Decision Below

2018 WL 5116330
Only the Westlaw citation is currently available.
This case was not selected for
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See Fed. Rule of Appellate Procedure 32.1
generally governing citation of judicial
decisions issued on or after Jan. 1, 2007.
See also U.S. Ct. of App. 11th Cir. Rule 36-2.
United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Dan REED, Defendant-Appellant.

No. 17-12699
|
Non-Argument Calendar
|
(October 19, 2018)

Attorneys and Law Firms

Linda Julin McNamara, Yvette Rhodes, U.S. Attorney Service - Middle District of Florida, U.S. Attorney's Office, Tampa, FL, for Plaintiff-Appellee

Mara Allison Guagliardo, Federal Public Defender's Office, Tampa, FL, James T. Skuthan, Rosemary Cakmis, Donna Lee Elm, Alisha Marie Nair, Federal Public Defender's Office, Orlando, FL, for Defendant-Appellant

Appeal from the United States District Court for the Middle District of Florida, D.C. Docket No. 6:15-cr-00162-GAP-KRS-1

Before WILLIAM PRYOR, NEWSOM and JULIE CARNES, Circuit Judges.

Opinion

PER CURIAM:

***1** Dan Reed appeals his conviction and sentence of 180 months of imprisonment for possessing a firearm as a felon. 18 U.S.C. §§ 922(g)(1), 924(a)(2), (e)(1). Reed challenges the exclusion of testimony from his mental health expert, Dr. Robert Cohen, the enhancement of his sentence under the Armed Career Criminal Act, and the constitutionality of section 922(g). We affirm.

I. BACKGROUND

The morning of January 16, 2015, Reed—his face bruised and bandaged—appeared at the fence that separated his back yard from a public storage facility where he occasionally performed odd jobs for its owner, Paul Camp. Reed told Camp that he had been robbed the previous evening. At Camp's request, Reed remained on his property, and eventually he walked home. Later that day, Reed returned to the fence line wielding a gun and shouting that he was "going to kill everybody."

Camp called 911, and Harry Oakley of the Daytona Beach Police Department responded to the call. Oakley, who had known Reed for several years, approached Reed and asked if he had a gun. Reed responded affirmatively and moved his hand to allow Officer Oakley to remove the gun from Reed's waistband. Oakley asked Reed why he was brandishing the gun and Reed responded that he was talking to the individuals who had assaulted him, although he acknowledged that his back yard was empty.

Oakley arrested Reed after receiving a report that he was a convicted felon. When interviewed later, Reed stated that he armed himself because several persons had attacked him the previous evening and he feared they planned to return to harm him or to "shoot[ ] up his mother's house."

After his indictment, Reed filed notice that he intended to call Dr. Cohen, a neuropsychologist, to testify regarding Reed's mental disabilities and his affirmative defense of justification. The government moved *in limine* to exclude Dr. Cohen's testimony as irrelevant and inadmissible. The district court granted the motion of the government with the explanation that Reed's "subjective perception of threats and subjective ability to consider reasonable alternatives is not relevant to a justification defense and that Cohen's testimony ... would not assist the trier of fact." Before trial, Reed moved for reconsideration and proffered Dr. Cohen's testimony. The district court denied Reed's motion for reconsideration.

The jury convicted Reed, and the probation office prepared a presentence investigation report that classified him as an armed career criminal based on his three prior convictions in Florida courts for serious drug offenses. 18 U.S.C. § 924(e). The report stated that Reed had been convicted in 1987 for unlawfully selling a controlled

substance, in 1990 for unlawfully possessing with intent to sell or deliver a controlled substance, and in 2011 for selling cocaine near a place of worship or business. With a total offense level of 33 and a criminal history of V, the report provided a recommended sentencing range of 210 to 262 months of imprisonment. The report also stated that Reed faced a statutory sentence of 15 years to imprisonment for life.

***2** Reed objected to the presentence report and argued that he had less than the three predicate offenses required for the sentence enhancement. Reed argued that his 1990 conviction did not qualify as a serious drug offense. He also argued that the government could not prove he committed the 1987 drug offense.

At sentencing, the government presented evidence that connected Reed to the 1987 drug offense. Cynthia Oteri, a fingerprint examiner with the Daytona Beach Police Department, testified that the right thumb on the fingerprint card made of the arrestee in the 1987 case matched both the thumb print collected from Reed for his federal firearm offense and the prints associated with his 1990 and 2011 drug convictions. Oteri testified that she obtained the fingerprint card from the print unit of Volusia County Sheriff's Office, and the manager of its print unit, Mary Seney, authenticated the fingerprint card and testified that it was transferred to her office from the Daytona Beach Police Department around 1995. Seney stated that the fingerprint card and a report of Reed's criminal history produced by the National Crime Information Center had identical aliases, dates of birth and arrest, and originating case numbers. The government also introduced a certified police affidavit, docket sheet, and judgment for the 1987 offense, which had certain identical data as the fingerprint card. The fingerprint card had the same offender name, personal characteristics, and date of birth as the affidavit and had the same aliases, offense, and dates of birth and arrest as the docket sheet. The docket sheet, judgment, and National Crime Center report had the same charge, originating case number, sentence, and dates of birth, arrest, and sentencing.

