

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

VICTOR STITT, II

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APPENDIX

United States of America vs. Victor J. Stitt, II, Case No. 14-6158
(6th Cir. July 15, 2019)
(6th Cir. September 26, 2019)
(Order denying petition rehearing)

United States of America vs. Victor J. Stitt, II, Case No. 4:12-cr-000019
(U.S. District Court, Eastern District of Tennessee)
(Indictment, March 27, 2012)
(Jury Trial Transcript, May 21, 2015)
(Verdict Form, April 2, 2014)

s/ Michael C. Holley

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NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

File Name: 19a0362n.06

No. 14-6158

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED

Jul 15, 2019

DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
VICTOR J. STITT, II,
Defendant-Appellant.

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

OPINION

Before: MOORE and COOK, Circuit Judges; PEARSON, District Judge.*

MOORE, J., delivered the opinion of the court in which PEARSON, D.J., joined.
COOK, J., concurs in the judgment only.

KAREN NELSON MOORE, Circuit Judge. This case returns to us following the United States Supreme Court’s decision in *United States v. Stitt*, 139 S. Ct. 399 (2018). In our original disposition of this case, we affirmed Defendant-Appellant Victor J. Stitt’s sentence under the Armed Career Criminal Act (“ACCA”) after his conviction for being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). *United States v. Stitt*, 637 F. App’x 927, 928 (6th Cir. 2016). Stitt’s sentence was based on six convictions for Tennessee aggravated burglary. *Id.* at 931–32. We also affirmed the district court’s denial of Stitt’s motion to suppress and rejected Stitt’s challenge to the district court’s venue. *Id.* at 929–30. Sitting en banc we subsequently vacated our decision and judgment, *see* 646 F. App’x 454 (6th Cir. 2016), and then reversed as to

* The Honorable Benita Y. Pearson, United States District Judge for the Northern District of Ohio, sitting by designation.

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Stitt's ACCA designation, *United States v. Stitt*, 860 F.3d 854 (6th Cir. 2017) (en banc). We concluded that because Tennessee's aggravated burglary statute covered burglary of tents, cars, or "self-propelled vehicle[s]," it was broader than generic burglary¹ and thus could not serve as a predicate offense. *Stitt*, 860 F.3d at 860–61. The Supreme Court then reversed the en banc decision, concluding that the generic definition of "burglary" under the ACCA included "burglary of a structure or vehicle that has been adapted or is customarily used for overnight accommodation." *Stitt*, 139 S. Ct. at 403–04. On remand, we once again consider Stitt's ACCA designation. For the reasons set forth below, we affirm Stitt's sentence under the ACCA. Additionally, because neither the en banc decision nor the Supreme Court's decision in *Stitt* calls into question this panel's original resolution of Stitt's venue or suppression claims, we reissue those sections (Parts II and III) of our panel decision in full. *See Stitt*, 637 F. App'x at 929–30; *see also Stitt*, 139 S. Ct. at 403–04 (considering the scope of "generic burglary" under the ACCA); *Stitt*, 860 F.3d at 856–57 (explaining that Stitt's petition for rehearing en banc was granted to resolve Stitt's claim under the ACCA).

I. FACTUAL BACKGROUND

In 2011, Stitt was indicted on one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). R. 1 (Indictment) (Page ID #1). Following a jury trial, Stitt was found guilty of the charged offense. R. 92 (Verdict) (Page ID #395). The pre-sentence

¹The Supreme Court has defined generic burglary under the ACCA as being "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Taylor v. United States*, 495 U.S. 575, 598 (1990).

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investigation report (“PSR”) noted that, among other convictions, Stitt had six convictions for Tennessee aggravated burglary. R. 100 (PSR ¶¶ 24, 28) (Page ID #429–30, 432). The PSR identified those convictions as predicate offenses under the ACCA, thus triggering the ACCA’s fifteen-year minimum sentence requirement. *Compare* 18 U.S.C. § 924(e)(1) (mandating a fifteen-year sentence for individuals with three or more predicate offenses under the ACCA), *with id.* § 924(a)(2) (mandating a ten-year statutory maximum for felon-in-possession convictions). At sentencing, the district court overruled Stitt’s objections to his ACCA designation and imposed a 290-month sentence. R. 113 (Judgment at 2) (Page ID #504). Stitt appealed.

II. DISCUSSION

Throughout the proceedings of this case, Stitt has argued that Tennessee’s aggravated burglary statute is broader than generic burglary for three distinct reasons. First, in his opening brief before the original panel, Stitt asserted that because a person may be convicted of aggravated burglary by passively, as opposed to affirmatively, deceiving the owner of the property to gain entrance into a habitation, and generic burglary requires, at a minimum, some “affirmative” act, Tennessee aggravated burglary is not a predicate offense. *See* Appellant Br. at 34–42. Second, Stitt contended that Tennessee’s definition of “habitation” under Tennessee Code Annotated § 39-14-401 was broader than generic burglary because it covered burglaries of cars, tents, or other movable structures. Reply Br. at 8. Finally, in his reply brief before the en banc court, Stitt argued that because Tennessee aggravated burglary may be committed “recklessly,” as opposed to just “knowingly” or “intentionally,” Tennessee aggravated burglary could not form the basis of Stitt’s ACCA enhancement. Appellant En Banc Reply Br. at 6–7.

