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Appendix A

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

APR 22 2026

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOHN THOMAS FENCL,

Defendant - Appellant.

No. 24-1373

D.C. No.

3:21-cr-03101-JLS-1

MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Janis L. Sammartino, District Judge, Presiding

Argued and Submitted March 3, 2026
Pasadena, California

Before: WARDLAW and DE ALBA, Circuit Judges, and BROWN, District
Judge.**

John Thomas Fencel was convicted of three counts of knowingly possessing
unregistered short-barreled rifles and four counts of knowingly possessing
unlawful firearm silencers. He appeals both the district court's denial of his

* This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

** The Honorable Jeffrey Vincent Brown, United States District Judge
for the Southern District of Texas, sitting by designation.

motion to suppress evidence and his conviction. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. The district court did not err in denying Fencel’s motion to suppress evidence found during the search of his home. “We review a ‘district court’s rulings on motions to suppress,’ including applications of the good faith exception to the exclusionary rule, . . . ‘*de novo*,’” and factual findings for clear error. *United States v. Barnes*, 895 F.3d 1194, 1199 (9th Cir. 2018) (quoting *United States v. Underwood*, 725 F.3d 1076, 1081 (9th Cir. 2013)). Here, both parties agree that officers searched Fencel’s home without a warrant or other exigent circumstances sufficient to justify the search. But, even assuming a Fourth Amendment violation took place, the exclusionary rule does not apply necessarily apply here. “To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.” *Herring v. United States*, 555 U.S. 135, 144 (2009). Accordingly, “the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence,” but not mere isolated negligence. *Id.*

The district court properly applied the good faith exception to the exclusionary rule. “[O]ur good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known

that the search was illegal.” *United States v. Leon*, 468 U.S. 897, 923 n.23 (1984).

Detective White made multiple attempts to confirm Fencel’s probationary status: he checked the police department database which indicated that Fencel was still on probation; he followed his department’s policy and contacted the probation office to confirm that Fencel was still on probation; and his partner called the City Attorney’s Office and an attorney from the office stated that Fencel was still on probation. While all three sources provided factually incorrect information to Detective White, “the good faith exception” can apply to an officer who “*reasonably relied on an external source, which turned out to be erroneous.*”

United States v. Camou, 773 F.3d 932, 945 (9th Cir. 2014). Here, Detective White took the extra step of checking multiple sources to confirm the accuracy of the external sources he relied upon. In these circumstances, the government has established that any mistakes did not rise to the level of gross negligence required for application of the exclusionary rule.

Fencel argues that the police “database contained systemic errors,” and therefore the good faith exception should not apply. The Supreme Court has explained that “[i]n a case where systemic errors were demonstrated, it might be reckless for officers to rely on an unreliable” database. *Herring*, 555 U.S. at 146. But, here, there is “no evidence” that errors in the police database system were “routine or widespread.” *Id.* at 147; *see also Arizona v. Evans*, 514 U.S. 1, 15

(1995) (holding that reliance on a database to be objectively reasonable even though it was erroneous and a similar “error occurred once every three or four years”). To the contrary, the El Cajon Police Department worked with the Probation Department to implement Assembly Bill 1950 and notified officers of the change in law. Moreover, Detective White mitigated the risk of any errors in the police database by making multiple efforts to confirm the information through checking other sources.

2. The district court’s jury instructions, and the prosecutor’s closing argument remarks, do not require reversal. “We review de novo whether the Government’s theory of [guilt] at trial was legally valid.” *United States v. Milheiser*, 98 F.4th 935, 941 (9th Cir. 2024). “A prosecutor’s misstatements of law during closing argument” may also “provide grounds for reversal.” *United States v. Velazquez*, 1 F.4th 1132, 1136 (9th Cir. 2021). While there is a “potential intra-circuit conflict on the standard of review for challenges to prosecutorial comments,” specifically whether that standard of review is de novo or for an abuse of discretion, we need not resolve this issue because “we reach the same conclusion under either standard of review.” *Id.* at 1137.

