IN THE
SUPREME COURT OF THE UNITED STATES

ANDERSEN RABEL,
Petitioner,

vs. Number

UNITED STATES OF AMERICA
Respondent.
_____/

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

COMES NOW the petitioner, ANDERSEN RABEL, by and through undersigned counsel and pursuant to Sup. Ct. R.39, and moves this Honorable Court for leave to file the attached Petition for Certiorari in the Supreme Court of the United States without costs and to proceed in forma pauperis.

In the lower courts, the Petitioner was formally adjudicated unable to afford counsel and undersigned counsel was appointed for him under 18 U.S.C. Section 3006(a) of the Criminal Justice Act; accordingly, the Petitioner has not attached an affidavit of insolvency.

Respectfully Submitted,

s/Gregory A. Samms
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Counsel for Petitioner
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via U.S. Mail upon The Solicitor General, United States Department of Justice, Washington, D.C. 20530 and upon all counsel of record, this 25th day of September, 2024.

s/Gregory A. Samms
Gregory A. Samms, Esq
Florida Bar No. 438863

IN THE
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PETITION FOR A WRIT OF CERTIORARI

TO

THE UNITED STATES COURT OF APPEALS
IN AND FOR THE ELEVENTH JUDICIAL CIRCUIT
_____

DECLARATION VERIFYING TIMELY FILING

Petitioner, Andersen Rabel, through undersigned counsel, and pursuant to SUP. CT. R. 29.2 and 28 U.S.C. § 1746, declares that the Petition for Writ of Certiorari filed in the above-styled matter was placed in the U.S. mail in a prepaid first-class envelope, addressed to the Clerk of the Supreme Court of the United States, on the 25th day of September, 2024.

GREGORY A. SAMMS, ESQ.
Attorney for the Petitioner

By: s/Gregory A. Samms

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Telephone No. (786) 953-5802

September 25, 2024

IN THE
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IN AND FOR THE ELEVENTH JUDICIAL CIRCUIT

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ANDERSEN RABEL respectfully petitions the Supreme Court of the United States for a Writ of Certiorari to review the judgement of the United States Court of Appeals for the Eleventh Judicial Circuit rendered and entered in Case No. 22-13854 of that Honorable Court as a mandate on AUGUST 24, 2024, which affirmed the judgement and sentence of the United States District Court for the Southern District of Florida.

QUESTIONS PRESENTED

1. Whether the District Court, Erred When It Refused to Allow Evidence of the Fact That the Bureau of Alcohol Tobacco and Firearms (hereinafter ATF), Did Not Adequately Disseminate That They Changed Their Interpretation of Whether Solvent Traps Sold Commonly to the Public as a Firearm Accessory Would Now be Considered Silencers and Therefore Illegal Under the National Firearms Act.
2. Whether the District Court Erred by Allowing the Case to go to the Jury When There Was Not Sufficient Evidence to Conclude That the Appellant Had Sufficient Mens Rea to Commit the Offense of Possession of a Firearm.
3. Whether the Appellant Could Not Be Legally Convicted of Possession of a Firearm Because the Appellant Was Employed by a Licensed Gun Dealer Who Has a Type 07 FFL License.
4. Whether, the District Court Erred When it Allowed the Presentation of a Video of an Unknown Individual Shooting What Appeared to be a Silencer Into the Ground Along With Irrelevant Unfairly Prejudicial Text Messages, Tainted the Trial Such That a New Trial Should be Granted.

LIST OF PARTIES

The parties in this proceeding or persons who have an interest in the outcome of this case are as follows:

1. Andersen Rabel, Appellant.

2. United States of America, Appellee.

3. Karla Albite, AUSA

4. Manuel Reguiera, Codefendant

5. Joe Rosenbaum, Atty. for Codefendant

6. Gregory A. Samms, Esq., Attorney for Appellant.

7. Bureau of Alcohol, Tobacco, Firearms and Explosives

8. Kimberly Acevedo, Atty. for Codefendant

9. Miami Gun Shop

10. Lisa Tobin Rubio, Counsel for USA on appeal

11. Patrick Hayden O' Byrne, Counsel for USA

12. Hon. Edwin G. Torres

13. Hon. Kathleen Williams

14. Hon. Alicia M. Otazo-Reyes

15. Hon. Chris M. McAliley

16. Hon. Jacqueline Becerra

17. Hon. Melissa Damien

18. Markenzy Lapointe United States Attorney Southern District of Florida

19. Jason Wu Counsel for USA on appeal.

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REFERENCE TO THE OPINION BELOW

The trail court issued no written opinions in this matter. The Eleventh Circuit Court of Appeals did issue a written, unpublished opinion which, along with the judgement of the trial court, is included in the appendix to this petition.

STATEMENT OF JURISDICTION

This court has jurisdiction under 28 U.S.C. Section 1254 (1).

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Court Below.

The Appellant was charged by Indictment on February 18, 2022 with a number of charges related to violations of the National Firearms Act; Possession of an Unregistered Firearm in Count X; Transfer of an Unregistered Firearm; Failure of a Federally Licensed Dealer to Keep Proper Records; and Transferring a Firearm Without Conducting a NICS Background Check. [D.E. 19]. On August 29, 2022 the case went to a jury trial with the defendant being found guilty on Court X Possession of an Unregistered Firearm. [D.E. 113].

On November 17, 2022, the probation department prepared a pre-sentence investigation report. [D.E. 144]. Based upon a total offense level of 17 and a criminal history category of I, the guideline imprisonment range was calculated as 24 months to 30 months. The Court after considering the factors contained in 18

U.S.C. 3553 granted a variance and sentenced the defendant to 8 months in prison. [D.E. 141].

This case largely revolves around the activities of the codefendant Manuel Regueira, who is the owner and operator of the Miami Gun Shop. The charges contained in the Indictment against the Appellant originated through the Appellant's employment with the Miami Gun Shop as a desk clerk. [D.E. 120-2]. The Miami Gun Shop was owned and operated by codefendant Manuel Regueira who operated as a Federal Firearms Licensee with a type 07 license. [D.E. 3 p.6]. A type 07 license allows the licensee to manufacturer firearms or ammunition as a business. [D.E. 3 p.6]. With the FFL 07 license the Miami Gun Shop and Manuel Regueira engaged in the manufacture and sale of firearms. [D.E. 3 p.6].

The Appellant, Rabel Andersen, was employed at Miami Gun Shop for approximately 8 months prior to his arrest, as a sales assistant who also assisted with IT work. [D.E. 120-2]. The Appellant is knowledgeable about firearms and is certified as a firearms instructor. [D.E. 120-2; 120-14]. In order to operate as a holder of a FFL 07 license codefendant Reguiera must designate a person to be a "Responsible Person" in the business. [D.E. 120-2]. Mr. Regueria listed the Appellant as one of two "Responsible Persons" of the Miami Gun Shop. [D.E. 3 par. 16]. The Code of Federal Regulations defines a Responsible Person as follows:

Responsible person. An individual who has the power to direct the management and policies of the applicant pertaining to explosive materials. Generally, the term includes partners, sole proprietors, site managers, corporate officers and directors, and majority shareholders. (27 CFR § 555.11).

As a "Responsible Person" the Appellant was knowledgeable about the registration requirements of the NFA. Further, through the FFF 07 license that was held by Reguiera, the Appellant was able to possess NFA defined firearms for the purpose of sale or manufacture as long as they were not transferred to members of the public in violation of any of the NFA or State of Florida registration and background requirements. [D.E. 94-2 p.3].

The Miami Gun Shop came to the attention of ATF agents on September 30, 2021 when several individuals were arrested with machinegun conversion devices and switches. [D.E. 3 par. 17]. Switches allow machine guns to fire multiple rounds without pulling the trigger. [D.E. 3 par. 17]. Neither the switches nor the machinegun conversion devices can be sold to members of the public without completing background checks with a filled-out Form 4473 and a Form 4 which has to be sent to ATF for approval. [D.E. 3 ¶¶ 13-17]. None of the federal or state requirements were complied with for the firearms and therefore the possessors of the firearms were in violation of federal and state law. [D.E. 3 ¶¶ 13-17]. One of the arrested

suspects indicated that the owner of the Miami Gun Shop, an individual named Manny, sold them the illegal devises. [D.E. 3 ¶ 17].