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The Supreme Court's decision in *United States v. Stitt* clearly forecloses Stitt's second argument regarding Tennessee's "habitation" definition. *Stitt*, 139 S. Ct. at 403–04. As for Stitt's third (mens rea) argument, Stitt did not raise this claim in his original briefing before this panel and, indeed, articulated it for the first time in a *reply* brief before the en banc court. Stitt's argument did not rely on any new law or statute that was unavailable to him in his original petition and Stitt has not provided any explanation for his failure to raise this issue either before the original panel or in his initial en banc brief. Consequently, Stitt has forfeited this claim, and we need not address it. *United States v. Abboud*, 438 F.3d 554, 589 (6th Cir. 2006) (refusing to address the merits of an argument raised for the first time in a *reply* brief). This leaves Stitt's claim that because a defendant can commit aggravated burglary by entering or remaining in a habitation either by affirmative or passive acts, it is broader than generic burglary and therefore cannot form the basis of his ACCA designation. Although this argument is not necessarily prohibited by the Supreme Court's resolution of Stitt's appeal,² we nonetheless conclude it is meritless.

"We review *de novo* a district court's determination that a defendant should be sentenced as an armed career criminal." *United States v. Vanhook*, 640 F.3d 706, 709 (6th Cir. 2011). In

²After all, the Supreme Court examined only the "relevant language" of Tennessee's definition of "habitation" and did not consider the scope of other aspects of Tennessee's aggravated burglary or burglary statutes. *See Stitt*, 139 S. Ct. at 406. True, we have also recently held in *United States v. Ferguson*, 868 F.3d 514, 515–16 (6th Cir. 2017), that, per *United States v. Priddy*, 808 F.3d 676 (6th Cir. 2015), Tennessee burglary constitutes generic burglary under *Taylor*. However, *Ferguson* did not consider the question raised by Stitt in this appeal: whether Tennessee's definition of "consent" renders burglary (and therefore aggravated burglary) broader than generic burglary, *see Ferguson*, 868 F.3d at 515 (rejecting the defendant's argument that Tennessee burglary is broader "because it allows a defendant to be convicted of burglary if he enters a building and then forms the requisite intent to commit a crime while inside").

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support of his argument, Stitt primarily relies upon the plain language of Tennessee's burglary statute and a relatively recent decision by the Tennessee Supreme Court, *State v. Pope*, 427 S.W. 3d 363 (Tenn. 2013), in which the court interpreted the requirements of aggravated burglary. Under Tennessee law, “[a]ggrevated burglary is burglary of a habitation as defined in §§ 39-14-401 [defining ‘habitation’] and 39-14-402 [defining ‘burglary’].” Tenn. Code Ann. § 39-14-403. When §§ 39-14-402 and 39-14-401 are combined, therefore, an individual commits aggravated burglary in Tennessee if, “without the effective consent of the property owner,” he does any of the following: (1) enters a habitation with intent to commit a felony, theft, or assault; (2) remains concealed in a habitation with intent to commit a felony, theft, or assault; or (3) enters a habitation and commits or attempts to commit a felony, theft, or assault. *See* Tenn. Code Ann. § 39-14-402(a)(1)–(a)(3).³ Stitt’s claim on appeal focuses on the “without the effective consent of the property owner” language, which is applicable to all subsections.

“Effective consent” refers to “assent in fact, whether express or apparent,” but not if “[i]nduced by deception or coercion.” Tenn. Code Ann. § 39-11-106(a)(9)(A). “Deception” includes: (1) “[c]reat[ing] or reinforc[ing] a false impression by words or conduct, including false impressions of fact, law, value or intention or other state of mind that the person does not believe

³Section 39-14-402(a)(4) also prohibits someone from entering “any freight or passenger car, automobile, truck, trailer, boat, airplane or other motor vehicle with intent to commit a felony, theft or assault or commits or attempts to commit a felony, theft or assault.” However, because aggravated burglary applies only to burglaries of habitations and not to general structures that are not adapted for overnight use, *Stitt*, 139 S. Ct. at 406, “burglary of a habitation” does not encapsulate § 39-14-402(a)(4)’s prohibition on entering these other, non-adapted, structures. Consequently, we limit our discussion to the provisions of § 39-14-402(a)(1)–(a)(3).

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to be true”; (2) “[p]revent[ing] another from acquiring information which would likely affect the other’s judgment in the transaction”; and (3) “[f]ailing to correct a false impression of law or fact the person knows to be false” and the person either created the falsity or knows the falsity is likely to influence another person. *Id.* § 39-11-106(a)(6)(A)(i)–(iii). The Tennessee Supreme Court has further explained that because an individual may commit aggravated burglary by *either* “creating or reinforcing” a victim’s misconception or “failing to correct a false impression of law or fact,” Tennessee law criminalizes aggravated burglary by both affirmative and passive acts of deception, respectively. *Pope*, 427 S.W. 3d at 370–71 (internal quotation marks omitted); *see also* Appellee En Banc Br. at 19–20 (agreeing with this general statement of law).

Importantly, the *Pope* court later qualified its holding, explaining that although passive deception may suffice for aggravated burglary, a defendant does not commit burglary if he merely fails to correct a victim’s false impression concerning the defendant’s *intent*. *See Pope*, 427 S.W. 3d at 374 (“[E]ven if the victim could have formed a false impression that the Defendant intended to enter his residence for the purpose of purchasing a drink, our statute does not allow for a conviction based upon the Defendant’s failure to correct the victim’s false impression of his intention.”). “To hold otherwise would mean that in order to obtain ‘effective consent’ from a property owner, a defendant would have to announce his or her criminal intent prior to obtaining the owner’s permission to enter a habitation.” *Id.*

Based on this definition of “deception” vis à vis Tennessee’s requirement that burglary (and aggravated burglary) be committed “without the effective consent of the property owner,” Stitt asserts that Tennessee aggravated burglary is broader than generic burglary because generic

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burglary requires an “affirmative” act, i.e., “breaking and entering.” Appellant Br. at 35–36 (explaining that the “unlawful entry” requirement in generic burglary means “entry along the lines of breaking and entering” (internal citation omitted)). For support, Stitt relies almost entirely on the Supreme Court’s discussion of the categorical and modified categorical approaches in *Descamps v. United States*, 570 U.S. 254 (2013). However, the Court in *Descamps* did not comprehensively define generic burglary; rather, the Court merely concluded that California’s burglary statute, which did not require *any* unlawful or unprivileged entry (either by affirmative or passive acts of deception), did not constitute generic burglary. *See id.* at 258–59; Cal. Penal Code Ann. § 459 (providing that a “person who enters” certain locations “with intent to commit grand or petit larceny or any felony is guilty of burglary”). Because California’s statute did not require any “unlawful or unprivileged entry into, or remaining in, a building or structure,” the Court concluded that it was broader than generic burglary. *Descamps*, 570 U.S. at 261, 264–65.

