SUPREME COURT OF THE UNITED STATES

No. 96–1279

GEORGE G. ROGERS, PETITIONER *v.*
UNITED STATES

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

[January 14, 1998]

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE and JUSTICE SOUTER join, dissenting.

The case was submitted to a jury prior to our decision in *Staples* v. *United States*, 511 U. S. 600 (1994), and there was a colloquy between defense counsel and the trial court about whether the Government was required to show the defendant knew the object was a silencer. See, *e.g.*, App. 84–87. A fair reading of the record indicates that, consistent with then-governing Eleventh Circuit precedent, see 94 F. 3d 1519, 1523, n. 7 (1996), the trial court ruled this knowledge was not a necessary part of the Government's case.

Under the trial court's instructions, the defendant could be found guilty if he "knowingly possessed a 'firearm,' as defined above." App. 104. The word "knowingly" in the instruction modifies the word which follows it, viz., "possessed," rather than the instruction's further reference to the statutory definition of "firearm." Although in other circumstances one might argue the instruction was ambiguous, here the trial court agreed with the defendant's understanding of it. The trial court explained to the jury: "What must be proved beyond a reasonable doubt is that the Defendant knowingly possessed the item as charged, that such item was a 'firearm' as defined above, and that

[it] was not then registered to the Defendant in the National Firearms Registration and Transfer Record." *Ibid.* As understood by the trial court, *ibid.*, petitioner's counsel, Brief for Petitioner 2, the Solicitor General, Brief for United States 12, and the Court of Appeals, 94 F. 3d, at 1523, the instruction told the jury it had to find the defendant knew he possessed the device in question but not that he knew it was a silencer.

The plurality proceeds, however, to find not even that the instruction was ambiguous, but that it was a satisfactory implementation of our later-announced decision in *Staples.* And, though the Court in the end does nothing more than order the case dismissed, the plurality by its extensive discussion suggests in effect that all convictions based on this form of instruction must be affirmed. This is a substantive point; it was neither briefed nor argued; it is contrary to a common-sense reading of the instruction; and it tends to diminish the force of *Staples* itself.

If the plurality wishes to persist in its interpretation of the instruction, it ought to issue a full opinion addressing the merits of the conviction, rather than mask a substantive determination in its opinion supporting dismissal. As things stand, it brings little credit to us to get rid of the case by a strained and novel reading of the instruction— a reading quite unsupportable on the record— after we granted certiorari and expended the Court's resources to determine a different and important issue of substantive criminal law. The petitioner, whose conviction now stands based on what is for practical purposes an affirmance on a theory no one has suggested until now, will be hard put to understand the plurality's cavalier refusal to address his substantive arguments.

I dissent from the order dismissing the case.