Subsequently, ATF agents began an operation to determine if the Miami Gun shop was illegally selling firearms. An ATF undercover agent (UC) on October 21, 2021 met with Regueira in the Miami Gun Shops which led to the purchase of firearm components by the UC. [D.E. 3 ¶ 20]. Regueira did not provide any receipts to the UC for the transaction. Nor were any background checks done. [D.E. 3 ¶ 20].

On November 16, 2021 the UC met with Regueira at the Miami Gun Shop and was escorted into the back room of the store by Regueira. On this occasion the UC purchased 5 assault style rifles. The rifles did not have serial numbers nor did Mr. Reguiera fill out the Form 4473 which is required under the NFA. Mr. Regueira also did not do a background check on the UC which is required under state law. [D.E. 3 ¶¶ 22-23].

On January 11, 2022 the UC returned to the Miami Gun Shop and was taken to the back room where Reguiera showed the UC what appeared to be solvent traps. The UC purchased two suspected solvent traps for $1,000.00. Reguiera did not have any serial numbers on the solvent traps and did not take background information from the UC to do a background check or fill out the Form 4473. [D.E. 3 ¶¶ 23, 27].

The ATF tested the suspected silencers and made their own determination that the suspected silencers could be classified as functional silencers and as such would have to comply with the NFA by requiring that a Form 4473 be filled out. In order to fill out the form, identifying information would have to be provided from the seller. Mr. Reguiera did not obtain any such information. [26 USC 5861(c)); [D.E. 3 ¶ 28].

After the initial purchase on January 12th, the UC called Reguiera later that day and inquired using code language if Reguiera had automatic weapons for sale. [D.E. 3 ¶ 29]. Reguiera answered in the affirmative and the UC came back to Miami Gun Shop and met with Reguiera. [D.E. 3 ¶ 30]. Reguiera presented the UC with three suspect machine guns for sale. The UC gave Reguiera $4,500.00 of government funds for the purchase of the firearms. Reguiera did not ask for identification from the UC, nor was a receipt provided. [D.E. 3 ¶ 31].

The firearms were subsequently allegedly determined to be automatic weapons subject to the NFA. If in fact the weapons were firearms a Form 4473 was required to be completed and filed with BATF. Further if the weapons were qualifying firearms, they could not be sold without a serial number on them which is also required under the NFA. [D.E. 3 ¶ 32]; (26,U.S.C. Section 5861(d); 18 U.S.C. 922(1945); 18 U.S.C. 923(g)(1)(A)).

On January 21, 2022, the UC for the first time, dealt with the Appellant, only because Mr. Reguiera was out of town. [D.E. 161, p.8]. The UC came into Miami Gun Shop asking to see Reguiera. Mr. Andersen told the UC that Manny was out of town for a gun convention. [D.E. 161, p.8; D.E 123 at 4:01-4:10]. Mr. Rabel then called Mr. Reguiera and handed the phone to the UC. [D.E 123 at 4:45] The UC then had direct conversation with Reguiera. [D.E 123 at 4:45-5:53]. During the conversation the UC asked to purchase "soda cans." [D.E. 3 ¶ 34]. The UC handed the phone back to the Appellant who had more conversation with Reguiera. During that conversation Reguiera directed the Appellant to sell solvent traps to the UC. [D.E. 3 ¶ 34].

The solvent traps were located in the back room where Reguiera took the UC to previously to sell the weapons. The Appellant asked another employee where the bags were and was directed to a rear portion of the room. [D.E 123 at 5:59]. The Appellant presented the UC with a solvent trap for inspection that was pulled from one of the bags. [D.E 123 at 6:41].

After the UC looked at the solvent trap, he asked what their price was and the Appellant indicated they were $500 a piece which was consistent with the amount the UC paid when he purchased solvent cans on January 11th. [D.E 123 at 6:41]. The UC purchased 4 solvent cans and gave the Appellant $2,000.00 of government

funds. The Appellant did not get identifying information from the UC and did not give a receipt. The solvent cans did not have a serial number. [D.E. 3 ¶ 35].

ARGUMENT

LEGAL ARGUMENT

I. Whether The District Court Erred When It Prevented the Defense From Introducing Into Evidence Facts Demonstrating That Neither the Public Nor the Defendant had Knowledge That the Purchase and Sale of Solvent Traps Were In Violation of the NFA.

On August 23, 2022, the United States filed an Omnibus Motion in Limine seeking to prevent the defense from introducing congressional letters that specifically pointed out that the gun owning public had been purchasing solvent traps for years and having these traps approved after the filing of a Form 1. [D.E. 80]. The congressional inquiries revealed facts that proved the ATF suddenly changed their position on solvent traps and began sending warning letters to specific purchasers of solvent traps on February 28, 2022. [D.E. 48-6]. This date is particularly relevant because the Appellant did not sell his purported silencers until January 21, 2022. [D.E. 19 p. 10]. The defense sought to argue to the jury that the defendant did not have knowledge of the sudden sea change in policy by the ATF and that the defense expert should have been allowed to testify to the state of knowledge of the gun owning public regarding whether solvent traps were a legal gun accessory prior to

February 28, 2022. [D.E. 83 p.3]. Had the defense's firearms expert been allowed to opine on the state of knowledge of the gun owning community that it was legal to have and sell solvent traps before February 28, 2022, then the jury could determine whether it was reasonable for the Appellant to sell the solvent traps without any criminal intent. [D.E. 83].

The defense expert could have testified to ATF's continued acceptance of solvent traps as being able to be converted to silencers if the Form 1 was procured. The defense's expert testified that until a person attempts to modify a solvent trap he does not have to fill out a Form 1. [D.E. 162 p.19]. There was unanimity regarding that fact. [D.E. 161pps.118-119]. Therefore, if the Appellant reasonably believes that a solvent trap does not have to have a Form 1 executed until it is to be modified, then he had every reason to believe that he could legally possess and sell the solvent trap as is.

If the expert had been allowed to opine that the congressional letters which demonstrated that the ATF was inconsistent with their policy and did not inform the gun owing public of their new-found belief that solvent traps were silencers, then the defense could argue that criminal *mens rea* is in doubt. Further, the expert could also opine that the selective notice that was sent to certain gun purchasers was insufficient public notice to the majority of the gun owning public and the expert could further opine that the majority of the gun owning public did not know of the

change. [D.E. 83 p.3]. This problem was brought to light by a group of United States Senators who outlined the problem with the ATF specifically making a change in enforcement regarding solvent traps without notice to the public. The senators sent the ATF a series of questions highlighting how the gun owning public was suddenly placed in criminal jeopardy without notice by asking the following:

> 1. Please explain why the ATF is denying Form 1 applications for silencers.
> 2. Please explain whether these denials reflect a change in policy in how the ATF
> regulates self-made silencers.
> 3. Please explain what the ATF has done to inform the American people of its position regarding a Form 1 application and devices it believes are silencer "kits," so that law abiding Americans can attempt to comply with the law.
> 4. Please explain how the ATF evaluates whether a Form 1 application for a silencer is going to be used for a kit that, in ATF's view, is already legally a silencer.
> 5. Please explain why the ATF has repeatedly approved Form 1 applications for
> silencers made from "kits" if the agency's policy is that one or more items in the
> "kits" are considered silencers.
> 6. Please explain how the ATF intends to handle approved Form 1 applications that occurred before February 28, 2022 for silencers made from "kits."
> 7. Please explain how the ATF plans to make tax-free registration available for
> applicants who in good faith attempted to comply with federal law. If ATF does not plan to make tax-free registration available for applicants who in good faith attempted to comply with the federal law, please explain why.
> 8. Please produce all documents and communications, including but not limited to ATF legal opinions, referring or relating to the ATF's definition of a silencer, or what constitutes a silencer "kit."

[D.E. 124-1].

