
No. _____

In the
Supreme Court of the United States

ERNEST ARMANDO ANDUJO, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

Petition for Writ of Certiorari

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Question Presented

Federal law defines a firearm silencer as “any device for silencing, muffling, or diminishing the report of a portable firearm.”

Does the word “for” in the federal definition require a showing of subjective purpose or intent to use a device as a silencer, as the First, Sixth, and Seventh Circuits have held, or can a firearms expert permissibly testify that a device is a silencer based on its objective characteristics and that its intended use is irrelevant to culpability, as the Ninth Circuit ruled in this case?

Statement of Related Proceedings

- *United States v. Ernest Armando Andujo*,
 - No. 2:18-cr-00835-DSF-1 (C.D. Cal. Feb. 10, 2020)
- *United States v. Ernest Armando Andujo*,
 - No. 20-50043, 2021 WL 5860900 (9th Cir. Dec. 10, 2021)

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Petition for Writ of Certiorari

Ernest Andujo petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Opinions Below

The opinion of the court of appeals is unreported. App. 1a–4a. The ruling of the district court is also unreported. App. 6a–9a.

Jurisdiction

The judgment of the court of appeals was entered on December 10, 2021. App. 1a. A timely petition for rehearing en banc was denied on April 6, 2022. App. 5a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutory Provisions Involved

26 U.S.C. § 5861 provides, in relevant part:

It shall be unlawful for any person—

....

(d) to . . . possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record; or

....

(i) to . . . possess a firearm which is not identified by a serial number as required by this chapter[.]

26 U.S.C. § 5845 provides, in relevant part:

For the purpose of this chapter--

(a) Firearm.--The term “firearm” means (1) a shotgun having a barrel or barrels of less than 18 inches in length; (2) a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length; (3) a rifle having a barrel or barrels of less than 16 inches in length; (4) a weapon made from a rifle if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 16 inches in length; (5) any other weapon, as defined in subsection (e); (6) a machinegun; (7) any silencer (as defined in section 921 of title 18, United States Code); and (8) a destructive device.

18 U.S.C. § 921 provides, in relevant part:

(a)(24) The terms “firearm silencer” and “firearm muffler” mean any device for silencing, muffling, or diminishing the report of a portable firearm, including any combination of parts, designed or redesigned, and intended for use in assembling or fabricating a firearm silencer or firearm muffler, and any part intended only for use in such assembly or fabrication.

Statement of the Case

Petitioner Ernest Andujo is in the business of providing prop weapons and fabrication services for low-budget, independent action movies. (4-ER-668-674, 708-714, 737-750, 755-756, 771-776.) Based on his possession of two silver cylinders, he was convicted of possessing an unregistered silencer and a silencer without a serial number. (App. 1a-3a.)

1. Los Angeles Port Police detective Robert Redondo found six guns in Andujo's bedroom closet during the November 2018 search of Andujo's residence in Long Beach, California. (3-ER-303-315.) Records indicated that Andujo had lawfully purchased all six guns from Turner's Outdoorsman, a licensed federal firearms dealer. (3-ER-434-437-445.)

One of the guns was an AR-15-style rifle located in a plastic tub. (3-ER-314-316.) The plastic tub also contained a black duffel bag. (3-ER-331-334.) Inside the black duffel bag, Redondo found two silver cylinders that appeared to him to be sound suppressors, or silencers. (3-ER-331-334-457.) The duffel bag also contained flechette darts, an archery bow, a crossbow, brass knuckles, leather saps, knives, a fishing reel, and fishing line. (3-ER-345-355-432.) The silver cylinders had some handwritten markings but did not bear serial numbers, information about their manufacture, or engravings. (3-ER-333-336.)

The silver cylinders were made of three pieces of aluminum—two end caps that screwed onto a tubular body. (3-ER-337.) Upon unscrewing the end caps, Redondo could see a rubber gasket and intact plastic PVC pipe caps, drilled down the center, inside each cylinder. (3-ER-337-457-459.) Both silver cylinders had threading. (3-ER-339-340.) Redondo had tried to screw each cylinder onto the AR-15 rifle and pronounced each a “perfect fit.” (3-ER-340-341.)