Neither the definition of a rifle nor the definition of a silencer requires proof of subjective intent. A short-barreled rifle is “a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder.” 26 U.S.C. § 5845(c).

In similar contexts, we have held that intended use “turns solely on an *objective* inquiry into the article’s likely use in light of its features and any accompanying labeling,” rather than a subjective inquiry into the manufacturer’s or user’s intent. *United States v. Marschall*, 82 F.4th 774, 780 (9th Cir. 2023); *see also Posters ‘N’ Things, Ltd. v. United States*, 511 U.S. 513, 519–22 (1994) (holding that the phrase “primarily intended . . . for use” refers to an item’s likely use as an objective matter, rather than the subjective intent of the item’s buyer or seller).

The definition of a silencer also does not require proof of subjective intent. A silencer includes “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.” 18 U.S.C.A. § 921(a)(25). Just as in the rifle definition, the phrase “intended for use” refers to an objective inquiry related to the object’s likely use, rather than a subjective inquiry into the manufacturer’s or user’s state of mind.

Moreover, even if either the rifle or silencer definition required proof of subjective intent, any error in failing to give such an instruction was harmless beyond a reasonable doubt. *See United States v. Perez*, 962 F.3d 420, 441 (9th Cir. 2020). The district court judge instructed the jury on the relevant definitions of both rifles and silencers but did not explain whether either definition required subjective intent. In closing argument, the prosecutor argued that the three short-

barreled rifles were intended to be fired from the shoulder because of the presence of a “shoulder stock”; because “the length of pull for each of these is a rifle length of pull, meaning that they were all intended or designed with a length of pull to be braced against your shoulder”; and because they each had “rifle sights.” The prosecutor further argued that FencI “lied” when he stated that he did not intend to shoot the three rifles from the shoulder. Moreover, the prosecutor maintained that FencI’s statement that the silencers had “an automotive purpose” was not credible, because the evidence established that the only purpose for the four charged objects was to be used as silencers. In light of the substantial evidence that FencI subjectively intended to use the charged items as rifles and silencers and the prosecutor’s arguments that FencI’s statements to the contrary were untruthful, any errors in the jury instructions defining the offenses, or in the prosecutor’s statements during closing argument, were harmless beyond a reasonable doubt.

AFFIRMED.

Appendix B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUL 31 2026

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JOHN THOMAS FENCL,

Defendant - Appellant.

No. 24-1373

D.C. No.

3:21-cr-03101-JLS-1

Southern District of California,
San Diego

ORDER

Before: WARDLAW and DE ALBA, Circuit Judges, and BROWN, District Judge.*

Judges Wardlaw, de Alba, and Brown have unanimously voted to deny the
Petition for Rehearing. The Petition for Rehearing, Dkt. No. 49, is **DENIED**.

* The Honorable Jeffrey Vincent Brown, United States District Judge for the Southern District of Texas, sitting by designation.

Appendix C

26 U.S.C. § 5845. Definitions

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. The term “firearm” shall not include an antique firearm or any device (other than a machinegun or destructive device) which, although designed as a weapon, the Secretary finds by reason of the date of its manufacture, value, design, and other characteristics is primarily a collector’s item and is not likely to be used as a weapon.

(b) Machinegun.—The term “machinegun” means any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger. The term shall also include the frame or receiver of any such weapon, any part designed and intended solely and exclusively, or combination of parts designed and intended, for use in converting a weapon into a machinegun, and any combination of parts from which a machinegun can be assembled if such parts are in the possession or under the control of a person.

(c) Rifle.—The term “rifle” means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger, and shall include any such weapon which may be readily restored to fire a fixed cartridge.