After "considering the evidence as a whole, [the district court ruled that] the government ... met its burden of proving that [Reed] was convicted of the [1986] offense...." The district court observed that "all of the documents name Dan Reed or some variation of that name, including his alias 'Tom Tom' " and "consistently show[ed] that [Reed] was arrested for the sale of cocaine and sentenced to 30 months DOC." The district court also observed that "[t]he docket sheet, affidavit, NCIC, and fingerprint card all reflect [Reed's] birthdate of October 20, 1965"; "[t]he docket sheet and affidavit specify an offense date of July 9, 1986"; and "the docket sheet, NCIC, and fingerprint card show an August 15, 1986 arrest date."

The district court ruled that Reed's prior convictions qualified as serious drug offenses under the Armed Career Criminal Act. The district court imposed a fifteen-year sentence of imprisonment, the minimum under the Act. The district court also described that sentence as "unjust."

II. STANDARDS OF REVIEW

Three standards of review govern this appeal. Our review of the exclusion of expert testimony is deferential and only for abuse of discretion, under which "we [will] not reverse an evidentiary decision of a district court unless the ruling is manifestly erroneous." *United States v. Frazier*, 387 F.3d 1244, 1258 (11th Cir. 2004) (en banc) (internal quotation marks and citation omitted). "We review *de novo* whether a conviction qualifies as a serious drug offense under the [Armed Career Criminal Act]." *United States v. White*, 837 F.3d 1225, 1228 (11th Cir. 2016), *cert. denied*, —— U.S. ——, 138 S.Ct. 1282, 200 L.Ed.2d 477 (2018). We review related findings of fact for clear error. *United States v. Wilson*, 183 F.3d 1291, 1301 (11th Cir. 1999).

III. DISCUSSION

***3** Reed raises six challenges to his conviction and sentence. First, Reed argues that he was denied a fair trial because the jury was unable to consider Dr. Cohen's testimony about Reed's mental disabilities and their effect on his perception of reasonableness when assessing his defense of justification. As his second and third issues, Reed argues that the government failed to prove that he committed a drug crime in 1986 and that his 1990 conviction in a Florida court for unlawful possession with intent to sell or deliver a controlled substance does not qualify as a serious drug offense. Reed argues in his fourth and fifth issues, for the first time on appeal, that the enhancement of his sentence based on offenses that were neither charged in his indictment nor proved to a jury

violated his rights under the Fifth and Sixth Amendments and that the imposition of the statutory minimum sentence violated the Eighth Amendment and the Due Process Clause. As his sixth issue, Reed challenges, also for the first time, the constitutionality of the firearm statute, 18 U.S.C. § 922(g). We address his arguments in turn.

The district court did not abuse its discretion by excluding testimony from Dr. Cohen that was irrelevant and inadmissible. The affirmative defense of justification is available to a defendant in "extraordinary circumstances" to excuse his unlawful possession of a firearm in a situation where he faces "unlawful and present, imminent, and impending threat of death or serious bodily injury" and he has "no reasonable legal alternative to violating the law." *United States v. Deleveaux*, 205 F.3d 1292, 1297 (11th Cir. 2000). Dr. Cohen's proposed testimony about Reed's mental disabilities would not have assisted the jury in determining whether Reed faced actual imminent harm or whether a reasonable option existed for his protection. *See* Fed. R. Evid. 702. The jury could discern from firsthand accounts of Reed's behavior whether he was justified in possessing the firearm. Dr. Cohen's proposed testimony was inadmissible as "an opinion about whether [Reed] did or did not have a mental state or condition that constitutes an element ... of [his] defense" of justification, Fed. R. Evid. 704(b). Dr. Cohen opined that Reed was "certainly under duress" when he possessed the firearm, that his intellectual disability and psychosis divested him of the ability to act rationally or to make good judgments, and that he "act[ed] out in [a] way that [was] a little excessive, but in his mind ma[d]e the most sense." Dr. Cohen addressed directly the element of immediacy in his written report, where he stated Reed possessed the firearm "because he believed that he and/or his family was under a real threat" due to his "assault[ ] the day prior and ... not [being] on psychiatric medication at the time." The district court acted well within its discretion in excluding Dr. Cohen's testimony.

