BREAKING AND ENTERING

The defendant in this case is charged with breaking and entering a (building) (ship) (vessel) (vehicle) in the nighttime, with the intent to commit a felony, in violation of section 16 of chapter 266 of our General Laws.

In order to prove the defendant guilty of this offense, the Commonwealth must prove four things beyond a reasonable doubt:

First: **That the defendant broke into a (building) (ship) (vessel) (vehicle) belonging to another person;**

Second: **That the defendant entered that (building) (ship) (vessel) (vehicle);**

Third: **That the defendant did so with the intent to commit a felony in that (building) (ship) (vessel) (vehicle); and**

Fourth: **That this event took place during the nighttime.**

As to the first element of the offense, "breaking" has been defined as exerting physical force, even slight physical force, and thereby forcibly removing an obstruction and gaining entry. Another definition would be: moving in a significant manner anything that bars the way into the

(building) (ship) (vessel) (vehicle). Some obvious examples would include breaking a window, or forcing open a door or window, or removing a plank from a wall. But there are some less obvious examples that also are considered to be "breakings." Opening a closed door or window is a breaking, even if they are unlocked. Going in through an open window that is not intended for use as an entrance is also a breaking, but going in through an unobstructed entrance — such as an open door — is not.

Commonwealth v. Burke, 392 Mass. 688, 689-690, 467 N.E.2d 846, 848 (1984); *Commonwealth v. Tilley,* 355 Mass. 507, 508-509, 246 N.E.2d 176, 177-178 (1969); *Commonwealth v. Shedd,* 140 Mass. 451, 453, 5 N.E. 254, 256 (1886); *Commonwealth v. Hall*, 48 Mass. App. Ct. 727, 731, 725 N.E.2d 247, 250 (2000) (open window). See *Commonwealth v. Jeffrey Pearson,* 72 Mass. App. Ct. 1101, 888 N.E.2d 386 (No. 07-P-676, June 6, 2008) (unpublished opinion under Appeals Court Rule 1:28) (since a car window is not used or intended to enter a car, leaning torso and both arms through open window of parked car sufficient to support finding of breaking and entering).

The second element of this offense is that the defendant in fact entered the (building) (ship) (vessel) (vehicle). "Entry" is the unlawful making of one's way into a (building) (ship) (vessel) (vehicle). Entry occurs if any part of the defendant's body — even a hand or foot — or any instrument or weapon controlled by the defendant physically enters the (building) (ship) (vessel) (vehicle). Breaking an outer storm window and reaching inside between the outer and inner windows with one's hand is an entry.

Burke, 392 Mass. at 691, 467 N.E.2d at 849 (reaching between outer and inner window with a tool, but not a hand, insufficient); *Commonwealth v. Lewis,* 346 Mass. 373, 377, 191 N.E.2d 753, 757 (1963).

The third element of the offense is that the defendant broke in with the intent to commit a felony. In this Commonwealth, offenses for which a person may be sentenced to state prison are called "felonies." Other, lesser offenses are called "misdemeanors."

If no specific felony was charged, or the evidence suggests a different felony. **The Commonwealth is not required to prove that the defendant intended any particular felony, but it must prove that the defendant intended to commit *some* felony.**

I instruct you that _____ (and) _____ (is a felony) (are felonies). The Commonwealth must prove that the defendant intended to commit a felony at the time he (she) broke and entered the (building) (ship) (vessel) (vehicle).

Rogan v. Commonwealth, 415 Mass. 376, 613 N.E.2d 920 (1993) (jury may find intent to commit an unspecified felony); *Commonwealth v. Poff,* 56 Mass. App. Ct. 201, 203, 775 N.E. 2d 1246 (2002) (felonious intent must be present at the time of the breaking and entering); *Commonwealth v. Clemente*, 25 Mass. App. Ct. 229, 235 n.10, 517 N.E.2d 479, 483 n.10 (1988) (statute apparently does not require an intent to commit a felony in the same building into which the break was made).

Finally, the Commonwealth must prove that the breaking and entering took place in the nighttime. The law is that the "nighttime" begins one hour after sunset and ends one hour before sunrise the next day, measured according to mean, or average, time at that time of the year in the place where the crime was committed.

The Commonwealth may prove that a crime occurred in the nighttime by (presenting evidence that it was completely dark outside at the time of the offense) (offering an almanac or other reference book to show the time of sunset or sunrise on that day) (asking you as jurors to rely on your common knowledge of approximately when the sun rises or sets on ___*[date]*___ **in this area). Whatever method is used, you must be convinced beyond a reasonable doubt that the crime occurred sometime between one hour after sunset and one hour before sunrise.**

Here instruct on "Intent" (Instruction 3.120).