Redondo seized more than ten empty firearm magazines from Andujo’s bedroom closet. (3-ER-359-363, 446.) He testified that he also found ammunition but was instructed not to seize it. (3-ER-359-360; 4-ER-583.)

Redondo further testified that the search turned up an automotive oil filter with a thread adapter screwed into it that “could be a good form of a silencer.” (3-ER-363-365.) The oil filter with thread adapter fit when screwed onto the AR-15-style rifle. (3-ER-366.) Redondo also found two other oil filters that did not have adapters attached to them. (3-ER-365-368.)

2. The government called Eve Eisenbise, a Firearms Enforcement Officer for the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”), as an expert witness. (3-ER-487-494-495.) She testified that a silencer is a “firearm” under federal law and defined the term “silencer” as “a device for diminishing or muffling the sound of a portable firearm or any combination of parts from which a firearm silencer can be assembled or fabricated or any

part that is designed, redesigned, and intended for the use in the assembly or fabrication of a firearm silencer.” (3-ER-493–494.)

Eisenbise explained that while anyone who is not prohibited from owning a firearm may possess a silencer, one must obtain registration before making or possessing a silencer. (3-ER-497–498.) The prosecutor then embarked on a line of questioning regarding the applicable legal requirements for devices used as props or on movie sets. (3-ER-498-499.) The district court overruled defense counsel’s objections based on Federal Rule of Evidence 403 and improper “legal conclusions” and permitted Eisenbise to opine on these issues:

[AUSA]: Are there different requirements if a silencer is labeled a prop?

[EISENBISE]: It doesn’t matter how —

[DEFENSE COUNSEL]: Your Honor, 403.

THE COURT: Overruled.

[EISENBISE]: An NFA firearm, including a silencer which we just discussed, is a firearm under the NFA.

[DEFENSE COUNSEL]: Your Honor, these are legal conclusions that the government is eliciting from the witness. It’s the province [of] the jury.

THE COURT: Well, then, I will instruct them on it. Go ahead.

(3-ER-498–499.)

Over a defense objection, the prosecutor proceeded to elicit Eisenbise's opinion on the legal requirements for silencers used on movie sets.

[AUSA]: [A]re the requirements different for these permitting requirements, are they different for silencers that are used on movie sets?

[EISENBISE]: No, sir. If it's a silencer, it requires registration and it has marking requirements.

[AUSA]: Does that change if an actor is using the silencer on a set?

[DEFENSE COUNSEL]: Your Honor, I think the issue in this case is knowledge. But the government's question presumes that these are in fact silencers. That's the ultimate question the jury has to determine.

But this line of questioning is confusing the issue.

[AUSA]: We're going to elicit —

THE COURT: Wait. Wait. That's not the objection you made before. What is your objection?

[DEFENSE COUNSEL]: I think it's too, Your Honor. The jury has to establish whether or not this was a silencer.

THE COURT: Yes. And experts can testify on ultimate issues.

[DEFENSE COUNSEL]: I think it's confusing the issue.

THE COURT: It's not confusing the issue. It's right on the issue. It's right on your defense. And I think you'd probably rather have it come from her than from me because if it's the law and you want me to instruct on it, then I'm going to have to instruct on it.

(3-ER-499-500.) After defense counsel noted that knowledge was an element of the charged offenses, the district court stated, “First, they have to prove it is a silencer. That’s what they are trying to do with the expert.” (3-ER-501.)

Eisenbise testified that classification of a device as a silencer depended “on its design, features, and characteristics.” (3-ER-504.) She testified that she could make this classification by examining a device’s exterior and interior components, and that test-firing was unnecessary. (3-ER-502–503.) Eisenbise opined that a device could be classified as a silencer even if it had never been used. (3-ER-509.)