The exclusion of Dr. Cohen's testimony did not prevent Reed from informing the jury of his mental limitations or impair his ability to present his justification defense. For example, Officer Oakley testified that, because he was familiar with Reed, he surmised that Reed was "venting" by waiving a gun and uttering threats to his attackers. Reed's mother told the jury that Reed had "stopped learning" after ingesting aspirin as a child, that he was "schizophrenic" and fluctuated between functioning as a child and as an adult, and that he was "a little different from other children." And Reed testified that he obtained the gun because he feared that the men who robbed him the previous evening would return and re-injure him or harm his mother. *See United States v. De La Mata*, 266 F.3d 1275, 1301 (11th Cir. 2001) (concluding that the exclusion of testimony did not affect the defendant's ability to present his good faith defense). Based on the evidence supporting Reed's justification defense, the district court instructed the jury that, if it found "that the government [had] proved beyond a reasonable doubt that [Reed] committed the crime as charged, [they] must then consider whether [he] should nevertheless be found not guilty because his actions were justified." The district court instructed the jury then to consider if Reed "prove[d] by a preponderance of [the] evidence" the four elements required to excuse his offense based on justification. Reed was given a fair opportunity to present his defense to the jury.

***4** The district court did not clearly err by finding that Reed was convicted in 1987 of the unlawful sale of a controlled substance. The government connected Reed to the offense by a preponderance of the evidence, *see United States v. Alicea*, 875 F.3d 606, 608 (11th Cir. 2017), through "presenting reliable and specific evidence," *United States v. Almedina*, 686 F.3d 1312, 1315 (11th Cir. 2012). It was entitled to present "any information (including hearsay), regardless of its admissibility at trial, ... provided that the information is sufficiently reliable." *United States v. Wilson*, 183 F.3d 1291, 1301 (11th Cir. 1999). And the information the government presented was equivalent to what we have sanctioned as sufficiently reliable sources, such as "a [presentence investigation report], the on-the-record statements of a probation officer, and the notes of another probation officer," *id.*, uncertified docket sheets, *United States v. Brown*, 526 F.3d 691, 710 (11th Cir. 2008), *vacated on other grounds*, 556 U.S. 1150, 129 S.Ct. 1668, 173 L.Ed.2d 1050 (2009), and two convictions in New York courts using different given names based on a "probation officer's undisputed notation that both convictions bore an identification number identical to the one in [the defendant's] National Crime Information Center report," *Alicea*, 875 F.3d at 609. The fingerprint card, certified police affidavit, docket sheet, written judgment, and report from the National Crime Center that contained either Reed's name or a known alias and different

combinations of his social security number, his date of birth, and the charge and dates of arrest and sentencing related to the 1987 offense, along with Oteri's identification of Reed's thumb print on the fingerprint card, established with reasonable certainty that Reed was convicted of the 1987 drug offense. Reed argues that the district court erroneously relied on the affidavit and docket sheet because they were not admitted as exhibits and that the fingerprint card was unreliable because there were gaps in the chain of custody, but those alleged defects are irrelevant because a sentencing hearing is not governed by the Federal Rules of Evidence, *see Wilson*, 183 F.3d at 1301. The district court did not clearly err in counting the 1987 conviction, which clearly qualifies as a serious drug offense, as a predicate offense for Reed's sentence enhancement.

Reed's challenge to the classification of his conviction in 1990 for the unlawful possession with intent to sell or deliver a controlled substance, Fla. Stat. § 893.13(1)(a)(1), as a serious drug offense is foreclosed by our precedents. In *United States v. Smith*, 775 F.3d 1262, 1268 (11th Cir. 2014), we held that a violation of section 893.13(1)(a)(1) "is ... a serious drug offense." A "serious drug offense ... [is] an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance." 18 U.S.C. § 924(e)(2)(A)(ii). Reed argues that his drug conviction did not qualify as a serious drug offense in 1990 because section 893.13 also punished the act of purchasing an illegal drug, yet he acknowledges that in *Spaho v. United States Attorney General*, 837 F.3d 1172 (11th Cir. 2016), we held that the alternative acts punished "are elements rather than means" and the modified categorical approach, instead of the categorical approach, applies, *id.* at 1177. Reed's judgment of conviction, which states that he possessed an illegal drug to "sell or deliver," not to purchase, qualifies as a serious drug offense.

Reed also challenges the classification of his prior conviction on the ground that "Florida law does not require remuneration," but that argument fails. "We look to the plain language of the definitions to determine their elements," *Smith*, 775 F.3d at 1267, and a serious drug offense has no remuneration requirement.