G.L. c. 278, § 10. *Commonwealth v. Kingsbury,* 378 Mass. 751, 752-754, 393 N.E.2d 391, 392-393 (1979); *Commonwealth v. Bergstrom,* 10 Mass. App. Ct. 838, 838-839, 406 N.E.2d 1056, 1056-1057 (1980); *Commonwealth v. Servidori,* 6 Mass. App. Ct. 969, 384 N.E.2d 226 (1979).

SUPPLEMENTAL INSTRUCTIONS

1. *Constructive breaking.* **It is not always necessary that a person physically break into a (building) (ship) (vessel) (vehicle) to be found guilty of this offense. The defendant may be convicted if an accomplice let him (her) into the (building) (ship) (vessel) (vehicle), or if the defendant convinced an innocent person by trick or threat to allow him (her) to enter, if the defendant entered with the intent to commit a felony.**

Commonwealth v. Lowrey, 158 Mass. 18, 19-20, 32 N.E. 940, 941 (1893) (accomplice); *Commonwealth v. Labare,* 11 Mass. App. Ct. 370, 377, 416 N.E.2d 534, 538 (1981) (phony name).

2. *Judicial notice of time of sunset or sunrise.* **The law permits me to take notice of certain facts that are not subject to reasonable dispute. In this case, based upon** *[reference book]* **, I have decided to accept as proved the fact that on** *[date]* **the sun (set) (rose)** at *[time]* **. Therefore, you may accept this fact as true, even though no evidence has been introduced about it. You are not required to do so, but you may.**

See the notes to the supplemental instruction on "Judicial Notice" in Instruction 2.220 (What Is Evidence; Stipulations; Judicial Notice).

3. *Breaking and entering in daytime as lesser included offense.* **If it has not been proved to you beyond a reasonable doubt that the defendant committed this offense sometime between one hour after sunset and one hour before sunrise, but all the other elements of the offense have been proved to you beyond a reasonable doubt, you may find the defendant guilty of the lesser included offense of breaking and entering in the daytime.**

Commonwealth v. Sitko, 372 Mass. 305, 307-308, 361 N.E.2d 1258, 1259-1261 (1977) (breaking and entering in the daytime under G.L. c. 266, § 18 is the equivalent of a lesser included offense in breaking and entering in the nighttime).

4. *Intent to steal.* **When a person breaks and enters in the nighttime, it is ordinarily a fair inference, in the absence of contrary evidence, that he intends to steal. You are permitted to draw such an inference if you think it reasonable. You are not required to draw such a conclusion, but you may.**

Commonwealth v. McGovern, 397 Mass. 863, 868, 494 N.E.2d 1298, 1301 (1986); *Commonwealth v. Hughes,* 380 Mass. 596, 602-604, 404 N.E.2d 1246, 1250-1251 (1980) (dwelling); *Commonwealth v. Wygrzywalski,* 362 Mass. 790, 792, 291 N.E.2d 401, 402-403 (1973) (store); *Commonwealth v. Eppich,* 342 Mass. 487, 493, 174 N.E.2d 31, 34 (1961) (same); *Commonwealth v. Ronchetti,* 333 Mass. 78, 81, 128 N.E.2d 334, 336 (1955) (inference permissible even where defendant attacked homeowner, apparently spontaneously).

NOTES:

1. **"Another's" property.** The Commonwealth need not allege the building or vehicle owner's name in the complaint, G.L. c. 277, § 25, and if it does, at trial need only prove that the property was owned by someone other than the defendant, *Commonwealth v. Kalinowski,* 360 Mass. 682, 684-685, 277 N.E.2d 298, 299 (1971). At common law, one could not burglarize one's own dwelling, but the issue turned on rights of occupancy rather than ownership. *Commonwealth v. Ricardo*, 26 Mass. App. Ct. 345, 354-357, 526 N.E.2d 1340, 1346-1347 (1988) (charge of armed assault in dwelling). But see *Commonwealth v. Derome*, 6 Mass. App. Ct. 900, 901, 377 N.E.2d 707, 708 (1978) (directing verdict for defendant where Commonwealth charged the break of one premise but proved the break of another).

2. **"Breaking and entering and stealing therein."** At common law, a compound charge of "breaking and entering and stealing therein" was a variation on "breaking and entering with intent to steal." Since there is no better proof of intent to steal than actual larceny, the "averment of actual stealing is to be regarded as equivalent to alleging the intent to steal." When the offense was charged in such compound form, the actual larceny could not also be charged as a separate count, and no separate sentence could be imposed for the larceny. *Commonwealth v. Hope,* 22 Pick. 1, 5-7 (1839). When the breaking and entering and the larceny are charged in separate counts, rather than merged in a single count, separate convictions and sentences are permissible on both. *Commonwealth v. Ford,* 20 Mass. App. Ct. 575, 580, 481 N.E.2d 534, 537 (1985); *Josslyn v. Commonwealth,* 6 Met. 236, 240 (1843).