Nonetheless, Stitt points to the Court’s various statements in *Descamps* to the effect that the California statute is unlike generic burglary because generic burglary “generally demand[s] breaking and entering or similar conduct,” suggesting that this proves generic burglary and “unlawful entry” must be committed with some affirmative act. Appellant Br. at 35 (quoting *Descamps*, 570 U.S. at 259). Although the Supreme Court in *Descamps* did discuss “unlawful entry” in general terms of “breaking and entering,” we are unconvinced by Stitt’s argument. As noted above, the Supreme Court was not presented with—and therefore did not provide any holding regarding—the fine distinctions between “unlawful entry” and “breaking and entering or similar conduct” or between passive and affirmative acts of deception. *See Descamps*, 570 U.S.

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at 259. Rather, because the California statute did not require *any* unlawful or unprivileged entry and therefore applied to shoplifters who were undoubtedly permitted and privileged to enter and remain in the establishments where they were, a conviction under California's statute was not an ACCA predicate offense. *Id.*

Similarly, although "breaking and entering" plausibly corresponds to "affirmative" acts, such as active deception, nothing in *Descamps* necessarily suggests that "affirmative" acts are the *only* way a person may "break" into, unlawfully enter, or remain in a habitation. *See id.* (noting that "unlawful entry" generally includes "breaking and entering *or similar conduct*" (emphasis added)). If that were so, the *Taylor* Court presumably would have adopted the common-law definition of burglary, which was limited to "breaking and entering." *See Taylor*, 495 U.S. at 592–93. Of course, the Court expressly declined to do that: *Id.* at 593 (explaining that over the years, "[m]ost other States have expanded this definition to include entry without a 'breaking'"). Moreover, unlawfully "remaining in" a building with the intent to commit a felony, undoubtedly an ACCA-predicate "burglary," is *itself* largely passive.

Additionally, the very reason Congress included "burglary" as an enumerated felony—to punish thefts that are more likely to lead to violent confrontations—is readily applicable to situations where an individual uses "passive" acts of deception to unlawfully enter or remain in a building. *See Taylor*, 495 U.S. at 588. Indeed, because such actions will often require the defendant to interact with the owner of a habitation, any subsequent burglary could certainly lead to a "violent confrontation" when the owner realizes the defendant's true intent. *Stitt*, 139 S. Ct. at 406. And regardless of the method of entry, the offender's awareness of a potential

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confrontation suggests that “he is prepared to use violence if necessary to carry out his plans or to escape.” *Taylor*, 495 U.S. at 588. No part of *Descamps*’s holding regarding California’s burglary statute leads us to conclude that an individual who utilizes a victim’s confusion about his identity to burglarize the victim’s habitation is any less a “violent felon” than someone who, for instance, picks the lock.

Furthermore, on its face, Tennessee’s definition of “deception” and “without consent” necessarily encompasses acts that are either “unprivileged” or “unlawful,” thus bringing them within the generic definition of burglary. As the Tennessee Supreme Court has explained, if an individual fails to correct a victim’s incorrect assumption about the defendant’s identity and the victim subsequently allows the defendant into his home, the defendant has entered “without effective consent”; such an “entry” would be both “unlawful” and “unprivileged.” *Pope*, 427 S.W. 3d at 373. Similarly, even if a defendant enters a residence after realizing that the owner mistakenly believes him to be another person and *then* forms the intent to burglarize the house, the defendant would necessarily be “remaining in” the house in an “unlawful” or “unprivileged” way with “intent” to commit a felony. *See State v. Wesemanin*, No. 03C01-9407-CR-00260, 1995 WL 605442, at *2 (Tenn. Ct. Crim. App. Oct. 16, 1995) (“Criminal intent does not have to occur either prior to or simultaneously with the entry.”); *see also Quarles v. United States*, 139 S. Ct. 1872, 1879 (2019) (“[W]e interpret remaining-in burglary under § 924(e) to occur when the defendant forms the intent to commit a crime at any time while unlawfully present in a building or structure.”). And as the Supreme Court reminded us in *Quarles*, when interpreting state statutes, we should not “seiz[e] on modest state-law deviations from the generic definition of burglary.”

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Quarles, 139 S. Ct. at 1880. Rather, “so long as the state law in question ‘substantially corresponds’ to (or is narrower than) generic burglary, the conviction qualifies under § 924(e).” *Id.* (quoting *Taylor*, 495 U.S. at 602). Such is the case here.