With this evidence of a change in policy regarding solvent traps, the jury would have been allowed to conclude that Mr. Rabel did not have the requisite knowledge to commit the crime of possession of a silencer simply because neither he, nor the gun owning public was informed. [D.E. 124-1]. Certainly, the defense firearm expert, had the court allowed, could have testified to these letters and the fact that ATF did not notify the public appropriately of their sudden change in the law which caused innocent purchasers to immediately become criminals. With this evidence, the expert is entitled to opine that the majority of the gun-owning public did not know that solvent traps were being considered firearms. He should have been allowed to testify that for years the ATF was allowing people who purchased solvent traps to modify them by applying for legal acceptance with a Form 1. [D.E. 124-1]. This type of evidence goes to whether it was reasonable for the Appellant not to know that the ATF was claiming that solvent traps were firearms.

FRE 703 Bases of an Expert's Opinion Testimony states:

> An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

Rule 702 itself notes an expert may "testify in the form of an opinion or

otherwise . . . . " (emphasis added). Further, Rule 703 states the proponent of an opinion may disclose otherwise inadmissible facts or data underlying an expert opinion to the jury "if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect." Therefore, Rule 703 contemplates admitting either admissible or otherwise inadmissible facts or data. Additionally, Rule 705 states an expert may provide an opinion without first testifying about underlying facts or data, but the expert may need to disclose underlying facts or data on cross examination. The Notes of Advisory Committee on the 1972 Proposed Rules point out the current Rule 705 has eliminated the previous requirement of explaining underlying facts or data prior to rendering an opinion. See also *29 Charles Alan Wright & Arthur. R. Miller, Federal Practice and Procedure* § 6294 (2d ed.) (discussing Rule 705 in application). Thus, the Rules clearly contemplate an expert testifying about the facts and data underlying his opinion even if they are not opinions themselves. *Morris v. Wal-Mart Stores E., LP*, No. 5:20-cv-32, 2021 U.S. Dist. LEXIS 136990, at *10 n.2 (S.D. Ga. July 22, 2021)

The Eleventh Circuit, in its opinion in this case opined that *United States v. Ruiz*, 253 F.3d 634, 638 n.4 (11th Cir. 2001), established that the government only needed to "prove that the defendant was 'aware that his weapon possess[ed] any of the features detailed in 26 U.S.C. [section] 5845(a).'" *United*

States v. Rabel, 2024 U.S. App. LEXIS 16998 p. 10 (11th Cir. 2024). The Appellant agrees with the holding in *Ruiz,* but there was no evidence that the defendant was aware that the solvent traps could be considered a firearm under the NFA. This is precisely why the evidence of the change in enforcement by the BATF was crucial to the defense. The Appellant did not have knowledge that the solvent kits that were considered legal for years, suddenly was considered by the ATF as illegal silencers. If it was common knowledge, there would be no reason for the BATF to send letters informing the public that they now considered solvent traps to be illegal.

Clearly, the defense expert could have opined on the state of confusion and lack of knowledge in the gun owning community caused by ATF's sudden reversal regarding solvent traps. The Court's denial of this evidence deprived the defense of a crucial argument regarding whether or not the defendant had criminal knowledge when he sold the solvent traps. This error by the District Court requires the case be remanded for a new trial.

II. The Court Erred When It Found There Was Sufficient Mens Rea To Send The Case to the Jury.

On August 31, 2022, the defense argued at the close of the government's evidence that the case should be dismissed due to the government's failure to prove that Mr. Rabel had criminal intent to commit a crime. [D.E. 161 pps. 128-

129]. Count X charges Mr. Rabel with possession of an unregistered firearm in violation of 26 USC 5841and 26 USC 5861(d) which was the only count the defendant was convicted of. Although the statute does not contain explicit *mens rea* language the law has made it clear that *mens rea* is implied.

The Appellant was convicted of knowingly possessing a silencer. However, in order to be found guilty of the aforementioned charge the Appellant has to know that the solvent cans are in fact firearms under the NFA and therefore subjected to the different types of registration or reporting requirements under the statute. Knowingly possessing or transferring the solvent cans is not the *mens rea* requirement that is necessary to a finding of guilt. In order to be found guilty under each of the indicted charges the Appellant must know that the solvent cans are in fact firearms that come within the ambit of the NFA. In other words, the Appellant must know that the solvent cans are firearms as defined by the NFA and sought to evade the registration requirements of the NFA.

The Appellant's firearm expert stated that the solvent cans as sold were not operable as a suppression device. In order for the solvent cans to be operable the sealed end cap on the end of the solvent can has to be removed and replaced with an end cap that has been drilled in order to allow a projectile to proceed through the device. Once that is done then the solvent can may

operate as a silencer that can be placed on the end of a firearm to suppress sound. [D.E. 162 pps. 11-18].

However, without replacing the sealed end cap on the solvent can it is not a silencer and not subject to the NFA. [D.E. 162 pps. 11-18]. The ATF is claiming that when the Appellant sold the solvent can in the bag there was a drilled end cap loosely included in the bag. ATF claims that once the closed end cap is replaced with the drilled end cap that the solvent can becomes a silencer. However, if someone were to make those modifications then that person would have to fill out the Form 1 and place serial numbers on the silencer in compliance with 26,U.S.C. Section 5861(d); 18 U.S.C. 922(1945); and 18 U.S.C. 923(g)(1)(A). [D.E. 162 p.19].

The Appellant sold the UC solvent traps that do not require him to fill out the Form 4773, nor place serial numbers on the solvent traps. [D.E. 162 p.19]. In fact, these solvent cans are legally sold online and can be purchased by any person legally. [D.E. 48-4]. The Appellant did not put the drilled end caps in the bag that was sold to the UC. [D.E 123 at 6:52]. The solvent cans came from the manufacturer with the drilled end cap included separately. [D.E 123 at 6:52].

The Appellant, selling solvent cans to the UC without filling out the Form 4773, is no different than if the UC had purchased the solvent can online.

The drilled end cap does not change the quality of the solvent can. [D.E. 162 pps 18-19]. Anyone who takes steps to turn the solvent can into a suppression device and does not follow the dictates of the NFA would be the ones in violation of the law not the sellers who are selling legal solvent traps. [D.E. 162 ¶¶ 18-19].

The evidence at trial failed to state an offense because the government failed to prove the Appellant's *mens rea* with respect to the knowledge requirement under the NFA. The statutes are silent as to any required mental state for the defendant, but the Supreme Court has explained that it requires *mens rea* nonetheless. *Staples v. United States*, 511 U.S. 600, 605 (1994). That is because the Court employs a longstanding presumption in favor of *mens rea* when a statute is silent on the subject. See *Rehaif v. United States*, 139 S. Ct. 2191, 2195 (2019). The presumption in favor of *mens rea* is designed to separate innocent from wrongful conduct. *Id.* at 2197. Thus, the Court "read[s] in the statute 'only that *mens rea* which is necessary to separate wrongful conduct from otherwise innocent conduct." *Elonis v. United States*, 135 S. Ct. 2001, 2010 (2015) (quoting *Carter v. United States*, 530 U.S. 255, 269 (2000)). The presumption is at its strongest when the associated penalties are "harsh." See *Staples*, 511 U.S. at 616 (applying the presumption to § 5845's ten-year penalty). "The presumption in favor of a scienter requirement should apply to

each of the statutory elements that criminalize otherwise innocent conduct.'" *Elonis*, 135 S. Ct. at 2010 (quoting *United States v. X-Citement Video, Inc*., 513 U.S. 64, 70 (1994)).

In *Staples*, (supra), the Petitioner was indicted for unlawful possession of an unregistered machinegun in violation of the National Firearms Act (Act), 26 U.S.C.S. § 5861(d). During the trial the defendant testified that he was ignorant of the fact that the weapon he possessed had automatic firing capabilities which made it a firearm under the NFA. At trial the District Court rejected the Petitioner's argument that the statue had a *mens rea* requirement. The Circuit granted certiorari and reversed and remanded, holding that to obtain a conviction under the Act, the government was required to prove that petitioner knew of the features of his weapon that brought it within the scope of the Act. The court noted that the silence as to the *mens rea* requirement in § 5861(d) did not suggest a congressional intent that such requirement be eliminated. Staples leaves no doubt that the government must prove that the Appellant knew of the features of the solvent trap that would make it a silencer under the NFA. Proving that the item is a silencer does not establish any criminal intent on the part of the Appellant. As was stated by the Supreme Court in *Elonis*:

The fact that the statute does not specify any required mental state, however, does not mean that none exists. We have repeatedly held that "mere omission from a criminal enactment of any mention of criminal intent" should not be read "as dispensing with it." *Morissette v. United States*, 342 U.S. 246, 250, 72 S. Ct. 240, 96 L. Ed. 288 (1952). This rule of construction reflects the basic principle that "wrongdoing must be conscious to be criminal." *Id*., at 252, 72 S. Ct. 240, 96 L. Ed. 288. As Justice Jackson explained, this principle is "as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." *Id*., at 250, 72 S. Ct. 240, 96 L. Ed. 288. The "central thought" is that a defendant must be "blameworthy in mind" before he can be found guilty, a concept courts have expressed over time through various terms such as *mens rea*, scienter, malice aforethought, guilty knowledge, and the like. *Id*., at 252, 72 S. Ct. 240, 96 L. Ed. 288 *Elonis v. United States*, 575 U.S. 723, 734, (2015).