* * *

(f) Destructive device.—The term “destructive device” means (1) any explosive, incendiary, or poison gas (A) bomb, (B) grenade, (C) rocket having a propellant charge of more than four ounces, (D) missile having an explosive or incendiary charge of more than one-quarter ounce, (E) mine, or (F) similar device; (2) any type of weapon by whatever name known which will, or which may be readily converted

to, expel a projectile by the action of an explosive or other propellant, the barrel or barrels of which have a bore of more than one-half inch in diameter, except a shotgun or shotgun shell which the Secretary finds is generally recognized as particularly suitable for sporting purposes; and (3) any combination of parts either designed or intended for use in converting any device into a destructive device as defined in subparagraphs (1) and (2) and from which a destructive device may be readily assembled. The term “destructive device” shall not include any device which is neither designed nor redesigned for use as a weapon; any device, although originally designed for use as a weapon, which is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device; surplus ordnance sold, loaned, or given by the Secretary of the Army pursuant to the provisions of section 4684(2), 4685, or 4686 of title 10 of the United States Code; or any other device which the Secretary finds is not likely to be used as a weapon, or is an antique or is a rifle which the owner intends to use solely for sporting, recreational or cultural purposes.

* * *

26 U.S.C. § 5861. Prohibited acts

It shall be unlawful for any person—

* * *

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

* * *

26 U.S.C. § 5871. Penalties

Any person who violates or fails to comply with any provision of this chapter shall, upon conviction, be fined not more than \$10,000, or be imprisoned not more than ten years, or both.

18 U.S.C. § 921. Definitions

(a) As used in this chapter—

* * *

(7) The term “rifle” means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of an explosive to fire only a single projectile through a rifled bore for each single pull of the trigger.

* * *

(25) 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.

* * *

Appendix D

COURT'S INSTRUCTION NO. 11

14.25 FIREARMS—POSSESSION OF UNREGISTERED FIREARM (26 U.S.C. § 5861(d))

The defendant is charged in Counts 1-3 of the indictment with possession of an unregistered firearm in violation of Section 5861(d) of Title 26 of the United States Code. For the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, for Count 1, the defendant knowingly possessed a firearm, specifically a 5.56 NATO/.223 caliber AR-style Short Barreled Rifle made from parts including a Palmetto State Armory upper receiver, which did not bear legitimate manufacturer's markings or a serial number; and

For Count 2, the defendant knowingly possessed a firearm, specifically a 5.56 NATO/.223 caliber AR-style Short Barreled Rifle, which did not bear legitimate manufacturer's markings or a serial number; and

For Count 3, the defendant knowingly possessed a firearm, a Kaiser Defense, model KR-5, 5.56 NATO/.223 caliber Short Barreled Rifle, bearing serial number AI06042; and

Second, for Counts 1-3, the defendant was aware that the firearm was a rifle with a barrel of less than 16 inches in length; and

Third, for Counts 1-3, the defendant had not registered the firearm with the National Firearms Registration and Transfer Record.

The government need not prove that the defendant knew that possessing the firearm was illegal.

A firearm is defined as: (1) a rifle having a barrel or barrels of less than 16 inches in length; or (2) any silencer. The term "firearm" does not include an antique firearm.

The term “antique firearm” means any firearm not designed or redesigned for using rim fire or conventional center fire ignition with fixed ammunition and manufactured in or before 1898 (including any matchlock, flintlock, percussion cap, or similar type of ignition system or replica thereof, whether actually manufactured before or after the year 1898) and also any firearm using fixed ammunition manufactured in or before 1898, for which ammunition is no longer manufactured in the United States and is not readily available in the ordinary channels of commercial trade.

The term “rifle” means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger, and shall include any such weapon which may be readily restored to fire a fixed cartridge.

COURT'S INSTRUCTION NO. 12

**14.25 FIREARMS—POSSESSION OF UNREGISTERED FIREARM
(26 U.S.C. § 5861(d))**

The defendant is charged in Counts 4-7 of the indictment with possession of an unregistered firearm in violation of Section 5861(d) of Title 26 of the United States Code. For the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, for Count 4-7, the defendant knowingly possessed a firearm, specifically a firearm silencer that did not bear legitimate manufacturer's markings or a serial number; and

Second, for Counts 4-7, the defendant was aware that the firearm was a firearm silencer, a device for silencing, muffling, or diminishing the report of a portable firearm, including any combination of parts, designed or redesigned, and intended for the use in assembling or fabricating a firearm silencer or firearm muffler, any part intended only for use in such assembly or fabrication; and

Third, for Counts 4-7, the defendant had not registered the firearm with the National Firearms Registration and Transfer Record.