Finally, although other Circuits have not dealt with the particular nuances of “affirmative” versus “passive” acts of deception, they have generally concluded that when someone enters a building “without consent” and with the intent to commit a burglary, they have necessarily entered the building “unlawfully” pursuant to generic burglary. *See United States v. McArthur*, 850 F.3d 925, 938 (8th Cir. 2017) (determining that a Minnesota statute which forbids “entering a building without consent and with intent to . . . commit any felony or gross misdemeanor” qualified as generic burglary); *United States v. Mungró*, 754 F.3d 267, 270 (4th Cir. 2014) (concluding that because North Carolina’s statute prohibited breaking *or* entering without the consent of the owner, it constituted generic burglary, even post-*Descamps*); *United States v. Ramirez-Flores*, 743 F.3d 816, 822 & n.5 (11th Cir. 2014) (interpreting the Sentencing Guidelines and equating entry “without consent” to generic burglary depending on the definition of “dwelling”); *United States v. Bonilla*, 687 F.3d 188, 192–93 (4th Cir. 2012) (concluding that a person has committed generic burglary when he or she “enters a building or habitation and commits or attempts to commit a felony, theft, or an assault . . . without the effective consent of the owner” (internal quotation marks omitted)).

For all the reasons set forth above, we therefore conclude that, despite Tennessee burglary’s inclusion of both “passive” and “affirmative” acts of deception within its statutory framework, Tennessee aggravated burglary categorically constitutes generic burglary. Consequently, Stitt was

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correctly designated as a career offender under the ACCA, and we once again affirm his conviction and sentence.

III. CONCLUSION

For the reasons set forth above, we **AFFIRM** Stitt's conviction and sentence. We reissue Parts II and III of our panel decision affirming the denial of Stitt's motion to suppress and rejecting his venue claim, and affirm his 290-month sentence. *See Stitt*, 637 F. App'x at 929–30.

Case No. 14-6158

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

ORDER

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

VICTOR J STITT, II

Defendant - Appellant

BEFORE: MOORE, Circuit Judge; COOK, Circuit Judge; PEARSON, U.S. District Judge;

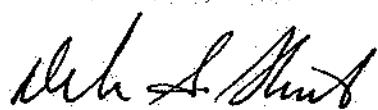
Upon consideration of the petition for rehearing filed by the appellant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Issued: September 26, 2019



UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at WINCHESTER

302 MAR 27 P 4 13

UNITED STATES OF AMERICA

vs.

VICTOR J. STITT, II.

)
)
)
)
vs.
)
)
)
)

UNITED STATES
4:12-cr-19
Judge Mattice Lee

INDICTMENT

COUNT ONE

The Grand Jury charges that on or about October 21, 2011, in the Eastern District of Tennessee, the defendant, VICTOR J. STITT, II, having previously been convicted in court of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess in and affecting commerce, a firearm; in violation of Title 18, United States Code, Section 922(g)(1).

A TRUE BILL

SIGNATURE REDACTED

NANCY STALLARD HARR
Acting United States Attorney

By: Steven S. Neff
Steven S. Neff
Assistant U.S. Attorney

1 IN THE UNITED STATES DISTRICT COURT

2 EASTERN DISTRICT OF TENNESSEE

3 AT CHATTANOOGA

4 :
5 UNITED STATES OF AMERICA, :
6 Plaintiff, :
-versus- : CR-4-12-19
7 VICTOR J. STITT, II, :
8 Defendant. :

9 Chattanooga, Tennessee
April 2, 2014

10
11 BEFORE: THE HONORABLE HARRY S. MATTICE, JR.,
12 UNITED STATES DISTRICT JUDGE

13 APPEARANCES:

14

15 FOR THE PLAINTIFF:

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Chattanooga, Tennessee 37402

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23 EXCERPT OF PROCEEDINGS
24 JURY CHARGE
PAGES 1 THROUGH 23

25

UNITED STATES DISTRICT COURT

1 THE COURT: Members of the jury, now it's time for
2 me to instruct you about the law that you must follow in
3 deciding this case.

4 I'll start by explaining your duties and the general
5 rules that apply in every criminal case.

6 Then I'll explain some rules that you must use in
7 evaluating particular testimony and evidence.

8 Then I'll explain the elements, or parts, of the
9 crimes that the defendant is accused of committing.

10 And last, I'll explain the rules that you must
11 follow during your deliberations in the jury room, and the
12 possible verdicts that you may return.

13 Please listen very carefully to everything that I
14 say.

15 You have two main duties as jurors. The first one
16 is to decide what the facts are from the evidence that you saw
17 and heard here in court. Deciding what the facts are is your
18 job, not mine, and nothing that I have said or done during
19 this trial was meant to influence your decision about the
20 facts in any way.

21 Your second duty is to take the law that I give you,
22 apply it to the facts, and decide if the government has proved
23 the defendant guilty beyond a reasonable doubt. It's my job
24 to instruct you about the law, and you are bound by the oath
25 that you took at the beginning of the trial to follow the

UNITED STATES DISTRICT COURT

1 instructions that I give you, even if you may personally
2 disagree with them. This includes the instructions that I
3 gave you before and during the trial, and these instructions.
4 All of the instructions are important, and you should consider
5 them together as a whole.

6 The lawyers may have talked about the law during
7 their arguments, and it's proper that they do so. But if what
8 they said is different from what I say now, you must follow
9 what I say. What I say about the law controls.

10 Perform these duties fairly. Do not let any bias,
11 sympathy, or prejudice that you may feel toward one side or
12 the other influence your decision in any way.

13 Now, as you know, the defendant has pleaded not
14 guilty to the crime charged in the indictment. The indictment
15 is not any evidence at all of guilt. It's just the formal way
16 that the government tells the defendant what crimes he's
17 accused of committing. It does not even raise a suspicion of
18 guilt.

19 Instead, the defendant starts the trial with a clean
20 slate, with no evidence at all against him, and the law
21 presumes that he's innocent. This presumption of innocence
22 stays with him unless the government presents evidence here in
23 court that overcomes the presumption, and convinces you beyond
24 a reasonable doubt that he is guilty.