As for her visual examination of the silver cylinders, Eisenbise testified that they each had an outer body, a common silencer part; end caps with a drilled hole to allow a projectile to pass through; PVC caps used as “baffles” to restrain the spreading of sound; and a black rubber “spacer” typically used to create more space between baffles. (3-ER-504–507.) Each silver cylinder had threading that is typically used to attach a silencer to a firearm barrel. (3-ER-512–513.)

Eisenbise testified that both silver cylinders were firearm silencers, and therefore firearms under federal law. (3-ER-509.) She reiterated that the use of the silver cylinders on movie sets, and the labeling of the silver

cylinder as props, would have “no bearing whatsoever” on her conclusion that they qualified as silencers under federal law. (3-ER-509–510.)

When Eisenbise began to define the term “silencer,” to explain why the silencers could not be considered fake, defense counsel objected that “[f]or the expert to state the definition is a question the jury has to answer, Your Honor[.]” (3-ER-510.) The district court said defense counsel was “right,” and told the jury it “will be evaluating the testimony and all the other evidence in the case and then will determine the facts and apply the law as I give it to you and then render your verdict.” (3-ER-510.) Eisenbise then proceeded to testify that the silencers were not fake because they contained firearm silencer parts that were, in themselves, “silencers” under federal law; she further testified that a fake silencer would not need to have the internal components these devices had. (3-ER-511.)

Neither silver cylinder had engraving that indicated a serial number or manufacturer. (3-ER-514–515.) The handwritten numbers and removable barcode stickers on the devices, Eisenbise testified, would not meet federal marking requirements. (3-ER-513-516.)

Eisenbise testified that automotive oil filters are very commonly used as “good” homemade silencers, and that she had previously classified an oil filter as a silencer. (4-ER-548.) Eisenbise had also seen other household items used as silencers, such as cardboard tubes, duct tape, PVC pipes,

flashlight bodies, and even the top of a tiki torch lamp. (4-ER-572.) On cross-examination, Eisenbise testified that a pillow could be classified as a silencer if there was “some intent shown that the pillow was meant to be used as a firearm silencer.” (4-ER-572.) So could a potato, she testified. (4-ER-572.)

Eisenbise had tested the silver cylinders for their decibel reduction effect and found them to be “very effective.” (4-ER-551–554.) When the prosecutor asked whether a device needed to reduce the sound of a firearm to be classified as a silencer, or whether visual inspection was sufficient, defense counsel again objected on “403” grounds. The district court overruled the objection, stating that the “jury will determine whether they are firearms or not.” (4-ER-554.) Eisenbise testified that testing is not necessary to classify a device as a silencer, and that a device does not need to perform to a certain level to be classified as a silencer. (4-ER-554–555–562–563–577.) According to Eisenbise, testing is not necessary because “one silencer part all alone by itself is a silencer under federal law.” (4-ER-564.) She identified one silver cylinder as containing nine silencer parts and the other as containing ten silencer parts. (4-ER-576.)

3. ATF Industry Operations Investigator Tania Pleasants testified regarding an ATF database that stores applications to possess NFA weapons. (4-ER-623–627.) Pleasants found no registration records under Andujo’s

name in the database. (4-ER-629-631.) She also found no record for Andujo in the database of federal firearms licensees. (4-ER-633-634.)

4. The jury convicted Andujo of both silencer charges. (5-ER-884-885.) The district court denied Andujo's post-trial motion for a judgment of acquittal or a new trial, including a claim challenging Eisenbise's expert testimony as misleading the jury as to the elements of the silencer offenses. (1-ER-7-10.) Andujo was sentenced to twelve months and one day of imprisonment, to be followed by three years of supervised release. (1-ER-2.)

5. Andujo appealed his convictions to the Ninth Circuit. (App. 1a.) He challenged aspects of Agent Eisenbise's expert testimony and argued that the government constructively amended the indictment by presenting evidence and argument regarding an uncharged oil filter. (App. 2a-4a.)

