

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

UNITED STATES OF AMERICA,

v.

(1) DARIO REYES-TORRES,
Defendant.

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MO:19-CR-00270-DC

ORDER ADOPTING REPORT AND RECOMMENDATION

BEFORE THE COURT is United States Magistrate Judge Ronald C. Griffin's Report and Recommendation (R&R) issued and entered on January 24, 2020, in connection with Defendant Dario Reyes-Torres' (Defendant) Motion to Dismiss Indictment (Motion) filed on January 7, 2020. (Docs. 15, 30). Defendant filed a timely objection to the R&R on February 5, 2020. (Doc. 38). After due consideration of the parties' filings, the record, and the applicable law, the Court **ADOPTS** the R&R in its entirety (Doc. 30), **OVERRULES** Defendant's objections (Doc. 38), and **DENIES** Defendant's Motion (Doc. 15).

On December 18, 2019, Defendant was indicted in a one-count Indictment for being an alien in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(5) and 924(a)(2).¹ (Doc. 8). On January 7, 2020, Defendant filed his Motion seeking dismissal of the Indictment on the basis that 18 U.S.C. § 922(g)(5) violates the Second Amendment facially and as applied to Defendant. (Doc. 15). On the same day, Defendant filed twelve (12) exhibits in support of his Motion. (Doc. 16). This Court referred the Motion to the Magistrate Judge on January 9, 2020. (Doc 19). Finally, the Government filed a timely Response on January 19, 2020. (Doc. 21).

1. A Superseding Indictment was filed on January 29, 2020, after the Magistrate Judge issued his R&R. (Doc. 32). However, the Superseding Indictment does not affect the outcome of Defendant's Motion.

The Magistrate Judge issued the instant R&R on January 24, 2020. (Doc. 30). The Magistrate Judge notes that Defendant concedes that the Fifth Circuit foreclosed his argument that the Second Amendment extends to persons illegally present in the United States. *Id.* at 2. Based on Fifth Circuit precedent, the Magistrate Judge finds that “illegal aliens do not fall within the scope of ‘the people’ guaranteed the right to bear arms by the Second Amendment.” *Id.* at 3. Thus, the Magistrate Judge recommends denying Defendant’s Motion.

A party may contest the report and recommendation by filing written objections within fourteen (14) days of being served with a copy of the report and recommendation. *See* 28 U.S.C. § 636(b)(1). A party’s objections to an R&R entitle him to a de novo review of those claims by this Court. *See* 28 U.S.C. § 636(b)(1). However, objections must specifically identify those findings or recommendations to which objections are being made. The Court need not consider frivolous, conclusive, or general objections. *See Battle v. United States Parole Comm’n*, 834 F.2d 419 (5th Cir. 1987).

Defendant filed timely objections to the R&R. (*See* Doc. 38). Defendant first objects to the Magistrate Judge’s finding that the Second Amendment does not protect people unlawfully in the United States. *Id.* at 1. Defendant argues that *United States v. Portillo-Munoz*, 643 F.3d 437 (5th Cir. 2011), to the extent it holds that illegal aliens are not protected by the Second Amendment, contravenes *D.C. v. Heller*, 554 U.S. 570 (2008). In addition, Defendant alleges that *Portillo-Munoz* does not address the Fifth Amendment’s Equal Protection Clause. *Id.* at 1–2. Further, Defendant contends the Magistrate Judge “erred in not reviewing Congress’ relatively recent exclusion of persons identified in § 922(g)(5) because the term ‘alien illegally and unlawfully in the United States’ was nonexistent and completely unknown to the Founders in 1791.” *Id.* at 2. Defendant next objects to the Magistrate Judge’s alleged failure to address

whether § 922(g)(5) is unconstitutional under the Second Amendment as applied to Defendant. *Id.* at 3. Finally, Defendant requests a hearing in relation to the second objection.

Defendant triggered de novo review as to the listed objections.