25 This means that the defendant has no obligation to

UNITED STATES DISTRICT COURT

1 present any evidence at all, or to prove to you in any way
2 that he is innocent. It's up to the government to prove that
3 he's guilty, and this burden stays on the government from
4 start to finish. You must find the defendant not guilty
5 unless the government convinces you beyond a reasonable doubt
6 that he is guilty.

7 The government must prove every element of the crime
8 charged beyond a reasonable doubt. Proof beyond a reasonable
9 doubt does not mean proof beyond all possible doubt. Possible
10 doubts or doubts based purely on speculation are not
11 reasonable doubts. A reasonable doubt is a doubt based upon
12 reason and common sense. It may arise from the evidence, the
13 lack of the evidence, or the nature of the evidence.

14 Proof beyond a reasonable doubt means proof which is
15 so convincing that you would not hesitate to rely and act on
16 it in making the most important decisions in your own lives.
17 If you are convinced that the government has proved the
18 defendant guilty beyond a reasonable doubt, say so by
19 returning a guilty verdict. If you're not convinced, say so
20 by returning a not guilty verdict.

21 Now, you must make your decision based only on the
22 evidence that you saw and heard here in court. Do not let
23 rumors, suspicions, or anything else that you may have seen or
24 heard outside of court influence your decision in any way.

25 The evidence in this case includes only what the

UNITED STATES DISTRICT COURT

1 witnesses said while they were testifying under oath; any
2 exhibits that I may have allowed into evidence; any
3 stipulations that the lawyers may have agreed to; and any
4 facts that I may have judicially noticed.

5 Nothing else is evidence. The lawyers' statements
6 and arguments are not evidence. Their questions and
7 objections are not evidence. My legal rulings are not
8 evidence. And my comments and questions are not evidence.

9 During the trial, I may not have let you hear the
10 answers to some of the questions that the lawyers asked. I
11 also may have ruled that you could not see some of the
12 exhibits that the lawyers wanted you to see. And sometimes I
13 may have ordered you to disregard things that you saw or
14 heard, or I may have struck things from the record. You must
15 completely ignore all of these things. Do not even think
16 about them. Do not speculate about what a witness might have
17 said or what an exhibit might have shown. These things are
18 not evidence, and you're bound by your oath not to let them
19 influence your decision in any way.

20 I also may have instructed you to consider some
21 evidence for a certain purpose. You must follow those
22 instructions and consider that evidence only for the purpose
23 that I told you it was to serve.

24 Make your decision based only on the evidence, as
25 I've defined it here, and nothing else.

UNITED STATES DISTRICT COURT

1 You should use your common sense in weighing the
2 evidence. Consider it in light of your everyday experience
3 with people and events, and give it whatever weight you
4 believe it deserves. If your experience tells you that
5 certain evidence reasonably leads to a conclusion, you're free
6 to reach that conclusion.

7 Now, some of you may have heard the terms "direct
8 evidence" and "circumstantial evidence".

9 Direct evidence is simply evidence like the
10 testimony of an eyewitness which, if you believe it, directly
11 proves a fact. If a witness testified that he saw it raining
12 outside, and you believed him, that would be direct evidence
13 that it was raining.

14 Circumstantial evidence is simply a chain of
15 circumstances that indirectly proves a fact. If someone
16 walked into the courtroom wearing a raincoat covered with
17 drops of water and carrying a wet umbrella, that would be
18 circumstantial evidence from which you could conclude that it
19 was raining.

20 It's your job to decide how much weight to give the
21 direct and circumstantial evidence. The law makes no
22 distinction between the weight that you should give to either
23 one, or say that one is any better evidence than the other.
24 You should consider all of the evidence, both direct and
25 circumstantial, and give it whatever weight you believe it

UNITED STATES DISTRICT COURT

1 deserves.

2 Now, as we've discussed, a stipulation is an
3 agreement. The parties have stipulated that certain matters
4 of fact are true. The parties are bound by this agreement,
5 and in your consideration of the evidence, you must treat
6 these facts as proved.

7 The parties in this matter, the United States, and
8 the defendant, Victor J. Stitt, have agreed and stipulated
9 that the defendant, Victor J. Stitt, had been convicted of a
10 crime punishable by imprisonment of a term exceeding one year
11 prior to October 21st, 2011.

12 Now, another part of your job as jurors is to decide
13 how credible or believable each witness was. This is your
14 job, not mine. It is up to you to decide if a witness's
15 testimony was believable, and how much weight you think it
16 deserves. You're free to believe everything that a witness
17 said, or only part of it, or none of it at all. But you
18 should act reasonably and carefully in making these decisions.

19 Let me suggest some things for you to consider in
20 considering -- let me suggest some things for you to consider
21 in evaluating each witness's testimony.

22 Ask yourself if the witness was able to clearly see
23 or hear the events. Sometimes even an honest witness may not
24 have been able to see or hear what was happening, and may make
25 a mistake.

UNITED STATES DISTRICT COURT

1 Ask yourself how good the witness's memory seemed to
2 be. Did the witness seem to be able to accurately remember
3 what happened?

4 Ask yourself if there was anything else that may
5 have interfered with the witness's ability to perceive or
6 remember the events.

7 Ask yourself how the witness acted while testifying.
8 Did the witness appear honest? Or did the witness appear to
9 be lying?

10 Ask yourself if the witness had any relationship to
11 the government, or to the defendant, or anything to gain or
12 lose from the case, that might influence the witness's
13 testimony. Ask yourself if the witness had any bias, or
14 prejudice, or reason for testifying that might cause the
15 witness to lie or slant the testimony in favor of one side or
16 the other.

17 Ask yourself if the witness testified inconsistently
18 while on the witness stand, or if the witness said or did
19 something (or failed to say or do something) at any other time
20 that is inconsistent with what the witness said while
21 testifying. If you believe that the witness was inconsistent,
22 ask yourself if this makes the witness's testimony less
23 believable. Sometimes it may; other times it may not.
24 Consider whether the inconsistency was about something
25 important, or about some unimportant detail. Ask yourself if

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1 it seemed like an innocent mistake, or if it seemed
2 deliberate.