On December 10, 2021, the Ninth Circuit affirmed Andujo's convictions in a memorandum disposition. (App. 1a-4a.) First, the panel concluded that the admission of Eisenbise's testimony on the definition of a silencer, the methods of classifying a silencer, and the requirements under federal law was not plain error because Eisenbise used legal terms only to explain the factual bases for her opinions. (App. 2a) Second, the panel ruled that any error in admitting Eisenbise's testimony regarding the law governing silencers used as props or on movie sets was harmless, as there was no evidence that the testimony was incorrect, and the government presented overwhelming

evidence that the silver cylinders were silencers. (App. 2a–3a.) Third, the panel determined that Eisenbise did not impermissibly testify to Andujo’s mental state, in violation of Federal Rule of Evidence 704(b), and that, to the extent the testimony supported an inference about Andujo’s mental state, there was no plain error. (App. 3a.) Finally, the panel held that the government’s references to the uncharged oil filter did not constructively amend the indictment, and thus did not constitute plain error. (App. 3a–4a.)

Reasons for Granting the Petition

This Court should grant certiorari to resolve a circuit conflict regarding the mens rea for violations of silencer registration and marking requirements. Federal law defines a silencer to include “any device for silencing, muffling, or diminishing the report of a portable firearm.” 18 U.S.C. § 921(a)(24). At petitioner’s trial, the government’s expert witness testified that an object’s intended use as a prop on a movie set was irrelevant to a defendant’s culpability under the statute governing the registration and serial numbers of silencers. The Ninth Circuit upheld the admission of this legal opinion on the grounds that there was “no evidence” that the testimony was incorrect, and that the evidence that the silver cylinders were silencers was overwhelming. (App. 3a.) In doing so, it necessarily endorsed the firearm expert’s view of the “device for silencing” definition as objective in nature, such that a defendant’s intended use of the object for a purpose other

than silencing was irrelevant to culpability.

But this interpretation of the silencer definition conflicts with the published decisions of three courts of appeal holding that classification as a silencer depends on a showing of purpose or intent to use an object to diminish the sound of a firearm, as opposed to mere muffling capability. As the First Circuit has explained, this construction prevents the statute from criminalizing possession of common household items, such as soda bottles and potatoes, that can reduce the sound of a shot. This Court should grant certiorari to establish a uniform definition of a “silencer” under federal firearms laws.

I. The Courts of Appeal Are Divided as to Whether the Definition of a Silencer Depends Solely on a Device’s Objective Characteristics or an Individual’s Intent to Use the Device to Silence, Muffle, or Diminish the Sound of a Gunshot.

Title 26 U.S.C. § 5861 prescribes conduct relating to, among other acts, the registration and serial number identification of firearms. 26 U.S.C. § 5861(d), (i). The statutory term “firearm” includes not only silencers but also certain shotguns, certain rifles, certain weapons made from shotguns and rifles, machineguns, destructive devices, and “any other weapon” meeting specified design standards. *Id.* § 5861(a)–(f). For most of these devices, designation as a firearm depends on objective criteria. For instance, a shotgun with a barrel less than 18 inches in length is a firearm, as is a rifle

with a barrel less than 16 inches in length; a weapon made from a shotgun or rifle qualifies as a firearm depending on its overall length or barrel length. *Id.* § 5861(a). Likewise, whether a weapon can be classified as a machinegun depends on its “objective features.” *United States v. Kuzma*, 967 F.3d 959, 974 (9th Cir. 2020).

Silencers differ from the other firearms regulated by Section 5861 insofar as the classification of a device as a silencer depends on a defendant’s intent, and not merely on its objective features. A silencer is defined as “any device for silencing, muffling, or diminishing the report of a portable firearm,” 18 U.S.C. § 921(a)(24) (emphasis added). Focusing on the word “for,” the First Circuit has construed the word “for” to denote “purpose” and not “capability.” *United States v. Crooker*, 608 F.3d 94, 97 (1st Cir. 2010) (per curiam). It rejected a definition of “silencer” premised on its mere capability to diminish the sound of a firearm because it would sweep in common household items, such as a soda bottle or potato: “The peculiar problem of silencers is that many objects, including relatively innocent ones, have some capacity to muffle the sound of a shot.” *Id.* Instead, the First Circuit adopted the defendant’s argument that “intent or purpose is an element of the initial silencer definition.” *Id.* at 98.