Reed raises three new challenges to his sentence, but he cannot establish that the district court committed any error, much less plain error, because his arguments are foreclosed by our precedents. First, Reed argues that this sentence violates his rights under the Fifth and Sixth Amendments because the convictions were neither alleged in his indictment nor proved to a jury beyond a reasonable doubt, but the Constitution does not "prevent[ ] the district court from finding the fact of [Reed's] prior convictions, or using them to designate him an Armed Career Criminal," *id.* at 1266 (quoting *United States v. Gibson*, 434 F.3d 1234, 1246 (11th Cir. 2006)) (alteration adopted). *See Almendarez–Torres v. United States*, 523 U.S. 224, 247, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). Second, Reed argues that the application of the mandatory minimum sentence, 18 U.S.C. § 924(e), violates the Eighth Amendment because it fails to account for his mental disabilities, but the imposition of a statutory fifteen-year sentence for recidivism "is neither disproportionate to the offense [of being a felon in possession or a firearm] nor cruel and unusual punishment," *Smith*, 775 F.3d at 1266. Third, Reed argues that the mandatory sentence violates the Due Process Clause because it prevented the district court from considering "mitigating factors," but "mandatory minimum sentencing provisions ... [do not] deprive[ ] [a defendant] of an individualized sentencing proceeding ... [in] violat[ion of] due process," *United States v. Holmes*, 838 F.2d 1175, 1177 (11th Cir. 1988).

***5** The district court also committed no error, much less plain error, in convicting Reed because, as he concedes, his constitutional challenge to section 922(g)(1) is foreclosed by precedent. We have held that "the jurisdictional element of the statute, i.e., the requirement that the felon 'possess in or affecting commerce, any firearm or ammunition,' immunizes § 922(g)(1) from [a] facial constitutional attack," *United States v. Scott*, 263 F.3d 1270, 1273 (11th Cir. 2001), and that section 922(g)(1) is constitutional as applied to a defendant who possesses a firearm that traveled in interstate commerce, *United States v. Jordan*, 635 F.3d 1181, 1189 (11th Cir. 2011).

We **AFFIRM** Reed's conviction and sentence.

All Citations

--- Fed.Appx. ----, 2018 WL 5116330

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District Court’s Orders Excluding the Defense’s Expert

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA

VS. **CASE NO: 6:15-cr-162-Orl-31KRS**

DAN REED

ORDER

This matter comes before the Court on the Government's Motion in Limine to Exclude the Testimony of Robert E. Cohen (Doc. 64). The Government seeks to preclude Cohen, a psychologist, from testifying in support of the Defendant's justification defense. The Defendant argues that Cohen's expert testimony would assist jurors in understanding how his birth condition – mental retardation – affects perception of threats and the ability to consider reasonable alternatives. (Doc. 66 at 7). Upon review, the Court concludes that a defendant's subjective perception of threats and subjective ability to consider reasonable alternatives is not relevant to a justification defense, and that Cohen's testimony therefore would not assist the trier of fact. Accordingly, it is hereby

ORDERED that the Government's Motion in Limine to Exclude the Testimony of Robert E. Cohen (Doc. 64) is **GRANTED**.

DONE and **ORDERED** in Orlando, Florida on June 21, 2016.

GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

Copies furnished to:

United States Marshal
United States Attorney
United States Probation Office
United States Pretrial Services Office
Counsel for Defendant

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Docket No. 6:15-cr-162-Orl-31KRS

UNITED STATES OF AMERICA	
Plaintiff	Orlando, Florida June 22, 2016 9:00 a.m.
v.	
DAN REED	
Defendant	

TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: Embry Kidd

For the Defendant: Alicia Marie Scott

Court Reporter: Sandra K. Tremel, RMR/CRR
sandy.tremel@gmail.com

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

lunch hour.

MS. SCOTT: I apologize, Your Honor.

THE COURT: Lisa can make a copy and bring it back to me.

We will be in recess for about 30 minutes.

(luncheon recess at 1:00 p.m.)

THE COURT: Okay. With respect to the motion for reconsideration, with regard to Dr. Cohen, the motion is denied. I'm troubled by the ruling, but that's my understanding of the current state of the law. So if I'm wrong, welcome to have the 11th Circuit correct me in that regard.

Is there anything else before we bring the jury in for openings?

MR. KIDD: Your Honor, I just want to revisit the having the other agent here. If we were to remove the other agent from our witness list and affirmatively say we are not going to call him, would the Court permit him to be in the courtroom?

THE COURT: Sure.

MR. KIDD: Okay. We will do that.

THE COURT: Okay. All right.

MR. KIDD: I'll let him know.

THE COURT: You can have 15 government reps in here if you want, but -- as long as they don't testify.

District Court’s Sentencing Decision

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	Case No.: 6:15-cr-162-Orl-31KRS
vs.	:	
DAN REED,	:	Orlando, Florida June 5, 2017 1:29 p.m.
Defendant.	:	

TRANSCRIPT OF SENTENCING VOLUME 3 OF 3
BEFORE THE HONORABLE GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

APPEARANCES:

Counsel for Plaintiff: Embry Kidd

Counsel for Defendant: Alisha Marie Scott
James Skuthan

Proceedings recorded by mechanical stenography.
Transcript produced by computer-aided transcription.