3 And ask yourself how believable the witness's
4 testimony was in light of all of the other evidence. Was the
5 witness's testimony supported or contradicted by other
6 evidence that you found believable? If you believe that a
7 witness's testimony was contradicted by other evidence,
8 remember that people sometimes forget things, and that even
9 two honest people who witness the same event may not describe
10 it in exactly the same way.

11 Now, these are only some of the things that you may
12 consider in deciding how believable each witness was. You may
13 also consider other things that you think shed some light on
14 the witness's believability. Use your common sense and your
15 everyday experience in dealing with other people. And then
16 decide what testimony you believe, and how much weight you
17 think it deserves.

18 Now, a defendant has an absolute right not to
19 testify. The fact that he did not testify cannot be
20 considered by you in any way. Do not even discuss it in your
21 deliberations.

22 Remember that it's up to the government to prove the
23 defendant guilty beyond a reasonable doubt. It is not up to
24 the defendant to prove that he's innocent.

25 All right. Now, in the course of the trial you

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1 heard the testimony of Stephanie Lowery. You've also heard
2 that before this trial she made a statement that may be
3 different from her testimony here in court.

4 This earlier statement was brought to your attention
5 only to help you decide how believable her testimony was. You
6 cannot use it as proof of anything else. You can only use it
7 as one way of evaluating her testimony here in court.

8 Now, you've heard the testimony of both Stephanie
9 Lowery and Rebecca Hostetler. You've also heard that before
10 this trial they were each convicted of a crime.

11 This earlier conviction was brought to your
12 attention only as one way of helping you decide how believable
13 their testimony in this trial was. Do not use it for any
14 other purpose. It's not evidence of anything else.

15 Now, you've heard the testimony of Jason Reeves, who
16 testified as an opinion witness.

17 You do not have to accept Jason Reeves's opinion.
18 In deciding how much weight to give it, you should consider
19 the witness's qualifications and how he reached his
20 conclusions. Also consider other factors discussed in these
21 instructions for weighing the credibility of witnesses.

22 Remember that you alone decide how much of a
23 witness's testimony to believe, and how much weight it
24 deserves.

25 There is one more general subject that I want to

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1 talk to you about before I begin explaining the elements of
2 the crime charged in this case.

3 The lawyers for both sides may have objected to some
4 of the things that were said or done during the trial. Do not
5 hold that against either side. The lawyers have a duty to
6 object whenever they think that something is not permitted by
7 the rules of evidence. Those rules are designed to make sure
8 that both sides receive a fair trial.

9 And do not interpret my rulings on their objections
10 as any indication of how I think the case should be decided.
11 My rulings were based on the rules of evidence, not on how I
12 feel about the case. Remember that your decision must be
13 based only on the evidence that you saw and heard here in the
14 courtroom.

15 All right. Now, that concludes the part of my
16 instructions explaining your duties and the general rules that
17 apply in every criminal case. In a moment, I'll explain the
18 elements of the crime that the defendant is accused of
19 committing.

20 But before I do that, I want to emphasize that the
21 defendant is only on trial for the particular crime charged in
22 the indictment in this case. Your job is limited to deciding
23 whether the government has proved the crime charged in this
24 case.

25 I'll now explain the elements of the crime that the

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1 defendant is accused of committing.

2 Count 1 of the indictment accuses the defendant of
3 violating federal law by being a convicted felon in possession
4 of a firearm.

5 As to Count 1, the indictment alleges that on or
6 about October 21st, 2011, in the Eastern District of
7 Tennessee, the defendant, Victor J. Stitt, II, having
8 previously been convicted in court of a crime punishable by
9 imprisonment for a term exceeding one year, did knowingly
10 possess in and affecting commerce, a firearm; in violation of
11 Title 18, United States Code, Section 922(g)(1).

12 Title 18, United States Code, Section 922(g)(1)
13 specifies in relevant part that, and I quote, "it shall be
14 unlawful for any person who has been convicted in any court of
15 a crime punishable by imprisonment for a term exceeding one
16 year to ship or transport in interstate or foreign commerce,
17 or to possess in or affecting commerce, any firearm or
18 ammunition; or to receive any firearm or ammunition which has
19 been shipped or transported in interstate or foreign
20 commerce."

21 For you to find the defendant guilty of being a
22 convicted felon in possession of a firearm, you must find that
23 the government has proved each and every one of the following
24 elements beyond a reasonable doubt:

25 First, that the defendant had been convicted of a

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Jury Charge

1 crime punishable by imprisonment for more than one year. Now,
2 in this case, the government and the defendant have agreed
3 that the defendant has previously been convicted of a crime
4 punishable by imprisonment for a term of more than one year.

5 Second, that the defendant, following that
6 conviction, knowingly possessed a firearm, as specified in the
7 indictment.

8 And, third, that the specified firearm crossed a
9 state line prior to or during the alleged possession.

10 Now, I'll give you some more detailed instructions
11 on some of these terms.

12 As to the term possessed, the government does not
13 necessarily have to prove that the defendant physically
14 possessed the firearm for you to find him guilty of this
15 crime.

16 The defendant does not have to own the firearm in
17 order to possess it.

18 The law recognizes two kinds of possession - actual
19 possession and constructive possession. Either one of these,
20 if proved by the government, is enough to convict.

21 To establish actual possession, the government must
22 prove that the defendant had direct, physical control over the
23 firearm and knew that he had control of it.

24 To establish constructive possession, the government
25 must prove that the defendant had the right to exercise

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1 physical control over the firearm, and knew that he had this
2 right, and that he intended to exercise physical control over
3 the firearm at some time, either directly or through other
4 persons.