For example, in *Rehaif*, the statutes prohibited "knowingly" possessing a firearm for those with a certain status, such as felons, illegal aliens, and the mentally ill. The Government conceded that the *mens rea* applied to the element of possession, but argued that no *mens rea* applied to the status element. *Rehaif*, 139 S. Ct. at 2196. The Court disagreed because "the

defendant's status is the 'crucial element' separating innocent from wrongful conduct." Id. at 2198 (quoting *X-Citement Video*, 513 U.S. at 73). The Court considered examples of wholly innocent conduct that would be punishable if the statute did not require the defendant to know his status, such as "an alien who was brought into the United States unlawfully as a small child and was therefore unaware of his unlawful status" or "a person who was convicted of a prior crime but sentenced only to probation, who does not know that the crime is 'punishable by imprisonment for a term exceeding one year.'" *Id*. at 2198 (quoting 18 U.S.C. § 922(g)(1)). Here, *Staples* established that the Government must plead and prove that the Appellant knew that the "firearm" was a silencer, at a minimum. See *Staples*, 511 U.S. at 602. Therefore, as applied to silencers, establishing that the item possessed was a silencer is insufficient to separate wrongful from innocent conduct. It must be established that the defendant knew the item was a silencer. *Staples* at 602; Elonis at 734.

In *United States v. Anderson*, 885 F.2d 1248 (5th Cir. 1989), the defendant was convicted of possessing automatic pistols and silencer parts. The weapons were discovered in a vault in the defendant's home pursuant to a warrant that was issued based on alleged drug activity. The defendant was convicted at trial and on appeal argued that the jury instructions did not contain sufficient language regarding the necessity of criminal *mens rea* to wit that the

defendant knew that the weapons were in fact automatic weapons. Although Section 5861(d) does not contain express wording -- such as "knowingly" -- imposing a *mens rea* requirement, it is well settled that "far more than the simple omission of the appropriate phrase from the statutory definition [of the offense] is necessary to justify dispensing with" a *mens rea* requirement. Id. at 1253. "We think it far too severe for our community to bear -- and plainly not intended by Congress -- to subject to ten years' imprisonment one who possesses what appears to be, and what he innocently and reasonably believes to be, a wholly ordinary and legal pistol merely because it has been, unknown to him, modified to be fully automatic." Id. at 1254.

In *United States v. Moore* 253 F.3d 607 (11th Cir. 2001), officers pursuant to a search warrant found a silencer in Moore's home under a bundle of clothes. During interrogation about the silencer Moore admitted that "he brought that old thing from a pawn shop in Georgia for $150.00." After conviction, Moore appealed and argued that the jury instructions did not contain sufficient elements of *mens rea* to as a matter of law, convict him. The Eleventh Circuit agreed that the jury instructions did not contain sufficient *mens rea* language but that since Moore, during questioning, never denied that it was a silencer, that it was in his care, it was in his home and that he purchased it, a jury could infer that Moore had knowledge of the characteristics. In the

case *sub judice*, there are no facts demonstrating the defendant had knowledge of the characteristics of the solvent trap that would make it a silencer. Without that type of *mens rea* evidence the government cannot establish the type of knowledge necessary to state the defendant knew the object in question comes within the purview of the NFA or any other registration statutes.

The Appellant was simply following the directives of his boss who told him to sell the solvent traps to the UC. There was no dialog between the UC and Mr. Rabel that would lead one to infer that Mr. Rabel had knowledge that the solvent traps were in fact firearms under the NFA. [D.E. 123-1A].

There is nothing inherently wrongful about the receipt or possession of a silencer. While silencers may evoke popular images of Hollywood assassins and spies, they serve entirely lawful functions. More accurately referred to as "suppressors," they protect against hearing damage; reduce recoil, thereby increasing accuracy and reducing discomfort or injury; and reduce muzzle flash, thereby increasing accuracy by preventing the shooter's temporary blindness. As of May 2021, there were 2,664,774 silencers registered in the United States and 175,156 in Florida. [D.E. 48-7]. Thus, as in *Rehaif*, the lack of registration or other regulatory compliance is the "crucial" element that separates wrongful conduct from entirely innocent conduct. Also like in *Rehaif*, a number of wholly innocent acts would be punishable if the statute

required no knowledge for conviction, such as where a citizen innocently purchases a solvent trap online and then later is accused of violating the NFA.

The indictment alleges the Appellant's knowledge that he received and possessed what the BATF determined was a silencer, but the facts at trial did not establish the *mens rea* element: that the defendant knew the solvent trap was a silencer. The facts simply established that the Appellant was told by his boss to sell the items and this was done without any evidence of knowledge on behalf of the Appellant that the items were silencers. Because this *mens rea* was never established, the Appellant is entitled to an order of dismissal by this Court.

III. Count X Possession of an Unregistered Firearm Can Not Stand Because the Appellant Was Working for a Licensed Gun Dealer and Manufacturer.

The Appellant works for a Gun dealer who has a Type 07 FFL license. With it you can buy, sell and repair firearms and manufacture guns and ammo. That also allows the owner to test firearms to see if the firearms that he built are functional. (27 CFR 478.11 definitions for Dealer, Manufacturer, Engaged in the Business; D.E. 48-2 p. 40). Once the licensee determines that the firearms are operable, he must then file an ATF Form 2 (Notice of Firearms Manufactured or Imported) and ATF Form 5 (Application for Tax Exempt Transfer and Registration of a Firearm) with

respect to such firearms. (27 CFR § 479.103) That being the case, the Appellant, who is a Responsible Person under the NFA, can possess weapons that are being built and tested. [D.E. 48-3 pg. 3, Responsible Persons Listed on the Federal Firearms License; D.E. 48-2 p. 40]. He can also possess solvent traps that come into the store because under an 07 license, those solvent traps can be modified and tested to see if in fact they are operable. [D.E 48-3; D.E. 48-2 p.40]. Once it is determined that they are operable the FFL 07 licensee must now go through the regulatory process discussed above, to be able to transfer the item. Therefore, the Appellant is not in violation of the law by possessing solvent traps or weapon parts as a Responsible Person.

If the government's possession charge is allowed to stand it would stretch the law and common sense. A gun dealer receives weapons in the mail and through delivery. If the Appellant stacks those items in the store, under the government's theory he is in illegal possession the moment he handles the delivery. An FFL 07 licensee is entitled to have weapons and firearms delivered into his office. (27 CFR 478.11). The Appellant, as an employee who has the authority to act on behalf of the 07 licensee by receiving the items, stacking the items and inventorying the items, cannot then be guilty of possessing the items that a 07 licensee is entitled to possess by virtue of his license.

It is axiomatic that if the Miami Gun Shop is licensed to manufacture firearms then the business can order solvent traps. In addition, the licensee can make those solvent traps into firearms if they chose to do so as long as they register the solvent cans when they intend to do so. Therefore, they are incapable of illegally possessing the solvent traps as licensed dealers. The charge of possession has no application to the Appellant.

This is especially true because the jury found that Mr. Rabel was not guilty of sale of the alleged firearm. Therefore, he must illegally possess the solvent traps in order to be able to be found guilty of the same. [D.E. 48]. In this case, the Appellant can possess silencers and solvent traps in the scope of his employment; he simply cannot sell them without complying with the registration requirements of the NFA. The Court should remand this matter to the District Court to enter an order of dismissal.