Court Reporter: Suzanne L. Trimble, CCR, CRR, RPR
Federal Official Court Reporter
401 West Central Boulevard, Suite 4600
Orlando, Florida 32801
e-mail: trimblecourtreporter@gmail.com

jumped by three dudes the day before. I was scared. I didn't know what to do.

THE COURT: I understand that, sir. Thank you.

Okay. Well, I've been doing this for 16 years, and I've imposed a lot of sentences, and my feeling is somewhat akin to Mr. Skuthan's. This is not -- it's not a good day. It's not a good day for Mr. Reed. It's not a good day for me. It's not a good day for our system of justice.

Mr. Kidd, I hope you find it's a good day.

With respect to a reasonable sentence, I considered the 3553(a) factors, and I will deal with those factors for the reasons Mr. Skuthan indicated. It's because I think it's necessary for a complete record to show how unjust the sentence 15 years will be in the event that justice for Mr. Reed is accomplished some time in the future.

These factors include, first, the history characteristics of the defendant. Mr. Reed is a 51-year old black male, who resides with his mother in Daytona Beach, Florida. He grew up poor, in a drug infested neighborhood, and was sexually molested as a child. From age six he's been diagnosed as mentally retarded. His current diagnosis reflects a full scale IQ of 61, which is extremely low. He also has a history of schizophrenia of the paranoid type and major depression.

He has a long criminal record of street level petty

offenses. During his various stints in jail he's had no disciplinary problems, except for those that occurred after his conviction in 1990, and it appears that those disciplinary violations were caused by his extensive mental health issues; otherwise, the defendant has not exhibited signs of being a violent person.

Next, the seriousness of the offense. Mr. Reed is charged with being a felon in possession of a weapon. This was not a serious crime. As we all know, Mr. Reed was simply carrying a handgun, which I understand was unloaded, in the misguided but understandable belief that he was protecting his home from the thugs who had beat him up the night before.

In the scheme of gun violence in this country, this offense certainly is at the lowest end of seriousness in connection with gun possession.

Next is protection of the public. The public does not need protection from Mr. Reed. He's not a gun user. He's not a gun dealer. And he's not a violent person.

Next is the issue of deterrence. There's no empirical evidence of any deterrent effect by the imposition of a long sentence. Indeed, in this case it's ludicrous to suggest that putting the defendant in prison for 15 years or more will have any deterrent effect on anyone in the future who might consider committing a gun-related crime.

From an policy standpoint, the statute seeks to

enhance the sentence of a felon in possession if he has three prior convictions of a violent felony or serious drug offense. The sale of a $25 piece of crack cocaine 30 years ago is hardly a serious drug offense, but unfortunately it meets the congressional definition of one.

Simply put, Mr. Reed is not an armed career criminal, but we now sentence him as such, the same as if he had committed three armed robberies in the past, a sentence which is simply completely out of proportion to the seriousness of this offense.

Next, respect for the law. As recognized by Plato and Aristotle several thousand years ago, justice is a cardinal virtue of the human spirit. Accordingly, it has been said that justice is the first virtue of a social institution.

When punishment is unjust, our legal system has failed, and our legal system has failed Mr. Reed. Instead of providing him with the help he needs, we simply brand him as a serious criminal, lock him up, out of sight, out of mind for 15 years. This sentence does not bring respect for the law. It breeds disrespect for the law.

When I first came here 16 years ago, I came from a background of commercial litigation. As I observed and imposed sentences, I concluded that mandatory guidelines were wrong and often led to unjust sentences. So I spoke up, and I wrote opinion after opinion, reversed after reversal.

But ultimately I was vindicated by the U.S. Supreme Court by *Booker* and its progeny, and today our sentencing system is much better than it was as a result of some courageous judges, the efficacy of defense counsel, and others who recognized the injustice of mandatory guideline sentences, and improvements were made.

It's now time to once again speak out against the harsh mandatory minimum sentences that have no place in the court of justice, and today's sentence is exhibit No. 1.

So it's with a heavy heart and with disappointment in our system of justice and those who prosecuted this case that I sentence Mr. Reed to 180 months in federal prison.

Upon release from prison, Mr. Reed, you shall serve two years of supervised release. While on supervised release you must comply with the standard conditions adopted by this court. In addition, you must participate in a substance abuse program and a mental health treatment program and follow your probation officer's instructions in that regard. No search requirement. Defendant is ordered to cooperate in the collection of DNA. Mandatory drug testing is imposed. The fine is waived, special assessment of $100 is due and payable to the United States immediately.