5 For example, if you left something with a friend
6 intending to come back later and pick it up, or intending to
7 send someone else to pick it up for you, you would have
8 constructive possession of it while it was in the actual
9 possession of your friend.

10 One more thing about possession. The government
11 does not have to prove that the defendant was the only one who
12 had possession of the firearm. Two or more people can
13 together share actual or constructive possession over
14 property. And if they do both -- and if they do, both are
15 considered to have possession as far as the law is concerned.

16 But understand that just being present where
17 something is located does not equal possession. The
18 government must prove that the defendant had actual or
19 constructive possession of the firearm, and knew that he did,
20 for you to find him guilty of this crime. This, of course, is
21 all for you to decide.

22 The term "firearm" means any weapon which will or is
23 designed to or may readily be converted to expel a projectile
24 by the action of an explosive.

25 The term "knowingly" means voluntarily and

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1 intentionally, and not because of mistake or accident.

2 If you're convinced that the government has proved
3 all of these elements of the crime charged, say so by
4 returning a guilty verdict. If you have a reasonable doubt
5 about any one of these elements, then you must find the
6 defendant not guilty of this charge.

7 Now, that concludes my instructions to you on the
8 elements of the offense charged in the indictment.

9 Next, I want to say a word about the dates mentioned
10 in the indictment.

11 The indictment charges that the crimes happened "on
12 or about October 21, 2011". The government does not have to
13 prove that the crimes happened on that exact date, but the
14 government must prove that the crime happened reasonably close
15 to that date.

16 Next, I want to explain something about proving a
17 defendant's state of mind.

18 Ordinarily, there is no way that a defendant's state
19 of mind can be proved directly, because no one can read
20 another person's mind and tell what that person is thinking.

21 But a defendant's state of mind can be proved
22 indirectly from the surrounding circumstances. This includes
23 things like what the defendant said, what the defendant did,
24 how the defendant acted, and any other facts or circumstances
25 in evidence that show what was in the defendant's mind.

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1 You may also consider the natural and probable
2 results of any of the acts that the defendant knowingly did or
3 did not do, and whether it's reasonable to conclude the
4 defendant intended those results. This, again, of course, is
5 all for you to decide.

6 All right. That concludes the part of my
7 instructions explaining the rules for considering some of the
8 testimony and evidence and the law that applies in the case.
9 Now let me finish up by explaining some things about your
10 deliberations in the jury room and your possible verdicts.

11 The first thing that you should do in the jury room
12 is choose someone to be your foreperson. That person will
13 help guide your discussions and will speak for you here in
14 court.

15 Once you start deliberating, do not talk to the jury
16 officer, or to me, or to anyone else except each other about
17 the case. If you have any questions or messages, you must
18 write them down on a piece of paper, which we're going to
19 provide you, sign them, and then give them to the jury
20 officer, Ms. Capetz. Ms. Capetz will give them to me and I'll
21 respond to you as soon as I can. I may have to talk to the
22 lawyers about what you have asked, so it may take me some time
23 to get back to you. Any questions or messages normally should
24 be sent to me through your foreperson.

25 One more thing about your messages. Do not, excuse

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1 me, do not ever write down or tell anyone how you stand on
2 your vote from time to time. For example, do not write down
3 or tell anyone that you're split six to six or eight to four
4 or whatever your vote happens to be at that point in time.
5 That should remain secret until you're finished.

6 Now, remember that you must make your decision based
7 only on the evidence that you saw and heard here in court. Do
8 not try to gather any information about the case on your own
9 while you are deliberating. For example, do not conduct any
10 experiments inside or outside of the jury room; do not bring
11 any books, like a dictionary or anything else with you to help
12 you with your deliberations. Do not conduct any independent
13 research, reading, or investigation about the case, and,
14 certainly, do not visit any of the places that were mentioned
15 during the trial.

16 During your deliberations, you must not communicate
17 with or provide any information to anyone by any means about
18 this case. You may not use any electronic device or media,
19 such as a telephone, a cell phone, smart phone, iPhone,
20 Blackberry, or computer, the internet, any internet service,
21 any text or instant messaging service, any internet chat room,
22 blog or website, such as Facebook, MySpace, LinkedIn, YouTube
23 or Twitter, to communicate to anyone any information about
24 this case or to conduct any research about this case until I
25 accept your verdict. In other words, you simply cannot talk

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1 to anyone on the phone, correspond with anyone, or
2 electronically communicate with anyone about this case. You
3 can only discuss the case in the jury room with your fellow
4 jurors during deliberations. And I expect that you'll inform
5 me if you become aware that another juror has somehow violated
6 these instructions.

7 You may not use these electronic means to
8 investigate or communicate about the case because it's
9 important that you decide this case based solely on the
10 evidence presented here in the courtroom. Information on the
11 internet or available through social media might be wrong,
12 incomplete, or inaccurate. You're only permitted to discuss
13 the case with your fellow jurors during deliberations because
14 only they have seen and heard the same evidence that you have.
15 In our judicial system, it's important that you're not
16 influenced by anything or anyone outside of the courtroom.
17 Otherwise, your decision may be based upon information known
18 only by you and not by your fellow jurors or by the parties in
19 this case. This would unfairly and adversely impact the
20 judicial process.

21 Make your decision based only on the evidence that
22 you saw and heard here in court.

23 Now, your verdict, whether it is guilty or not
24 guilty, must be unanimous.

25 To find the defendant guilty, every one of you must

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1 agree that the government has overcome the presumption of
2 innocence with evidence that proves his guilt beyond a
3 reasonable doubt.

4 To find him not guilty, every one of you must agree
5 that the government has failed to convince you beyond a
6 reasonable doubt.