The government need not prove that the defendant knew that possessing the firearm was illegal.

A firearm is defined as: (1) a rifle having a barrel or barrels of less than 16 inches in length; or (2) any silencer. The term "firearm" does not include an antique firearm.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN THOMAS FENCL,

Defendant.

CASE NO.: 21CR3101-JLS

Hon. Janis L. Sammartino

Date: October 26, 2023

Time: 8:30 a.m.

**Proposed Theory of Defense Jury
Instructions**

Mr. Fencl, by and through counsel Theo Torres, Holly Sullivan, and Federal Defenders of San Diego, Inc., hereby submits the following proposed jury instructions:

THEORY OF THE DEFENSE INSTRUCTION

For Counts 1 through 3, Mr. Fencil's theory of defense is that he was not required to register the charged items, because he intended the guns to be AR-platform pistols when they were completely built, and he never intended to fire the weapons from his shoulder. The only reason they had shoulder stocks attached was so that they would not fall over as they sat in his locked safe. Because they were not designed and intended to be fired from the shoulder, the charged weapons are not "rifles" under the law. If the government does not prove beyond any reasonable doubt that Mr. Fencil intended to fire these weapons from his shoulder, then you must find him not guilty of these counts.

For Counts 4 through 7, Mr. Fencil's theory of defense is that he did not knowingly possess firearm silencers. Instead, Mr. Fencil possessed a bag of miscellaneous metal tubes that included the charged items, which he intended to later use as solvent traps, custom fuel filters, and wiring sheathes in the course of his business as a mobile heavy-duty truck mechanic. Mr. Fencil was not aware that any item in the bag recovered by officers had been configured with two drilled threads caps at each end. If the government does not prove beyond any reasonable doubt that Mr. Fencil intended to use these items as firearms silencers, then you must find him not guilty of these counts.

AUTHORITY

United States v. Houston, 648 F.3d 806, 816 (9th Cir. 2011) ("[A] defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor.") (quoting *Mathews v. United States*, 485 U.S. 58, 63 (1988)); *United States v. Kayser*, 488 F.3d 1070, 1076 (9th Cir. 2007) ("The legal standard [for a theory of defense instruction] is generous: a defendant is entitled to an instruction concerning his

1 theory of the case if the theory is legally sound and evidence in the case makes it
2 applicable, even if the evidence is weak, insufficient, inconsistent, or of doubtful
3 credibility. A defendant needs to show only that there is evidence upon which the
4 jury could rationally sustain the defense.”) (internal citation and quotations
5 omitted); *United States v. Castillo-Mendez*, 868 F.3d 830, 839 (9th Cir. 2017)
6 (observing that the government must prove that a defendant intended to enter the
7 United States free from official restraint).

8
9
10 Respectfully submitted,

11
12 Dated: October 25, 2023

s/ Theo Torres

Federal Defenders of San Diego, Inc.
Attorneys for Mr. Fencil

Appendix E

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1 THE COURT: Okay. Well, take a moment and read
2 the theory of defense. And then I'll tell you the
3 Court's thoughts.

4 With regard to the theory of defense, I think
5 it's a very fine statement of a theory of defense, but
6 it does not rise to the level of an actual defense.
7 It's argument, Counsel, and I expect you it make that
8 argument. That's what I was anticipating in this case,
9 but I will not instruct on this.

10 I mean, we're not here to -- I mean, so much of
11 what's in here -- the only reason there was a shoulder
12 stock attached was so that they wouldn't fall over. One
13 does not instruct on that, Mr. Torres and Ms. Sullivan,
14 and I think you both kind of realize that.

15 And the same is true with the second paragraph.
16 So this will not be given, but it's certainly fine to
17 argue it. And I think all the law that permits you to
18 argue that is given by the Court and the instructions we
19 just settled.

