**

1. Felony possession with intent or manufacture, sale or delivery of controlled substances is not a lesser-included offense of committing those crimes in a drug-free zone. Therefore, the jury’s finding as to drug-free zone must be stated by the jury in a separate finding. See State v. Jordan, E2018-00471-CCA-R3-CD, 2020

WL 360518 (Tenn. Crim. App., Knoxville, 1/21/20) citing *State v. Smith*, 48 S.W.3d 159, 167-68 (Tenn. Crim. App. 2000).

2. If the offense occurred prior to 9/1/20 and if the offense occurred on the grounds or facilities of any school or within one thousand feet (1,000') of the real property that comprises a public or private elementary school, middle school, or secondary school, the defendant shall be punished one (1) classification higher than is provided in § 39-17-417(b)-(i) for such violation, the maximum fines to be imposed are increased, and the minimum sentence in the defendant's range must be served at 100%. See T.C.A. § 39-17-432 and *Davis v. State*, 313 S.W.3d 751, 760-66 (Tenn. 2010). If the offense occurred on the grounds or facilities of a preschool, childcare center, public library, recreational center or park, the defendant shall be punished one (1) classification higher for purposes of the fines set out in T.C.A. § 39-17-432(b)(2), and the minimum sentence in the defendant's range must be served at 100%, but the defendant shall not be punished one (1) classification higher for purposes of incarceration. If the offense occurred on or after 9/1/20, the mandatory minimum sentence and enhanced punishments for drug-free zones are discretionary with the trial judge, and T.C.A. §39-17-432 should be consulted regarding enhancements of fines, letter grades of offenses, the amount of incarceration and the rebuttable presumption that an offender not be made to serve a minimum sentence unless "the defendant's conduct exposed vulnerable persons to the distractions and dangers that are incident to the occurrence of illegal drug activity." T.C.A. § 39-17-432(c).