A. First Objection

The Fifth Circuit’s decision in *Portillo-Munoz* is the subject of Defendant’s first objection. (Doc. 38 at 1–3). In *Portillo-Munoz*, the Fifth Circuit, relying on *Heller*, held that the Supreme Court’s “language in *Heller* invalidate[d the defendant]’s attempt to extend the protections of the Second Amendment to illegal aliens.” *See Portillo-Munoz*, 643 F.3d at 440. The Fifth Circuit reasoned that “[i]llegal aliens are not ‘law-abiding, responsible citizens’ or ‘members of the political community,’ and aliens who enter or remain in this country illegally and without authorization are not Americans as that word is commonly understood.” *Id.* As noted previously, it is Defendant’s position that *Portillo-Munoz* contradicts *Heller* and that it is inapplicable here because it did not address the defendant’s Fifth Amendment argument. *Id.*

As to Defendant’s first argument—that the Second Amendment protects all people without regard to their legal status—the Court finds that *Portillo-Munoz* forecloses Defendant’s argument. *See Portillo-Munoz*, 643 F.3d at 440; *accord United States v. Mirza*, 454 F. App’x. 249, 257 (5th Cir. 2011) (“*Portillo-Munoz* therefore requires us to conclude that the rights conferred by the Second Amendment do not extend to individuals like [the defendant] who are unlawfully in the United States.”). To the extent that Defendant invites this Court to depart from Fifth Circuit precedent, the Court declines the invitation as Defendant provides no reasonable basis for finding *Portillo-Munoz* does not comport with *Heller*.²

2. After reviewing the Supreme Court’s decision in *Heller*, the Court opines that *Portillo-Munoz* does not directly or indirectly depart from *Heller*. *Compare Portillo-Munoz*, 643 F.3d at 437, with *Heller*, 554 U.S. at 570.

The Court further finds Defendant's second argument—that *Portillo-Munoz* does not address the Fifth Amendment's Equal Protection Clause—unavailing. Defendant fails to articulate how § 922(g)(5) violates the Fifth Amendment's Equal Protection Clause. (*See* Doc. 38). Defendant's objection read liberally in his favor at most argues that § 922(g)(5) discriminates based on alienage. In an unpublished decision, the Fifth Circuit concluded that “there is a rational relationship between Section 922(g)(5)(A) and a legitimate government purpose.” *See Mirza*, 454 F. App'x. at 258. Thus, it rejected the defendant's contention that § 922(g)(5) violates the Equal Protection Clause under the Fifth Amendment. *Id.* The Fifth Circuit noted that the defendant, in that case, failed to carry “his burden of showing that there is not a rational relationship between the challenged classification and some legitimate government purpose.” *Id.* Similarly, Defendant's objection currently before the Court does not explain the basis for his Fifth Amendment Equal Protection Clause argument. (*See* Doc. 38).

For the reasons detailed above, the Court overrules Defendant's first objection.

B. Second Objection

Defendant titles his second objection “the ‘as-applied’ challenge.” (Doc. 38 at 3). He argues that even if the facial challenge fails, § 922(g)(5) is unconstitutional under the Second Amendment as applied to Defendant. *Id.* Defendant contends that the Fifth Circuit's justification for its decision in *Portillo-Munoz* does not apply to Defendant who is an “honors graduate of Rankin High School, a home-owner, whose children are American citizens and attend the Rankin School District, who is and has been for many years gainfully employed, pays his federal income taxes and uses a rifle for protection of his home and ranch in rural Upton County, traditionally lawful activities, 45-minutes from the local law enforcement in Ranking[.]” *Id.* at 4.

The *Portillo-Munoz* decision unequivocally holds that “the phrase ‘the people’ in the Second Amendment of the Constitution does not include aliens illegally in the United States” See *Portillo-Munoz*, 643 F.3d at 442. It does not differentiate between illegal aliens who are allegedly upstanding citizens and those who are not. The focus is on the person’s legal status. The Court thus finds Defendant’s argument regarding Defendant’s character irrelevant and overrules Defendant’s second objection.

C. Request for a Hearing

Defendant requests a hearing to “fully develop the record for the ‘as-applied’ analysis.” (Doc. 38 at 5). However, because the Court finds Defendant’s “as-applied” objection is without merit, as explained above, a hearing is not necessary. Consequently, the Court denies Defendant’s request for a hearing.

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Based on the foregoing, the Court **OVERRULES** Defendant’s objections (Doc. 38) and **ADOPTS** the R&R in its entirety (Doc. 30).

The Court **ORDERS** that Defendant’s Motion to Dismiss be **DENIED**. (Doc. 15).

It is so **ORDERED**.

SIGNED this 12th day of February, 2020.

A handwritten signature in black ink, appearing to read "David Counts", with a stylized star or flourish at the end.

DAVID COUNTS
UNITED STATES DISTRICT JUDGE