20 I'm sorry. I haven't heard from you, but I'm
21 hoping that maybe we will get started soon.

22 MR. HOWE: I'll just add, I think, for the
23 record, these are highly argumentative. They're not the
24 sort of general instruction that generally is given as a
25 theory of defense.

1 And I think at least part of it would be
2 inaccurate as a statement of law because if Mr. Fenc1
3 did know that these were intended to be fired from the
4 shoulder, then whether he intended to fire them from the
5 shoulder would not show that they weren't short-barrel
6 rifles.

7 So for all those reasons, I agree with the
8 Court.

9 THE COURT: Okay. So --

10 MR. TORRES: I would disagree with that
11 statement of law, your Honor, but --

12 THE COURT: -- I'm not going to give this --
13 I'm sorry. Go ahead.

14 MR. TORRES: I understand the Court's ruling,
15 but I would disagree with Mr. Howe's statement of law.
16 I do think that Mr. Fenc1's individual intent is
17 dispositive here under the National Firearms Act.

18 MR. HOWE: I think his individual knowledge is
19 dispositive on the *mens rea* element. But if we were
20 going to say that what he intended to do with it defines
21 what the weapon is, it would essentially collapse the
22 *mens rea* requirement and the short-barrel rifle
23 requirement.

24 And I think that actually makes it more
25 difficult on them because they're taking away the

1 requirement that it actually be shown that it's a
2 short-barrel rifle before we get to the question
3 *mens rea*.

4 THE COURT: Okay.

5 MR. TORRES: So, your Honor, I don't want to
6 belabor this point, but the Ninth Circuit in
7 interpreting the National Firearms Act has interpreted
8 the phrase "designed and intended," which is the
9 operative phrase here, to require a showing of the
10 defendant's specific intent.

11 When the word is just "designed" without
12 "intended," the Ninth Circuit has said that's with
13 reference to objective design features. But here he
14 don't have "designed," we have "designed and intended."

15 THE COURT: But it's good argument. It's good
16 argument.

17 Okay. Let's see. We'll redo everything. We
18 know what the Court's going to do. We've got Mr. Colon
19 on the witness stand.

20 Not yet, sir, but soon.

21 And where are we going from there? How many
22 other witnesses? At this point, you've told the
23 Government that Mr. Fencel's going to testify. Who else,
24 if anybody else?

25 MS. SULLIVAN: That's it, your Honor.

1 THE COURT: That's it? So are we likely to
2 close the evidence this morning? Of course, we don't
3 know how long Mr. Fenc1's going to take.

4 MS. SULLIVAN: I would believe so, yes.

5 THE COURT: Okay. And then I'll ask you if you
6 have a rebuttal.

7 Are they all here?

8 THE CLERK: I'm missing one.

9 THE COURT: We're missing a juror. Okay. So
10 we've got a few minutes.

11 MR. HOWE: And we are on our last witness.
12 Obviously, it will depend on how the testimony comes
13 out, but at least at the moment, we don't intend to have
14 any rebuttal case, just to give the Court an estimate.

15 THE COURT: All right.

16 MR. HOWE: And then I'll also note just for
17 clarification, we intend to argue that Mr. Fenc1 did
18 intend to fire them from the shoulder. So I think this
19 argument -- this distinction will not be an issue for
20 how we argue the case regardless, just for
21 clarification.

22 THE COURT: Okay. Thank you. So let's finish
23 the evidence on both sides, see if there's a rebuttal
24 case, which there's not likely to be.

25 I could instruct this morning probably, if it

1 (The following proceedings took place in
2 front of the jury.)

3 THE COURT: Okay. Please be seated, everyone.

4 Good afternoon, members of the jury. We're now
5 to the final point in closing this case, and that's the
6 final argument by the counsel. As I've indicated, we'll
7 start with the Government. They have the burden of
8 proof. They also get the last word because they have
9 the burden of proof. And there are time limits. So we
10 will definitely get this case to you this afternoon.