IV. The Appellant Was Unfairly Prejudiced by the Admission of Video and Text Messages that Inflamed the Jury and Had No Bearing on the Issues at Bar.

Pursuant to a seizure of the Defendant's phone, the Bureau of Alcohol, Tobacco and Firearms (ATF), conducted a forensic cellphone analysis of data that was contained in the Appellant's, telephone and found a video and text that the

government used at trial. [D.E. 73-1; D.E 123-13b]. The seized video shows an individual firing an AR-type firearm towards the ground. The firearm appears to have automatic capabilities, and it has a silencer attached. The Defendant then responds to the video by sending a text message which states: "LMAO!!!! Love it!!! (various emojis) That solvent trap is real quiet too!!! (various emojis)". [D.E. 73-1; D.E 123-13b].

The Appellant moved the Court to suppress this evidence as being unfairly prejudicial and improper character evidence. [D.E. 73]. The Court denied the Motion In Limine on August 25, 2022 and allowed the government to present the aforementioned evidence to the jury. [D.E. 92].

The government used this "act" evidence to show that the defendant has knowledge that a solvent trap can be converted to a silencer, which is not an issue that is in dispute. [D.E. 85 p. 1]. The defense readily admitted that a solvent trap can be made into a silencer. The text of the response to the video made by the defendant clearly shows that his response was made in jest. He uses the acronym "LOL" to begin his response leaving no doubt the content of the statement that followed. [D.E. 73-1]. The government presented this evidence which unfairly prejudiced the trial by showing someone using a silencer recklessly to impugn the Defendant's character and to impermissibly make it appear the Defendant in some way broke the law by commenting on the use of the silencer by this anonymous individual.

The fact that silencers can be legally obtained further highlights the unfair prejudice of this video. The person in the video may well have legally modified his silencer, as such he is free to legally use it. Further, the government has no evidence that the Appellant has anything to do with the conversion of the solvent trap in the video to a silencer, assuming that a conversion was involved. This evidence is unfairly prejudicial in that it doesn't bear on any issue in this case. It does not show whether or not the defendant had the criminal intent to possess a silencer on the day in question.

All of these inferences are impermissible because the issue in this case is whether or not at the time of the sale on January 21, 2022, the defendant had the intent to illegally possess a firearm.

Federal Rule of Evidence 404(b) provides that:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . .

Fed. R. Evid. 404(b).

The rule is "one of inclusion which allows [extrinsic] evidence unless it tends to prove only criminal propensity. The list provided by the rule is not exhaustive and the range of relevancy outside the ban is almost infinite." *United States v. Stephens*,

365 F.3d 967, 975 (11th Cir. 2004) (quoting *United States v. Cohen*, 888 F.2d 770, 776 (11th Cir. 1989)) (internal quotation marks omitted).

To be admissible under Rule 404(b), evidence of prior bad acts must withstand a three-part test:

(1) the evidence must be relevant to an issue other than defendant's character;

(2) the probative value must not be substantially outweighed by its undue prejudice;

(3) the government must offer sufficient proof so that the jury could find that defendant committed the act.

United States v. Ellisor, 522 F.3d 1255, 1267 (11th Cir. 2008).

It is well-settled in this circuit that the principles governing what is commonly referred to as other crimes evidence are the same whether the conduct occurs before or after the offense charged, and regardless of whether the activity might give rise to criminal liability." *United States v. Delgado*, 56 F.3d 1357, 1365 (11th Cir. 1995) (footnote omitted).

"To establish relevance under the first prong where testimony is offered as proof of intent, it must be determined that the extrinsic offense requires the same

intent as the charged offense." *United States v. Dickerson*, 248 F.3d 1036, 1047 (11th Cir. 2001) (internal quotation marks omitted).

"Where the issue addressed is the defendant's intent to commit the offense charged, the relevancy of the extrinsic offense derives from the defendant's indulging himself in the same state of mind in the perpetration of both the extrinsic and charged offenses."). *United States v. Ellisor*, 522 F.3d 1255, 1268 (11th Cir. 2008).

In the instant case the government is attempting to establish the defendant's intent to show his knowledge of silencers by showing him commenting with a gun owner about how the solvent trap works well as a silencer, which he did in jest. This type of evidence is unfairly prejudicial. The jury will be led to believe that you can simply put a solvent trap on the end of a rifle and it will be a silencer. Further, the jury will have no knowledge of whether the individual in the video legally modified a solvent trap to become a silencer. If he did, then it is perfectly legal for that individual to shoot his weapon with a silencer attached. Therefore, any probative value of the video and the text message will be outweighed by its unfair prejudice.

In addition, the defense is not contesting the fact that a solvent trap can be modified to become a silencer. Anyone who attempts to do so must fill out a Form 1, pay a tax and wait for approval from the ATF before they can use the silencer. [D.E. 162 p.19]. Therefore, showing someone using a silencer has no bearing on

whether the Defendant sold or possessed a solvent trap that he knew was a silencer and specifically wanted to evade all the legal requirements of registration and firearm waiting periods.

Showing a man shooting a high-powered weapon with a silencer into the earth only inflamed the passions of the jury against the defendant. The offered extrinsic evidence requires the same intent as the charged offense. *Dickerson* (supra). The intent in the offenses charged is the intent to illegally possess a firearm. The video and text at issue fail to have any bearing on those issues.

REASONS FOR GRANTING THE WRIT

The Eleventh circuit improperly found that evidence of the ATF's change in policy regarding the legality of solvent traps caused innocent conduct to be criminalized without informing the gun owning community. The denial of the admission of this evidence prevented the Appellant from showing to the jury that it was reasonable for the Appellant not to know of the ATF's change in policy and thus not have the necessary *mens rea* to conclude that the Appellant engaged in criminal conduct.

The Government never established that the Appellant knew that the solvent trap that was received and sold in the gun shop qualified as a firearm

without any modification. As such the Appellant is entitled to an order of dismissal by this Court.

The Appellant as an employee of a licensed gun dealer was allowed to possess firearms. Since the jury acquitted the Appellant of sale, the Appellant's possession of the solvent trap was non-criminal as he simply possessed it as an employee of a licensed dealer. The Appellant is entitled to a reversal.

The trial was unfairly prejudiced by the Government's showing a video of a man shooting a high-powered weapon with a silencer into the earth. The video prejudiced the trial by showing an event that had no bearing on the issue of knowledge of the Appellant it only inflamed the passions of the jury against the defendant. There was no way for the jury to determine if the person in the video was firing an illegal modified solvent trap, a legally purchased silencer or legally modified solvent trap. As such this Court should vacate the conviction and order a new trial absent the impermissible evidence.

CONCLUSION

For the reasons stated here the Petition for a Writ of Certiorari should be granted.

Respectfully Submitted
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition was served via U.S. Mail upon the Solicitor General of the United States, U.S. Department of Justice, Washington D.C. 20530 and upon all counsel of record this 25th day of September, 2024.

BY:s/Gregory A. Samms

GREGORY A. SAMMS, ESQ.
Florida Bar No. 438863

APPENDIX

A1

[DO NOT PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 22-13854

Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ANDERSEN RABEL,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:22-cr-20058-KMW-2

Before JORDAN, LUCK, and LAGOA, Circuit Judges.

PER CURIAM:

Andersen Rabel appeals his conviction for possession of an unregistered firearm in violation of 26 U.S.C. section 5861(d). After review, we affirm.

FACTUAL BACKGROUND

On January 21, 2022, an undercover agent working for the Miami-Dade Police Department visited Miami Gun Shops, a licensed firearms dealer the agent had reason to believe was selling unregistered firearm silencers. As a federal firearms licensee ("FFL"), Miami Gun Shops could manufacture and sell firearms, including silencers, so long as it complied with federal law. Rabel worked at Miami Gun Shops and was designated as a "responsible person" at the store, meaning he could direct the business's firearm policies and practices.

The agent, who was wearing a concealed camera, approached Rabel and asked for the store's owner, Manuel Reguiera. Reguiera was not at the store, so Rabel called him. Rabel gave the phone to the agent, and the agent asked Reguiera if he could purchase "soda cans"—slang for silencers. After speaking with Reguiera about the agent's request, Rabel brought the agent to the back of the store to complete the sale.