After considering the advisory guidelines and all of the factors identified in 18 United States Code, Section 3553(a)(1) through (7) the Court finds that the

sentence imposed is greater than necessary to comply with the statutory purposes of sentencing, but the Court is otherwise bound by the mandatory minimum sentence imposed by Congress.

Any objection to the sentence, Mr. Kidd?

MR. KIDD: Your Honor, I have no objection to the sentence.

I do note that on September 29, 2016, the Court entered a final judgment of forfeiture at Document 113. We ask that it be listed in the final judgment of forfeiture in the judgment and conditions.

THE COURT: Okay. I will so note.

Mr. Skuthan?

MR. SKUTHAN: Yes, Your Honor. We renew all of our objections, and we do object to the sentence. We think it's substantively unreasonable.

THE COURT: So do I.

MR. SKUTHAN: Procedurally, I mean.

THE COURT: Well, there, I can't help you. I hope you're right.

MR. SKUTHAN: Yes, Your Honor.

We do have a recommendation. We would ask that the Court recommend that he serve his sentence at the Bureau of Prisons Skills Program. He's already been admitted to the program provisionally.

THE COURT: Yeah. I had a note of that to recommend

Indictment

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA

v.

DAN REED

CASE NO. 6:15-cr-162-Orl-31KRS
18 U.S.C. § 922(g)(1)
21 U.S.C. § 924(d) - Forfeiture
28 U.S.C. § 2461(c) - Forfeiture

INDICTMENT

The Grand Jury charges:

COUNT ONE

On or about January 26, 2015, in Volusia County, Florida, in the Middle District of Florida,

DAN REED

the defendant herein, having been convicted of a crime punishable by imprisonment for a term exceeding one year, that is:

1. On January 27, 1987, a conviction for **Burglary of a Structure**, in the Circuit Court in and for Volusia County, Florida, Case No. 85-6071-CC;

2. On January 27, 1987, a conviction for **Unlawful Sale or Delivery of a Controlled Substance**, in the Circuit Court in and for Volusia County, Florida, Case No. 86-3937-CC;

3. On November 1, 1989, a conviction for **Unlawful Possession of a Controlled Substance**, in the Circuit Court in and for Volusia County, Florida, Case No. 88-9116-CF;

4. On November 1, 1989, a conviction for **Unlawful Possession of a Controlled Substance**, in the Circuit Court in and for Volusia County, Florida, Case No. 89-6000-CF;

5. On October 26, 1990, a conviction for **Unlawful Possession with**

Intent to Sell or Deliver a Controlled Substance, in the Circuit Court in and for Volusia County, Florida, Case No. 90-2030CFAES;

6. On December 1, 2008, a conviction for **Possession of Cocaine**, in the Circuit Court in and for Volusia County, Florida, Case No. 2008-34207CFAES;

7. On November 29, 2011, a conviction for **Sale of Cocaine within 1000 feet of a Place of Worship or Business**, in the Circuit Court in and for Volusia County, Florida, Case No. 2011-35312CFAES; and

8. On October 17, 2013, a conviction for **Tampering with Physical Evidence**, in the Circuit Court in and for Volusia County, Florida, Case No. 2013-302205CFDB,

did knowingly possess a firearm in and affecting interstate commerce, to wit: a Smith and Wesson, model 36-9, .38 caliber revolver, bearing restored serial number CCU0312.

All in violation of Title 18, United States Code, Sections 922(g)(1), 924(a)(2), and 924(e)(1).

FORFEITURE

1. The allegations contained in Count One of this Indictment are hereby incorporated by reference for the purpose of alleging forfeiture pursuant to the provisions of Title 18, United States Code, Section 924(d), and Title 28, United States Code, Section 2461(c).

2. Upon conviction of the violations alleged in Count One of this Indictment, the defendant, **DAN REED**, shall forfeit to the United States of America, pursuant to Title 18, United States Code, Section 924(d), and Title 28, United States Code, Section 2461(c), all firearms and ammunition involved in the

commission of this offense.

4. If any of the property described above, as a result of any act or omission of the defendant:

a. cannot be located upon the exercise of due diligence;

b. has been transferred or sold to, or deposited with, a third party;

c. has been placed beyond the jurisdiction of the court;

d. has been substantially diminished in value; or

e. has been commingled with other property which cannot be divided without difficulty,

the United States of America shall be entitled to forfeiture of substitute property under the provisions of Title 21, United States Code, Section 853(p), as incorporated by Title 28, United States Code, Section 2461(c).

A TRUE BILL,

Foreperson

A. LEE BENTLEY, III
United States Attorney

By: _____
J. Bishop Ravenel
Assistant United States Attorney

By: _____
Carlos A. Perez-Irizarry
Assistant United States Attorney
Chief, Orlando Division

FORM OBD-34
APR 1991

No.

UNITED STATES DISTRICT COURT
Middle District of Florida
Orlando Division

THE UNITED STATES OF AMERICA

vs.