11 Mr. Kimura, you may proceed, sir.

12 MR. KIMURA: Thank you, your Honor.

13 John Fenc1 is not a casual gun owner. That's
14 what we told you at the beginning of this case. And
15 that's what the evidence has shown. That's shown that
16 he is an experienced and avid gun enthusiast. He
17 purchased them, he manufacturers them, he assembles
18 them, and he uses them. And he, in fact, has many
19 accessories, including additional barrels and parts
20 necessary for them. And that includes firearm
21 silencers.

22 What is at issue in this case is really about
23 whether or not he knew whether these charged weapons
24 were short-barrel rifles and firearm silencers. That's
25 it.

1 MS. SULLIVAN: Objection. Misstates the law.

2 THE COURT: Members of the jury, throughout
3 this case, when there are objections, what controls on
4 the law is the instructions that I give you. If facts
5 are objected to, what controls in this case is your
6 recollection of what you just heard in this courtroom.

7 Noted. Go ahead, Mr. Kimura.

8 MR. KIMURA: Now, before we get into that
9 issue, I want to talk about the elements of the charged
10 crime, because the United States has the burden of
11 proving each element. Even though some of them may be
12 undisputed. So let me go through these elements quickly
13 so that we can get to what is important in this case.

14 First, defendant knowingly possessed a firearm.
15 And there is a definition for a firearm, and we'll get
16 into that.

17 Second, defendant was aware that the firearm
18 was a rifle with a barrel of less than 16 inches in
19 length or the firearm was a firearm silencer. There's a
20 definition for firearm, and there's a definition for
21 rifle, and there's a definition for firearm silencers,
22 which we will get to.

23 And third, defendant has not registered the
24 firearm with the National Firearms Registration and
25 Transfer Record.

1 So let's start with the easy one first.

2 Registration. You heard the National Firearms
3 Registration and Transfer Record custodian James Scott
4 Robertson, right? He told you what he does.

5 He searched for the serial number of the only
6 firearm that had one, Government Exhibit 53. He also
7 searched for the defendant's name, his date of birth,
8 his Social Security number. And just to be sure, he
9 checked for variations of the defendant's name using
10 wildcards. And the results of those searches, both at
11 the time he did it and a few weeks before just to make
12 sure, was no results.

13 The defendant himself told you that he never
14 registered any of these weapons -- three charged
15 firearms and the four charged silencers -- with the
16 National Firearms Registration and Transfer Record. So
17 that element is both undisputed and met.

18 So let's go to the only two issues in this
19 case. First, defendant knowingly possessed a firearm
20 and, second, defendant was aware of the characteristics
21 of the firearms and the silencers.

22 The possession is not at issue. He got up
23 there. He told you these are all his. He possessed
24 them. So, again, the only issue for both of these
25 elements is what are these and what did he know about

1 these AR-15s have that same feature. They all have it.

2 And he manufactured and assembled these. He
3 did it. He had -- like a cook, right? They control
4 what ingredients goes into their recipes. He knows what
5 it does. And it's not like he did this once and made a
6 mistake. He did it three separate times. He told you,
7 he built these three separate rifles. Not once, not
8 twice, three times. And he even told you on the stand
9 he put those things on it. He admitted that in the
10 configuration they currently have, they were in, they
11 were found in, they were rifles.

12 Now, he said he didn't intend to use them as
13 rifles, but he said that they were rifles. And he
14 also -- we also knew from the interview -- Madam Clerk,
15 can we switch off so I can play the vid clip here?

16 In the clip 20B -- and you'll have all of these
17 digital exhibits back with you -- they're asking him
18 about the items that he built. And he says, "I built
19 pistols and I built rifles." And two of them, these
20 two, were in the safe.

21 (Video played in open court.)

22 MR. KIMURA: Sorry. Can we restart with the
23 volume up?

24 In any case, while we're getting that ready, in
25 the second clip, later, after the break, where they've

1 everything that you've said -- we put in at this point,
2 it's clear that he knew. So for that reason, we've met
3 the first and second element as regards the first three
4 charged items. The AR-15 short-barreled rifles.

5 Now, the silencers. We saw the silencers
6 talked about, right? Again, third element, same: Not
7 registered. We have to show that he possessed them. He
8 admitted that he possessed them. Got up there and told
9 you as much. What we have to show is that they were
10 silencers, that he knew they were silencers.