Once Rabel and the agent were in the back of the shop, Rabel retrieved four packages labeled "9.5mm Monocore w[ith]

Booster." The agent bought four of these "kits" from Rabel. Each of the kits contained four items. First, the kits contained a hollow metal tube that had an open hole on one end and a closed end cap on the other. These tubes contained monocore "baffling material" that separated the inside of each tube into multiple small chambers. Second, the kits contained a "Nielsen device," also called a "booster," that was attached to the open end of the metal tube. Third, the kits contained a replacement end cap with a hole drilled through it that could be swapped with the closed cap attached to the tube. And fourth, the kits contained an Allen wrench that allowed the buyer to swap the caps. Before completing the sale, the agent asked Rabel if all four kits came with the replacement end cap. Rabel confirmed they did. The kits did not, however, have serial numbers on them and were unregistered. Rabel did not perform a background check on the agent and did not record the sale.

PROCEDURAL HISTORY

A grand jury later indicted Rabel, Reguiera, and Miami Gun Shops on several charges related to the unlawful possession and sale of firearms. In short, the indictment alleged that the kits Rabel sold to the agent were silencers, and therefore firearms, that were subject to federal regulation.[1] Relevant to this appeal, Rabel was indicted on one count of possession of an unregistered firearm in violation of 26 U.S.C. section 5861(d) ("Count Ten"); one count of

[1] A "firearm" includes "any silencer . . . as defined in section 921 of title 18, United States Code." 26 USC § 5845(a).

transfer of an unregistered firearm in violation of 26 U.S.C. section 5861(e) ("Count Eleven"); and one count of failure by a federally licensed dealer to keep proper records in violation of 18 U.S.C. section 922(b)(5) ("Count Twelve").

Rabel moved to dismiss the indictment. As evidenced in his motion, Rabel's defense largely centered on his claim that the tubes included with the kits were legal "solvent traps" used to "capture cleaning solvent." He conceded that once the closed end cap was swapped for the replacement cap the tube operated as a silencer, but he argued that the tubes were not silencers until a person makes that swap. And building on this argument, he argued that Count Ten had to be dismissed because his position as a responsible person at an FFL allowed him to possess solvent traps that, even if they could be turned into silencers, weren't converted yet. The district court found that the issues raised by Rabel in the motion presented factual questions for the jury and therefore denied it.

Both Rabel and the government filed motions in limine. Rabel moved to prevent the government from utilizing text messages and a video it retrieved from his cellphone. The video, which was sent to Rabel over text message, showed an unidentified person firing a gun with a silencer attached. Rabel responded to the video by saying that the "solvent trap" in it was "real quiet."

Rabel argued the text messages and video were unfairly prejudicial and could confuse the jury because they would lead the jury to believe that solvent traps didn't have to be modified to work as silencers. Further, he argued that he was not disputing that solvent

traps could be turned into silencers, and, to the contrary, that it was legal to do so if they were properly registered. He also argued that the probative value of this evidence was weakened by the fact that the jury would not know whether the silencer in the video was legally converted into a silencer. And he argued that a video showing someone shooting a firearm with a silencer attached would prejudice the jury. The government argued that the video and text messages were admissible under Federal Rule of Evidence 404(b) because Rabel's use of the term "solvent trap" to refer to a silencer was relevant to whether he knew the kits were in fact silencers.

The government's motion sought to prevent Rabel from introducing evidence, including expert testimony, that the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") supposedly changed its enforcement practices and legal position on silencer conversion kits—including kits that allow buyers to convert solvent traps into silencers. This evidence included a letter issued by ATF to an unidentified individual about a month before Rabel made his sale that indicated ATF determined silencer conversion kits themselves qualify as silencers. It also included two letters that groups of Senators sent to ATF asking about ATF's perceived policy change. The government argued that Rabel did not allege he relied on this evidence and that it was irrelevant to whether Rabel knew that the kits he sold were in fact silencers. Rabel responded that this evidence would show that ATF's apparent policy change left the public confused about the legal status of solvent traps and conversion kits and that this confusion was relevant to whether

Rabel knew that ATF considered conversion kits and solvent traps to be firearms.

At a status conference before trial, the district court denied Rabel's motion to exclude the government's rule 404(b) evidence. As to the government's motion in limine, the district court found that the evidence related to ATF's perceived policy change on conversion kits was not relevant and granted the motion.

At trial, the government offered the video recording of the sale through the testimony of the agent who visited Miami Gun Shops. The agent testified about his visit to the store, his conversation with Reguiera over the phone, and his transaction with Rabel. He also testified about a previous visit to Miami Gun Shops during which he discussed buying silencers from Reguiera. During this visit, Rabel walked in on the meeting between the two while Reguiera was disassembling a silencer to show the agent.

The government also offered the testimony of Special Agent Andrea Randou, who extracted data from Rabel's cellphone. Randou testified about a text message conversation between Rabel and another employee of Miami Gun Shops. As part of this exchange, Rabel described the contents of a package Miami Gun Shops received as "definitely smaller in diameter but [with] loads [of] staggered expansion chambers." The other employee responded that his "can" was "bored at past that." Randou testified that in her experience "can" is often used to refer to a silencer. She also testified about the text message exchange in which Rabel reacted to the

video of the individual firing a silenced firearm and referred to the silencer as a "solvent trap."

Next, the government presented testimony from Cody Toy, an ATF firearms enforcement officer, who the government offered as an expert witness on firearm identification and silencer design and theory. Toy testified that silencers commonly consist of an outer body, a set of end caps, an expansion chamber, and baffles. He explained that baffling material reduces the sound created when a firearm is discharged. Toy was "not . . . aware of" any purpose baffles serve other than silencing the sound of a firearm. He also explained that the Nielsen device included in the kit is used to counteract the weight a silencer adds to a firearm's barrel and allows a firearm to operate normally when a silencer is attached. Like his testimony about the baffling material, Toy was "[n]ot . . . aware of" any purpose a Nielsen device serves other than allowing a silenced firearm to shoot properly. Finally, Toy explained that he tested one of the kits Rabel sold to the agent. The completed device reduced the sound a firearm made by about fourteen decibels.

Rabel moved for judgment of acquittal at the close of the government's case and argued that the government didn't present sufficient evidence to prove he knew the kits he sold were silencers. The district court found that there was sufficient evidence to allow the jury to infer Rabel's knowledge that the kits were silencers and denied the motion.

Then, Rabel presented his defense. Rabel presented the testimony of Christopher Robinson, who he offered as an expert

witness on firearms, silencers, and firearm cleaning. Looking at one of the kits Rabel sold, Robinson opined that the device was a solvent trap and that the monocore baffle in the tube was used to catch debris when cleaning a firearm barrel. To support his conclusion that the kits were solvent traps, Robinson noted the tubes did not have certain features, like foam or holes within the tube, that many silencers have. Robinson conceded, however, that once the end caps within the kit were swapped the device operated as a silencer.

The jury found Rabel guilty of possessing an unregistered silencer, and not guilty of the other counts. Rabel appeals his conviction.

STANDARD OF REVIEW

We review a district court's ruling on a motion in limine for an abuse of discretion. *United States v. Estrada*, 969 F.3d 1245, 1261 (11th Cir. 2020). We generally review de novo the denial of a motion for judgment of acquittal based on the sufficiency of the evidence. *United States v. Hernandez*, 433 F.3d 1328, 1332 (11th Cir. 2005). "[W]e review the evidence presented at trial in the light most favorable to the government, and we draw all reasonable factual inferences in favor of the jury's verdict." *United States v. Bergman*, 852 F.3d 1046, 1060 (11th Cir. 2017).

DISCUSSION

Rabel challenges his conviction by arguing: (1) the district court erred in denying his motion in limine and granting the government's; (2) the district court erred in denying his motion for

judgment of acquittal; and (3) the district court should have entered a judgment of acquittal because he could not be convicted of unlawfully possessing a firearm as the designated responsible person for his licensed firearms dealer. We address each argument in turn.