DAN REED

INDICTMENT

Violations:

18 U.S.C. § 922(g)(1)

A true bill,

Foreperson

Filed in open court this 15th day

of July, 2015.

Clerk

Bail $_____

Jury Instructions

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Docket No. 6:15-cr-162-Orl-31KRS

UNITED STATES OF AMERICA	
Plaintiff	Orlando, Florida June 23, 2016 9:00 a.m.
v.	
DAN REED	
Defendant	

TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: Embry Kidd

For the Defendant: Alicia Marie Scott

Court Reporter: Sandra K. Tremel, RMR/CRR
sandy.tremel@gmail.com

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

MR. KIDD: Your Honor, may I reserve a portion of my closings for rebuttal as well?

THE COURT: Sure, as long as it's reasonable rebuttal.

MR. KIDD: So I would request 15 and 10 perhaps.

THE COURT: Okay. That's an awful long time for --

MR. KIDD: Your Honor, I think I'm being very -- I don't expect it will take that long.

THE COURT: Okay. Well, I'll give you that if you need it, but I would be surprised if you can take that much time. So 25 minutes okay with defendant?

MS. SCOTT: Yes, Your Honor.

THE COURT: All right. Bring the jury in, then.

Jury present -- 11:20 a.m.

THE COURT: Okay. What I'm doing now, as I indicated, is give you the legal instructions that you must consider in deciding the case, and after I have finished with these instruction, the lawyers will be giving their close arguments and then you will retire to the jury room to begin your deliberations.

Your responsibility, of course, is to decide whether the government has proved the specific facts necessary to find the defendant guilty beyond a reasonable doubt. I see you all trying to take notes. Each of you are

going to get a copy of this written stuff, so don't take notes. I want you -- I do this verbally so you will have a good sense of what the legal principles are so when the lawyers give their closings argument you have some context.

When you go back to the jury room, if you have any questions about what I am telling you now, you will have a copy of these and you can read these for yourself. Okay?

The exhibits, on the other hand, they will go back. They'll be redacted. The indictment goes back for you to look at, and also any of these exhibits that have been admitted into the record will go back for you to look at. Okay?

So just listen up and I think you'll get a good sense of context in which these arguments by the lawyers are going to be made.

Your decision must be based only on the evidence presented here during the trial. And you must not influenced in any way by either sympathy for or prejudice against either party. And you must follow the law as I explain it even if do you not agree with it. And you must follow all of my instructions as a whole. You must not single out or disregard any of my instructions to you concerning the law.

Now, as I indicated earlier, the indictment against Mr. Reed, which is the formal charge against him, is

not evidence of guilt. The law presumes that Mr. Reed is innocent. And law presumes that every defendant is innocent. The defendant does not have to prove his innocence or produce any evidence at all. The government must prove guilt beyond a reasonable doubt. And if it fails to do so, you must find the defendant not guilty.

Now with respect to reasonable doubt, although the government's burden of proof is heavy, it does not have to prove the defendant's guilt beyond all possible doubt. The government's proof only has to exclude any reasonable doubt concerning the defendant's guilty. A reasonable doubt is a real doubt based on your reason and common sense after you have carefully and impartially considered all the evidence in the case. Proof beyond a reasonable doubt is proof so convincing that you would be willing to rely and act on without hesitation in the most important of your own affairs.

If you are convinced that the defendant has been proved guilty beyond a reasonable doubt, say so. If you are not convinced, say so.

As I said, you must consider only the evidence that I have admitted in this case. Evidence includes the testimony that witnesses who appeared and testified in open court as well as the exhibits that have been admitted into the record.

But anything the lawyers say is not evidence and is not binding on you. And you should not assume from anything I have said during the trial that I have any opinion about any factual issue in this case. Except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own decision about the facts.

Your own recollection and interpretation of the evidence is what matters. In considering the evidence, you may use reasoning and common sense to make deductions and reach conclusions. You should not be concerned about whether the evidence is direct or circumstantial.

Direct evidence is the testimony of a person who asserts that he or she has actual knowledge of a fact such as an eyewitness. Circumstantial evidence is proof of a chain of facts and circumstances that tend to prove or disprove a fact. And there's no legal difference in the weight you may give to either direct or circumstantial evidence.

Now, when I saw must consider all the evidence, I don't mean to suggest that you must accept all the evidence as true or accurate. You should decide whether you believe what each witness had to say and how important that testimony was.

In making that decision you may believe or

disbelieve any witness in whole or in part. And the number of witnesses testifying concerning a particular point does not necessarily matter. To decide whether you believe any witness, I suggest you ask yourself a few questions. Did the witness impress you as one who is telling the truth? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness seem to have a good memory? Did the witness have the opportunity and the ability to accurately observe the things he or she testified about? Did the witness appear to understand the questions clearly and answer them directly and did the witness' testimony differ from some other testimony or other evidence.

