

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND-ODESSA DIVISION**

UNITED STATES OF AMERICA

v.

DARIO REYES-TORRES

§
§
§
§
§

MO:19-CR-000270-DC

REPORT AND RECOMMENDATION OF THE U.S. MAGISTRATE JUDGE

BEFORE THE COURT is Defendant Dario Reyes-Toress' ("Defendant") Motion to Dismiss the Indictment. (Doc. 15). This motion is before the undersigned through an Order pursuant to 28 U.S.C. § 636 and Appendix C of the Local Court Rules for the Assignment of Duties to United States Magistrate Judges. (Doc. 19). After due consideration of the applicable law, the undersigned **RECOMMENDS** that Defendant's Motion to Dismiss the Indictment be **DENIED**. (Doc. 15).

I. BACKGROUND

On December 18, 2019, Defendant was indicted by a federal grand jury for one count of being an unlawful alien in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(5) and 924(a)(2). (Doc. 7). On January 7, 2020, Defendant filed the instant Motion to Dismiss the Indictment, arguing that 18 U.S.C. § 922(g)(5) is unconstitutional under the Second Amendment of the U.S. Constitution. (Doc. 15). On January 19, 2020, the Government filed a response. (Doc. 21).

II. LEGAL STANDARD

A defendant may raise a legal challenge to the indictment by pre-trial motion. *United States v. Fontenot*, 665 F.3d 640, 644 (5th Cir. 2011); *see* Fed. R. Crim. P. 12(b)(1). "An indictment is sufficient if it contains the elements of the charged offense, fairly informs the

defendant of the charges against him, and insures that there is no risk of future prosecutions for the same offense.” *United States v. Cavalier*, 17 F.3d 90, 92 (5th Cir. 1994). When reviewing a motion to dismiss an indictment for failure to state a claim, the court is required to “take the allegations of the indictment as true and to determine whether an offense has been stated.” *United States v. Kay*, 359 F.3d 738, 742 (5th Cir. 2004). Importantly, the indictment “must allege each and every essential element of the charged offense in order to pass constitutional muster.” *United States v. Coughlin*, 4:12-CR-166, 2013 WL 1507217, at *2–3 (E.D. Tex. Feb. 4, 2013), *report and recommendation adopted*, 2013 WL 1501025 (E.D. Tex. Apr. 10, 2013). “An indictment need only ‘be a plain, concise, and definite written statement of the essential facts constituting the offense charged.’” *Id.* at *3 (quoting Fed. R. Crim. P. 7(c)(1)).

III. DISCUSSION

Defendant argues that 18 U.S.C. § 922(g)(5) violates his Second Amendment rights. However, Defendant concedes that the Fifth Circuit has made clear that the Second Amendment does not extend to persons illegally present in the United States. (Doc. 15 at n.1; *United States v. Portillo-Munoz*, 643 F.3d 437 (5th Cir. 2011)). *United States v. Portillo-Munoz* is the leading case on this subject in the Fifth Circuit. Defendant moves the Court to break from the Fifth Circuit’s holding in *Portillo-Munoz* and to side with the dissent’s analysis. *Id.*

The Second Amendment provides that “the right of the people to keep and bear Arms, shall not be infringed.” U.S. Const. amend. II. In *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008), the Supreme Court acknowledged that the Second Amendment confers an “individual right to keep and bear arms.” Defendant argues that the framers of the constitution “understood that the constitutional right to keep and bear arms would extend to every free person who resided in the United States, including recent immigrants.” (Doc. 15 at 3). Defendant further

asserts that individuals unlawfully in the United States fall under the umbrella of “the people” as it is used in the Second Amendment. *Id.* at 5–12. However, these arguments have been rejected by the Fifth Circuit and numerous other circuit courts. *Portillo-Munoz*, 643 F.3d 437 (finding “the phrase ‘the people’ in the Second Amendment of the Constitution does not include aliens illegally in the United States”); *United States v. Flores*, 663 F.3d 1022, 1023 (8th Cir. 2011) (stating “the protections of the Second Amendment do not extend to aliens illegally in this country.”).

Based on the reasoning set forth by the Fifth Circuit in *Portillo-Munoz*, the undersigned finds that illegal aliens do not fall within the scope of “the people” guaranteed the right to bear arms by the Second Amendment. Accordingly, the Court should **DENY** Defendant’s Motion to Dismiss the Indictment.

IV. RECOMMENDATION

For the above reasons, it is **RECOMMENDED** that Defendant’s Motion to Dismiss the Indictment be **DENIED**. (Doc. 15).

SIGNED this 24th day of January, 2020.



RONALD C. GRIFFIN
UNITED STATES MAGISTRATE JUDGE