The District Court's Evidentiary Rulings

Rabel argues that he should have been allowed to offer evidence about the ATF's supposed policy change on the legality of solvent traps and silencer conversion kits. He contends that this evidence would have shown a "change in the law" about which he and the public were given insufficient notice. The ATF evidence, he says, would show that he lacked the requisite mens rea when he made the sale. We disagree.

Relevant evidence is generally admissible. Fed. R. Evid. 402. Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." Fed. R. Evid. 401. "Irrelevant evidence is not admissible." Fed. R. Evid. 402.

It is unlawful "to receive or possess a firearm which is not registered to [the person] in the National Firearms Registration and Transfer Record." 26 U.S.C. § 5861(d). The term "firearm" includes "any silencer []as defined in" 18 U.S.C. section 921. *Id.* § 5845(a). Under section 921, "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" is a "firearm silencer." 18 U.S.C. § 921(a)(25).

To prove a violation of section 5861(d), the government must show that: (1) the defendant "possessed a 'firearm' within the meaning of 26 U.S.C. [section] 5845(a) of the National Firearms Act"; (2) he "knew the features of the firearm that brought it within the scope of the Act"; and (3) "the firearm was not registered to the defendant." *United States v. Wilson*, 979 F.3d 889, 903–04 (11th Cir. 2020). "The Supreme Court and this Court consistently have held that, although the requisite mens rea to prove a violation of [section] 5861(d) is 'knowledge,' that mens rea does not attach to each element of that offense." *Id.* at 904. "[T]he government . . . need not prove that the defendant knew the weapon was unregistered[,] . . . . that the defendant knew his possession of the weapon was unlawful[,] or that he knew 'what features define a "firearm" under 26 U.S.C. [section] 5845(a).'" *Id.* (emphases omitted) (quoting *United States v. Ruiz*, 253 F.3d 634, 638 n.4 (11th Cir. 2001)). The government only needs to "prove that the defendant was 'aware that his weapon possess[ed] *any* of the features detailed in 26 U.S.C. [section] 5845(a).'" *Id.* at 904–05 (first alteration in original) (quoting *Ruiz*, 253 F.3d at 638).

Here, the district court properly concluded that Rabel's evidence relating to ATF's alleged policy change was irrelevant. Even if this evidence would have shown ATF changed its position on the legality of kits like the ones Rabel sold, causing confusion about the legality of the kits among the public, the evidence would still

be irrelevant to the mens rea our precedent requires. The government did not need to prove that Rabel "knew his possession of the [kits] was unlawful." *Id.* at 904. It only needed to prove that Rabel knew that the kits had the features that made them silencers under the statute. *Id.* at 904–05. So, while Rabel maintains the evidence would have shown that he and the public did not have notice that the kits were illegal under the statute, that argument doesn't help him here. The district court properly excluded the evidence.

Rabel's challenge to the district court's denial of his motion in limine also fails. He argues that the district court should have excluded the text messages and video pulled from his phone because they were not relevant to an issue at trial. As Rabel frames the issue, the government only used this evidence to prove that Rabel knew that solvent traps could be converted into silencers, which he has never disputed. And he argues that the video prejudiced the jury against him, and that any unfair prejudice is underscored by the fact that silencers can be legally obtained, the silencer in the video might have been legal, and the government did not present evidence showing that Rabel was involved in the event depicted in the video. We find no error in the admission of this evidence.

Under Federal Rule of Evidence 404(b), "[e]vidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Fed. R. Evid. 404(b)(1). But rule 404(b) evidence can be used "for another purpose, such as

proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b)(2). "The rule is 'one of inclusion which allows extrinsic evidence unless it tends to prove only criminal propensity.'" *United States v. Ellisor*, 522 F.3d 1255, 1267 (11th Cir. 2008) (alteration accepted) (quoting *United States v. Stephens*, 365 F.3d 967, 975 (11th Cir. 2004)).

"We employ a three-part test to determine whether a district court abused its discretion by admitting evidence of prior bad acts under Federal Rule of Evidence 404(b)[.]" *United States v. Phaknikone*, 605 F.3d 1099, 1107 (11th Cir. 2010). "First, the evidence must be relevant to an issue other than the defendant's character. Second, as part of the relevance analysis, there must be sufficient proof so that a jury could find that the defendant committed the extrinsic act." *Id.* (quoting *United States v. Miller*, 959 F.2d 1535, 1538 (11th Cir. 1992) (en banc)). And "[t]hird, the probative value of the evidence must not be 'substantially outweighed by its undue prejudice, and the evidence must meet the other requirements of [r]ule 403.'" *Id.* (quoting *Miller*, 959 F.2d at 1538). "In reviewing issues under [r]ule 403, we look at the evidence in a light most favorable to its admission, maximizing its probative value and minimizing its undue prejudicial impact." *United States v. Brown*, 441 F.3d 1330, 1362 (11th Cir. 2006).

The district court appropriately admitted the text messages and video. First, the evidence was clearly relevant to whether Rabel knew the kits were silencers. Throughout his trial and

appeal, Rabel has consistently maintained that he believed that the kits were solvent traps. Evidence of Rabel referring to an apparent silencer as a solvent trap was directly relevant to whether Rabel's belief was sincere. Rabel appears to concede this much in his reply brief, stating that he does not argue the evidence wasn't relevant. He also doesn't dispute that he sent the message, so there was sufficient evidence that he sent it.

Finally, viewing this evidence in the light most favorable to its admission, its probative value as to Rabel's knowledge was not substantially outweighed by whatever prejudicial effect it had in depicting an individual discharging a firearm. Notably, Rabel was acquitted of more charges than he was convicted, showing that any possible prejudicial effect did not influence the jury. *Cf. United States v. Rodriguez*, 765 F.2d 1546, 1560 (11th Cir. 1985) (noting that a partial acquittal "is telling proof that [the defendant] was not prejudiced by the prosecutor's [improper] remarks" (quotation omitted)). The district court therefore did not abuse its discretion when it allowed this evidence to be presented.

Motion for Judgment of Acquittal

Rabel next argues that the district court erred in denying his motion for judgment of acquittal because there was insufficient evidence that he knew the silencers were firearms under the National Firearms Act, and he continues to argue that the devices were legal solvent traps that only became silencers once the end caps were swapped. The government responds that it presented sufficient

evidence that Rabel knew the kits had the features that allowed them to suppress the sound of a firearm. We agree with the government.

As discussed, the government only needed to prove that Rabel "knew the features of the firearm that brought it within the scope of the Act." *Wilson*, 979 F.3d at 903–04. It did not need to prove that Rabel knew what defines a firearm under the statute. *Id.* A "firearm silencer" is "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." 18 U.S.C. § 921(a)(25) (emphasis added).

A district court must deny a motion for judgment of acquittal based on the sufficiency of the evidence "if 'a reasonable fact-finder could conclude that the evidence established the defendant's guilt beyond a reasonable doubt.'" *United States v. Thompson*, 610 F.3d 1335, 1337 (11th Cir. 2010) (quoting *United States v. Descent*, 292 F.3d 703, 706 (11th Cir. 2002)). Because Rabel was found guilty, we view the evidence in the light most favorable to the government and the jury's verdict. *Bergman*, 852 F.3d at 1060.

First, there was sufficient evidence that the kits were a "combination of parts, designed or redesigned, and intended for use in assembling or fabricating a firearm silencer" to "silenc[e], muffl[e], or diminish[] the report of a portable firearm." 18 U.S.C. § 921(a)(25). The government offered evidence that multiple

features of the kits—the baffles and the Nielsen device—only served to muffle the sound of a firearm discharge and allow a firearm to operate normally with a silencer attached. It also offered evidence that once the end caps were swapped the device could reduce the sound of a firearm by about fourteen decibels. And Rabel's own expert testified that once the end caps were swapped the kit operated as a silencer. Finally, the government presented testimony that Rabel had previously witnessed the agent buying silencers from Reguiera. The jury therefore had more than enough evidence before it to determine that the kit was a silencer beyond a reasonable doubt.