Similarly, the Sixth and Seventh Circuits have read a purpose or intent requirement into the “silencer” definition. *See United States v. Carter*, 465

F.3d 658, 667 (6th Cir. 2006) (“The language of the statute focuses on the intended application of a silencer, not its actual demonstrated operation. . . . The word choice indicates a concern for the purpose of the mechanism, and the parts thereof, not the function.”); *United States v. Syverson*, 90 F.3d 227, 232 (7th Cir. 1996) (“Under *Staples*, the government had to prove that the cylinder was made for the purpose of silencing a firearm, not that this purpose was realized.”).

These intent-based definitions are at odds with Eisenbise’s pronouncements at Petitioner’s trial that a device’s use as a movie prop is irrelevant to its status under federal law, and that she could classify an object as a silencer based solely on its design, features, and characteristics. (3-ER-498-499, 502-504.) Albeit in a different context, the Second Circuit has likewise espoused an objective definition, describing a silencer as “an illegal device that is defined by its functionality” or “characteristics.” *United States v. Kavoukian*, 354 F.3d 117, 120 (2d Cir. 2003).

Clarifying the proper construction of the statutory silencer definition is important for the uniform application of federal firearms laws and warrants this Court’s review. Indeed, this Court has previously granted certiorari to resolve a different circuit conflict regarding the mens rea required under § 5861(d), one of the statutes under which Petitioner was convicted. *Staples v. United States*, 511 U.S. 600, 604 (1996). In *Staples*, this Court read a mens

rea requirement into the provision criminalizing possession of an unregistered firearm, despite the statute's silence as to any mental state element. *Id.* at 619. The *Staples* Court held that "to obtain a conviction, the Government should have been required to prove that petitioner knew of the features of his AR-15 that brought it within the scope of the Act." *Id.*¹ Andujo was charged with violations of Section 5861(d) and 5861(i). More generally, this Court regularly grants certiorari to clarify the mens rea requirements of federal statutes. *See, e.g., Rehaif v. United States*, 139 S. Ct. 2191, 2195 (2019) (granting certiorari to consider mens rea requirement for statute prohibiting firearm ownership by prohibited persons); *Dean v. United States*, 556 U.S. 568, 571 (2009) (granting certiorari to resolve circuit conflict on intent requirement for statutory sentencing enhancement for discharging firearm); *Liparota v. United States*, 471 U.S. 419, 423 (1985) (granting

¹ *Staples* does not resolve the question presented here, however. Petitioner's mens rea argument is directed at the first element of both § 5861(d) and § 5861(i), as set forth in the jury instructions: "First, the defendant knowingly possessed at least one firearm silencer . . ." (2-ER-248-249.) The jury instructions for both charges reflected *Staples*'s holding in the second element: "Second, the defendant knew of the specific characteristics of the firearm silencer, that is, that this firearm silencer would silence, muffle, or diminish the sound report of a portable firearm[.]" (2-ER-248-249.) But *Staples* does not preclude this Court from concluding that the term "firearm silencer" in the first element requires a showing of intent or purpose, even if the second element requires only a mens rea of knowledge. Rather, *Staples* makes clear that "different elements of the same offense can require different mental states." 511 U.S. at 609.

certiorari to review circuit conflict on food stamp fraud statute’s mens rea requirement).

Further, as evidenced by Petitioner’s trial, the question presented has significant practical ramifications. Federal Rule of Evidence 704(b) prohibits expert witnesses from opining on “whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged.” Fed. R. Evid. 704(b). Therefore, if the definition of a silencer contains an embedded requirement of intent to use the device to muffle the sound of a firearm, an expert witness could not testify, as Agent Eisenbise did at Petitioner’s trial, that certain objects are “silencers.” (3-ER-509.) Such matters would be entrusted to “the trier of fact alone,” Fed. R. Evid. 704(b), as Petitioner’s trial counsel argued below. (3-ER-499-500.) In addition, because so many common household items—pillows, potatoes, soda bottles, oil filters—are capable of muffling the sound of a firearm, a purely objective or functional definition of silencer threatens “to criminalize a broad range of apparently innocent conduct.” *Liparota*, 471 U.S. at 426.