3. **One break or several?** As to whether multiple breaks into different units in a single building may be prosecuted and sentenced as separate crimes, see *Clemente,* 25 Mass. App. Ct. at 233-237, 517 N.E.2d at 482-484.

4. **Related offenses.** The model instruction is designed for the specific offenses of breaking and entering a building or a vehicle in the nighttime with the intent to commit a felony. That section also includes the offenses of breaking and entering a ship or vessel, which would require appropriate changes in the instruction. The instruction can also be used for violations of G.L. c. 266, §§ 16A, 17 and 18 with the following changes:

> *G.L. c. 266, § 16A (Breaking and entering with intent to commit a misdemeanor):* Change the third element of the model instruction to require proof of a misdemeanor. Omit the fourth element, since the breaking and entering can occur at any time. This is a lesser included offense in G.L. c. 266, § 16. *Commonwealth v. Murphy,* 31 Mass. App. Ct. 901, 901 n.1, 574 N.E.2d 412, 413 n.1 (1991).
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> *G.L. c. 266, § 17 (Entering in nighttime without breaking, or breaking and entering in daytime, owner put in fear):* Entering in nighttime does not require breaking, but entering in the daytime does. In either case, the owner or any other person lawfully therein must be put in fear. Otherwise, the model instruction remains unchanged.
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> *G.L. c. 266, § 18 (Entering dwelling house in nighttime, without breaking, or breaking and entering building in daytime, owner not put in fear):* The first offense in § 18 requires a change to "dwelling house" in the first three elements of the model instruction. An unoccupied apartment is a "dwelling house" if the tenants have taken possession and have the right to move in, even if they have not in fact done so. *Commonwealth v. Kingsbury,* 378 Mass. 751, 755-757, 393 N.E.2d 391, 384-395 (1979). An occupied motel room is a "dwelling." *Commonwealth v. Correia,* 17 Mass. App. Ct. 233, 234-236, 457 N.E.2d 648, 650-651 (1983). The second offense in § 18 requires a change to "daytime" in the fourth element of the model instruction.

Breaking and entering (G.L. c. 266, § 16) is not duplicitous of larceny in a building (G.L. c. 266, § 20), *Ford, supra,* possessing burglarious instruments (G.L. c. 266, § 49), *Commonwealth v. Johnson,* 406 Mass. 533, 535, 548 N.E.2d 1251, 1253 (1990), or receiving stolen property (G.L. c. 266, § 60). *Commonwealth v. Cabrera*, 449 Mass. 825, 874 N.E.2d 654 (2007). Trespass (G.L. c. 266, § 120) is not a lesser included offense of breaking and entering. *Commonwealth v. Vinnicombe,* 28 Mass. App. Ct. 934, 549 N.E.2d 1137 (1990).

5. **Variance in intended felony.** The complaint need not specify the intended felony. *Commonwealth v. Porcher*, 26 Mass. App. Ct. 517, 521, 529 N.E.2d 1348, 1351 (1988); *Commonwealth v. Wainio*, 1 Mass. App. Ct. 866, 867, 305 N.E.2d 867, 867 (1974). Since a complaint's specification of the intended felony is surplusage, proof of a different felony is permissible if the defendant is not misled or the jury confused. *Commonwealth v. Costello,* 392 Mass. 393, 402-404, 467 N.E.2d 811, 817-819 (1984); *Commonwealth v. Hobbs,* 385 Mass. 863, 869-871, 434 N.E.2d 633, 638-640 (1982); see also *Commonwealth v. Randolph*, 415 Mass. 364, 367, 613 N.E.2d 899, 901 (1993). See also *Rogan, supra* (jury may find intent to commit an unspecified misdemeanor on charge of breaking and entering in daytime with intent to commit felony).

6. **Evidence of Time.** The Commonwealth's failure to provide direct evidence of the time of the crime is not fatal to the Commonwealth's case because circumstantial evidence is competent evidence to establish guilt. *Commonwealth v. Bennett*, 424 Mass. 64, 67, 674 N.E.2d 237, 240 (1997). Nor is the Commonwealth compelled to provide any evidence of the time of sunrise. *Bennett*, 424 Mass. at 68, 674 N.E.2d at 240 ("The jury were entitled to rely on their general knowledge of matters commonly known within the community in determining what inferences may be drawn to establish a material fact not proved by direct evidence, such as the time of sunset or sunrise at a particular time of the year.").