Second, the government also presented extensive evidence that Rabel knew that the kits were silencers. The evidence showed that Rabel sold the kits after the agent asked to buy "soda cans" and that "soda can" is known slang for silencers. One text message string presented at trial showed another individual using the term "can" to Rabel before he made the sale to the agent, which demonstrated that he was familiar with the term at the time. The evidence also showed that Rabel knew the contents of each kit. The package for each indicated that they contained a "[m]onocore w[ith] booster," so a jury could find that Rabel knew they contained silencers given that these two components were used as parts for a silencer. And Rabel clearly knew each package contained the swappable end caps that allowed the buyer to make a fully functioning silencer—he assured the agent who purchased the kits that they did. Finally, while Rabel argued that he thought the packages contained solvent traps, the government's rule 404(b)

evidence called the sincerity of that belief into question. Given this evidence, the district court correctly denied Rabel's motion for judgment of acquittal.

Rabel's counterarguments don't compel a different conclusion. He repeats his contention that the government had to prove he knew the tubes were "in fact firearms that come within the ambit" of the statute and implies that the statute contains a scienter requirement. But, as we've already explained, under the possession-of-an-unregistered-silencer statute, he only needed to know the kits had the features that made them silencers. *See Wilson*, 979 F.3d at 904.

Rabel also argues that the swappable end caps don't make the kits silencers because, as he sees it, the tubes aren't silencers until the end caps are actually swapped. But that argument is contrary to the statute's language, which defines the term "silencer" to mean "any combination of parts, designed or redesigned, and intended for use in assembling or fabricating a firearm silencer"—and not just the assembled product. 18 U.S.C. § 921(a)(25).

Because a jury could find beyond a reasonable doubt that Rabel knew the kits had the features that made them silencers, the district court properly denied Rabel's motion for a judgment of acquittal.

Rabel's Status as a Responsible Person

Finally, Rabel argues that the district court should have entered a judgment of acquittal because Miami Gun Shops has a license to manufacture and distribute firearms. He contends that,

because Miami Gun Shops has an FFL license and he was a designated responsible person, he could possess solvent traps and weapon parts that were used to make firearms and could not illegally possess the kits he sold. Rabel also makes passing reference to the fact that he was acquitted of the other two counts he faced at trial and argues his acquittals are inconsistent with his guilty verdict.

The problem for Rabel, as he recognizes in his reply brief, is that an unregistered silencer cannot be legally possessed even by a manufacturer. *See* 27 C.F.R. § 479.101 ("Each manufacturer, importer, and maker shall register each firearm he manufactures . . . ."). Rabel's entire challenge relies on his argument that the kits were not themselves firearms subject to regulation. But, as we've already explained, a silencer is a firearm under the statute, 26 U.S.C. § 5845(a), and there was sufficient evidence at trial showing that the kits were in fact silencers. Because Rabel hasn't demonstrated that Miami Gun Shops was entitled to possess these silencers, we are unpersuaded that his status as the store's responsible person has any bearing on his conviction.

Rabel's reference to the fact that he was acquitted of the other counts at trial doesn't convince us otherwise. "[I]nconsistent jury verdicts are generally insulated from review because a jury may reach conflicting verdicts through mistake, compromise, or lenity[.]" *United States v. Green*, 981 F.3d 945, 960–61 (11th Cir. 2020) (quotation omitted). "[A]s long as the guilty verdict is supported by sufficient evidence, it must stand, even in the face of an

inconsistent verdict on another count." *Id.* (quoting *United States v. Mitchell*, 146 F.3d 1338, 1345 (11th Cir. 1998)). Therefore, even assuming the verdicts are inconsistent, they do not compel us to vacate Rabel's conviction, and we find no error.

AFFIRMED.

A2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

UNITED STATES OF AMERICA

v.

ANDERSEN RABEL

§ **JUDGMENT IN A CRIMINAL CASE**
§
§
§ Case Number: **1:22-CR-20058-KMW(2)**
§ USM Number: **83627-509**
§
§ Counsel for Defendant: **Gregory Antonio Samms**
§ Counsel for United States: **Karla Albite**

THE DEFENDANT:

☐	pleaded guilty to count(s)	
☐	pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court.	
☐	pleaded nolo contendere to count(s) which was accepted by the court	
☒	**was found guilty on Count 10 of the Indictment at trial.**	

The defendant is adjudicated guilty of these offenses:

Title & Section / Nature of Offense	Offense Ended	Count
26 U.S.C. § 5861(d) Possession of an Unregistered Firearm.	**02/17/2022**	**10**

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☒ **All remaining Counts are dismissed on the motion of the United States.**

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

November 10, 2022
Date of Imposition of Judgment

Signature of Judge

KATHLEEN M. WILLIAMS
UNITED STATES DISTRICT JUDGE
Name and Title of Judge

11/16/22
Date

DEFENDANT: ANDERSEN RABEL
CASE NUMBER: 1:22-CR-20058-KMW(2)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

8 months.

☒ **The court makes the following recommendations to the Bureau of Prisons:**
Defendant be designated to FCI Miami.

☐ The defendant is remanded to the custody of the United States Marshal.
☐ The defendant shall surrender to the United States Marshal for this district:

☐ at ☐ a.m. ☐ p.m. on

☐ as notified by the United States Marshal.

☒ **The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:**

☒ **On 1/17/2023 by 12:00 p.m.**
☐ as notified by the United States Marshal.
☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By
DEPUTY UNITED STATES MARSHAL

DEFENDANT: ANDERSEN RABEL
CASE NUMBER: 1:22-CR-20058-KMW(2)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **three (3) years.**

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (*check if applicable*)
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. (*check if applicable*)
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. (*check if applicable*)
7. ☐ You must participate in an approved program for domestic violence. (*check if applicable*)

You must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

DEFENDANT: ANDERSEN RABEL
CASE NUMBER: 1:22-CR-20058-KMW(2)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand additional information regarding these conditions is available at www.flsp.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: ANDERSEN RABEL
CASE NUMBER: 1:22-CR-20058-KMW(2)

SPECIAL CONDITIONS OF SUPERVISION

Home Detention: Immediately upon release from imprisonment, the defendant shall participate in the Home Detention Program for a period of **8 months**. During this time, the defendant shall remain at his place of residence except for employment and other activities approved in advance and provide the U.S. Probation Officer with requested documentation.

Related Concern Restriction: The defendant shall not own, operate, act as a consultant, be employed in, or participate in any manner, in any related concern during the period of supervision.

Permissible Search: The defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

Unpaid Restitution, Fines, or Special Assessments: If the defendant has any unpaid amount of restitution, fines, or special assessments, the defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay.

DEFENDANT: ANDERSEN RABEL
CASE NUMBER: 1:22-CR-20058-KMW(2)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments page.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$100.00	$.00	$.00		

☐ The determination of restitution is deferred until An *Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

☐ Restitution amount ordered pursuant to plea agreement $

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the schedule of payments page may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

Restitution with Imprisonment - It is further ordered that the defendant shall pay restitution in the amount of **$.00**. During the period of incarceration, payment shall be made as follows: (1) if the defendant earns wages in a Federal Prison Industries (UNICOR) job, then the defendant must pay 50% of wages earned toward the financial obligations imposed by this Judgment in a Criminal Case; (2) if the defendant does not work in a UNICOR job, then the defendant must pay a minimum of $25.00 per quarter toward the financial obligations imposed in this order. Upon release of incarceration, the defendant shall pay restitution at the rate of 10% of monthly gross earnings, until such time as the court may alter that payment schedule in the interests of justice. The U.S. Bureau of Prisons, U.S. Probation Office and U.S. Attorney's Office shall monitor the payment of restitution and report to the court any material change in the defendant's ability to pay. These payments do not preclude the government from using other assets or income of the defendant to satisfy the restitution obligations.

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, 18 U.S.C. §2259.
** Justice for Victims of Trafficking Act of 2015, 18 U.S.C. §3014.
*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: ANDERSEN RABEL
CASE NUMBER: 1:22-CR-20058-KMW(2)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☒ Lump sum payments of $100.00 due immediately, balance due

It is ordered that the Defendant shall pay to the United States a special assessment of $100.00 for Count 10, which shall be due immediately. Said special assessment shall be paid to the Clerk, U.S. District Court. Payment is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 8N09
MIAMI, FLORIDA 33128-7716

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several
See above for Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:
FORFEITURE of the defendant's right, title and interest in certain property is hereby ordered consistent with the plea agreement. The United States shall submit a proposed Order of Forfeiture within three days of this proceeding.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.