II. This Case Is an Excellent Vehicle for Resolving the Question Presented.

This case offers a prime opportunity to consider whether the statutory definition (“device for silencing”) contains an intent requirement. Although the Ninth Circuit did not determine whether the district court abused its

discretion by admitting expert testimony on the law of silencers on movie sets, its harmlessness holding necessarily adopted an objective definition of silencer that conflicts with the decisions of the First, Sixth, and Seventh Circuits. First, it ruled that Petitioner had not shown that the expert's testimony was incorrect, App. 3a, thereby necessarily rejecting Petitioner's argument that intent to use an item purely as a visual movie prop was relevant to culpability under § 5861(d). Second, it concluded that there was overwhelming evidence that the silver cylinders were silencers. App. 3a. But this begs the question: the evidence is not overwhelming if, as Petitioner argues, the statutory definition of "silencer" requires a showing of the defendant's intent or purpose to use an object to silence the sound of a firearm.

To the contrary, under a proper construction of the silencer definition, Petitioner would have had a strong defense at trial that he possessed the silver cylinders as visually impactful props, and not for the purpose of silencing the report of a firearm. The silver cylinders were found in a bag containing exotic weapons that could be used as props. (3-ER-345-355.) Petitioner's legitimate work in the film industry was well-established. As the district court stated, outside the presence of the jury, "Nobody doubts he's a filmmaker." (4-ER-706.) There was no evidence that Petitioner had any nefarious purpose for possessing the silver cylinders. *Cf. United States v.*

Thompson, 82 F.3d 849, 854 (9th Cir. 1996) (noting that “a silencer would have been a useful tool for a drug dealer doing business in a populated area”). Nor was there any evidence that Petitioner, despite his possession of lawfully purchased firearms, had ever fired through the silver cylinders. *Cf. id.* (citing testimony that defendant had used silencer in a shooting). On this record, Petitioner had a good prospect of being acquitted at trial under an intent-based definition of “silencer.”

III. The Ninth Circuit’s Decision Is Wrong.

The Ninth Circuit did not grapple with the statutory definition of silencer in concluding that any error in allowing the government’s firearms expert to give legal conclusions regarding the status of silencers on movie sets was harmless. It simply concluded that Petitioner had provided “no evidence” to support his argument that the firearms expert misinterpreted the statute. (App. 3a.) But the correct construction of the statutory definition is a legal question, not a factual one. And the plain language of the silencer definition demonstrates that the silencer definition incorporated in § 5861 contains an embedded intent element.

“Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.” *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009) (internal quotation marks omitted). In choosing

between the parties' competing interpretations, this Court's "only job . . . is to give the law's terms their ordinary meaning and, in that small way, ensure the federal government does not exceed its statutory license." *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1486 (2021). Section 921(a)(24) defines "silencer" not in terms of objective capability—as a device *that* silences, muffles, or diminishes the sound of a gunshot—but as "any device *for* silencing, muffling, or diminishing the report of a portable firearm." 18 U.S.C. § 921(a)(24) (emphasis added). And the word "for" introduces a purpose or intent element into the definition of silencer.

"[F]or" indicates purpose or aim. *See For*, Webster's New College Dictionary (3d ed. 2008); *see also For*, Webster's New International Dictionary (3d ed. 1993) ("[W]ith the purpose or object of."); *For*, Webster's New International Dictionary (2d ed. 1959) (same)

Hoever v. Marks, 993 F.3d 1353, 1357 (11th Cir. 2021) (en banc). The Ninth Circuit's failure to apply the ordinary meaning of the silencer definition justifies this Court's review.

Conclusion

For the foregoing reasons, Mr. Andujo respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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DATED: June 7, 2022

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