7 Either way, guilty or not guilty, your verdict must
8 be unanimous.

9 Now that all of the evidence is in and the arguments
10 are completed, you are free to talk about the case in the jury
11 room. In fact, it's your duty to talk with each other about
12 the evidence and to make every reasonable effort you can to
13 reach unanimous agreement. Talk with each other, listen
14 carefully and respectfully to each other's views, and keep an
15 open mind as you listen to what your fellow jurors have to
16 say. Try your best to work out your differences. Do not
17 hesitate to change your mind if you're convinced that other
18 jurors are right and that your original position may have been
19 wrong.

20 But do not ever change your mind just because other
21 jurors see things differently, or just to get the case over
22 with. In the end, your vote must be exactly that -- your own
23 vote. It's important for you to reach unanimous agreement,
24 but only if you can do so honestly and in good conscience.

25 No one will be allowed to hear your discussions in

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1 the jury room, and no record will be made of what you say. So
2 you should all feel free to speak your minds.

3 Listen carefully to what the other jurors have to
4 say, and then decide for yourself if the government has proved
5 the defendant guilty beyond a reasonable doubt.

6 Now, remember that if you elected to take notes
7 during the trial, your notes should be used only as memory
8 aids. You should not give your notes greater weight than your
9 own independent recollection of the evidence. You should
10 reply upon your own independent recollection of the evidence,
11 or lack of evidence, and you should not be unduly influenced
12 by the notes of other jurors. Notes are not entitled to any
13 more weight than the memory or impression of each juror.

14 Whether you took notes or not, each of you must form
15 and express your own opinion about the facts of the case.

16 Now, if you decide that the government has proved
17 the defendant guilty, then it will be my job to decide what
18 the appropriate punishment should be.

19 Deciding what the punishment should be is my job,
20 not yours. It would violate your oaths as jurors to even
21 consider the possible punishment in deciding your verdict.

22 Your job is to look at the evidence and decide if
23 the government has proved the defendant guilty beyond a
24 reasonable doubt.

25 Now, remember that the defendant is only on trial

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1 for the particular crime charged in the indictment in this
2 case. Your job is limited to deciding whether the government
3 has proved the crime charged in this case.

4 All right. Now, I've prepared a verdict form that
5 you should use to record your verdict. The form is very
6 simple. It's one page. It states, we, the jury, unanimously
7 find the following:

8 Question number one, with respect to the charge in
9 Count 1 of the indictment for being a felon in possession of a
10 firearm, we, the jury, unanimously find the defendant, Victor
11 J. Stitt, there is a space to check either guilty or not
12 guilty.

13 Once you've done that, have your foreperson sign and
14 date the form.

15 If you decide the government has proved the charges
16 against the defendant beyond a reasonable doubt, say so by
17 having your foreperson mark the appropriate place on the form.
18 If you decide that the government has not proved the charges
19 against him beyond a reasonable doubt, say so by having your
20 foreperson mark that appropriate place on the form. Your
21 foreperson should then sign the form and put a date on it and
22 return it to Ms. Capetz who will give it to me.

23 All right. Ladies and gentlemen, that concludes my
24 instructions to you in this case. The case is now in your
25 hands. In just a moment, I'm going to ask Ms. Capetz to take

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1 you into the jury room. Shortly thereafter, she'll bring back
2 to you all of the exhibits that I've admitted into the case,
3 you know. There were a couple of exceptions, you'll get
4 photographs instead of the gun and the ammunition. She's also
5 going to bring back some forms that are called communications
6 to the court for you to send out messages. She will also,
7 excuse me, also bring back to you one copy of the charge that
8 I just read to you.

9 Let me say this about messages. One of the things
10 that we'd like to know is what your schedule for deliberations
11 are. The reason for that is not just because we're nosy, we
12 may be nosy, but that's not the only reason. We have to be
13 available in case you send questions or information out.
14 Therefore, we've got to sort of coordinate our schedules with
15 yours. So, you don't have to tell us every five-minute break
16 you take or something like that, but if you're going to take a
17 lunch break of some, you know, of some length, we'd like to
18 know when you're leaving and when you're going to return so
19 that we can coordinate our schedules and be available in case
20 you have questions. So, please, send out messages of those
21 sorts as well as any others.

22 All right. That concludes my instructions to you.

23 Ms. Capetz, would you take the jurors back to the jury room?

24 (Whereupon, the jury was excused from the courtroom
25 and the proceedings continued as follows:)

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1 THE COURT: All right. Have a seat, everyone.

2 All right. Any objections to the jury instructions
3 as read. Ms. Bay?

4 MS. BAY: No objections, Your Honor.

5 THE COURT: All right. Mr. Little?

6 MR. LITTLE: No, Your Honor.

7 END OF JURY CHARGE

8

9 I, Shannan Andrews, do hereby certify that I
10 reported in machine shorthand the proceedings in the
11 above-styled cause held April 2, 2014, and that this
12 transcript is an accurate record of said proceedings.

13

14 s/Shannan Andrews
15 Shannan Andrews
Official Court Reporter

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UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at WINCHESTER

UNITED STATES OF AMERICA,)
) Case No. 4:12-cr-19
v.)
)
) Judge Mattice
VICTOR J. STITT, II,)
)

VERDICT FORM

April 2, 2014

WE, THE JURY, UNANIMOUSLY FIND THE FOLLOWING:

Question 1:

With respect to the charge in Count One of the Indictment for being a felon in possession of a firearm, we the jury unanimously find the Defendant Victor J. Stitt:

X GUILTY

NOT GUILTY

Please have your foreperson sign and date this Verdict Form and inform Ms. Capetz that you have reached a verdict.


Signature of Foreperson

4-2-14
Date