11 FEO -- and I'm using FEO -- Firearm Enforcement
12 Officer Bodell was the first person to testify about
13 that. He examined each of those. He examined each of
14 those and he made the determination that they were
15 firearm silencers.

16 Now, he was broader than what we have charged,
17 because if you remember his testimony, he's seen many,
18 many thousands of items that are classified or marketed,
19 I believe he said, as solvent traps, right?

20 And you saw some of the ones that he looked at.
21 And these are one of those -- the items that were not
22 drilled through. These are very similar to the ones
23 that he said before. He said that these by themselves
24 were silencers.

25 MS. SULLIVAN: Misstates the law.

1 THE COURT: I'm sorry, Ms. Sullivan?

2 MS. SULLIVAN: Misstates the law.

3 THE COURT: Members of the jury, you're going
4 to rely on the Court's instructions.

5 Continue, Mr. Kimura.

6 MR. KIMURA: To be clear, so we don't have any
7 more interruptions here, whether or not these are
8 actually silencers are for you to decide. But you can
9 rely, as the Court instructed you, on the -- or you can
10 consider the testimony of people like Mr. Coleman,
11 defendant's expert, and Mr. Bodell, who by their
12 training and experience are experts in their field.

13 So these are the demonstratives that we used.
14 And these are very similar to the other items found in
15 the plastic bag. Outer tube nearly identical. The end
16 caps, nearly identical. Baffling, for the mono
17 baffling, similar. These are, in fact, identical to the
18 two -- two of the four charged silencers.

19 Now, the difference between these and the
20 charged silencers is an important distinction that
21 Mr. Bodell even recognized. The silencers -- the
22 charged silencers have been finished, right? There is a
23 hole from one end to the other which a bullet can pass.
24 And when he talked to the officers, he made that
25 distinction.

1 Next, Mr. Fencel's intent. It's designed and
2 intended. His intent. If he intended to use this
3 merely as a paperweight, doesn't make it just a
4 paperweight. If it otherwise meets all of the other
5 elements that it was designed and intended --

6 MS. SULLIVAN: Objection. Misstates the law.

7 THE COURT: I'm sorry?

8 MS. SULLIVAN: Objection. Misstates the law.

9 THE COURT: The jury understands the objection
10 and the Court's position is you'll rely on the law that
11 the Court instructs you.

12 Go ahead.

13 MR. KIMURA: Otherwise, it would never be a
14 rifle. You don't even have to go to that because you
15 can go back again to what we talked about earlier, that
16 Mr. Fencel is an avid gun enthusiast.

17 And she talked about how he's been honest the
18 entirety of the time. What he is, is he's a very
19 knowledgeable gun person and he thinks he's in a
20 loophole, right? He thinks because if he can call it a
21 pistol, it doesn't qualify. If you call it a
22 solvent trap, he thinks it qualifies. He thinks because
23 everybody's doing it because they can buy it offline
24 easily, that he's fine.

25 That is what he thinks. He thinks he can talk

1 MS. SULLIVAN: I'm sorry. If I could
2 interject. That would be my requested response to all
3 the questions.

4 THE COURT: I think so. I was going to say on
5 Court's number 3, I believe they attached one. I
6 believe in the course --

7 MR. KIMURA: We had testimony --

8 THE COURT: Pardon?

9 MR. KIMURA: We had testimony. We didn't
10 actually put it on.

11 THE COURT: We didn't put it on. Okay. I sort
12 of feel like they did.

13 MR. TORRES: You might have been remembering
14 the muzzle attachment. So the non-alleged silencer
15 attachment that was screwed on and off a couple points
16 during the --

17 THE COURT: That's true. So we didn't actually
18 attach the silencer. Okay. I think that -- do you
19 agree, Mr. Kimura?

20 What I can do is I can take these in the back,
21 I can type them up nicely, and we'll attach these
22 because there's writing on the back of this one, which
23 says "Do you need intent to convict?" That's what that
24 one says.

25 Otherwise, these are clean. And you're welcome