You should also ask yourself whether there was evidence that a witness testified falsely about an important fact and ask whether there was evidence that at some other time a witness said or did something or didn't say or do something that was different from the testimony the witness gave during the trial. But keep in mind that a simple mistake does not mean a witness wasn't telling the truth as he or she remembers it. People naturally tend to forget some things or remember them inaccurately.

So if a witness misstated something, you must decide whether it was because of an innocent lapse in memory

or an intentional deception. And the significance of your decision may depend on whether the misstatement is about an important fact or only about an unimportant detail.

With respect to expert witness testimony, when scientific, technical or specialized knowledge might be helpful, a person who has special training or experience in that field is allowed to state an opinion about that matter. This does not mean you must accept that witness's opinion. As with any other witness's testimony you must decide for yourself whether to rely upon the opinion.

Now the indictment in this case charges one offense, which we refer to as a count, against Mr. Reed. You will be given a redacted copy of the indictment to refer to during your deliberations. Count one, the only count charged in the indictment, charges that Mr. Reed committed what is called a substantive offense, that is, specifically possession of a firearm by a convicted felon.

So let me now explain the law governing that substantive offense.

This appears at page 9 of the instructions that you will receive.

It's a federal crime under 18, United States Code, Section 922G1 for anyone who has been convicted of a felony offense to possess a firearm in or affecting interstate or foreign commerce. The defendant can be found guilty of this

crime only if all the following facts are proved beyond a reasonable doubt. One, the defendant knowingly possessed a firearm in or affecting interstate or foreign commerce; and two, before possessing the firearm, the defendant had been convicted of a felony, that is, a crime punishable by imprisonment for more than one year.

A firearm is any weapon designed to or readily convertible to expel a projectile by an action of an explosion or explosive device. The term includes the frame or receiver of any such weapon or any firearm muffler or silencer.

The term interstate or foreign commerce includes the movement of a firearm from one state to another or between the United States and any foreign country.

It is not necessary for the government to prove the defendant had knew the firearm had moved from one state to another, only that the firearm did in fact move from one state to another.

Now as you know, pursuant to a stipulation between the parties, it has been established that the defendant has been convicted of a prior felony.

The law recognizes several kinds of possession. A person may have actual possession, constructive possession, sole or joint possession. Actual possession of a thing occurs if a person knowingly has direct physical control

Stipulation

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Docket No. 6:15-cr-162-Orl-31KRS

UNITED STATES OF AMERICA Plaintiff v. DAN REED Defendant	Orlando, Florida June 22, 2016 9:00 a.m.

TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: Embry Kidd

For the Defendant: Alicia Marie Scott

Court Reporter: Sandra K. Tremel, RMR/CRR
sandy.tremel@gmail.com

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

So as you have heard one of the elements of this offense is the allegation that Mr. Reed's a convicted felon, and there is an agreement in that regard and parties have stipulated to that fact. So there will not be any other proof of that. And in lieu of that, in order to implement the agreement between the parties, there's a written stipulation that I'm going to read to you, okay? So this really will be the first piece of evidence in the case for you to consider.

And it reads that the United States, through its attorney and Mr. Reed, through his counsel, agree that at the time of the alleged crime, Dan Reed previously had been convicted of a felony offense. That is, a crime punishable by imprisonment in excess of one year. Furthermore, Mr. Reed never had a civil rights including the right to keep and bear firearms and ammunition restored by the State of Florida or executive clemency.

So the parties jointly agree this element has been proven beyond a reasonable doubt. Okay?

So with that, Mr. Kidd if you want to call your first witness.

MR. KIDD: United States calls Paul Camp.

THE COURT: I'm going to mark this stipulation as Court Exhibit No. 1.

THE DEPUTY CLERK: You mean number 2.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA,

v. **Case No: 6:15-cr-162-Orl-31KRS**

DAN REED,

_____/

STIPULATION OF THE PARTIES

The United States of America, through the undersigned Assistant United States Attorney, Dan Reed, and Counsel for Mr. Reed, Alisha Marie Scott, hereby submit this Joint Factual Stipulation to be read to the jury in this case and agree that the original or a copy of this document shall be received by the jury as an exhibit in this case:

The United States of America and Dan Reed, jointly agree that, at the time of the alleged crime, Dan Reed previously had been convicted of a felony offense, that is, a crime punishable by imprisonment for a term in excess of one year. Furthermore, Dan Reed never has had his civil rights, including the right to keep and bear firearms and ammunition, restored by the State of Florida Office of Executive Clemency. The parties jointly agree that this element has been proven beyond a reasonable doubt.

Alisha Marie Scott
Counsel for Dan Reed

Embry Kidd
Assistant United States Attorney

Dan Reed
Dan Reed