

**UNITED STATES OF APPEALS  
FOR THE TENTH CIRCUIT**

EMMANUEL HUITRON-GUIZAR, )  
Appellant, )  
 )  
vs. ) Case No: 11-8051  
 )  
UNITED STATES OF AMERICA, )  
Appellee, )

On Appeal from the United States District Court  
District of Wyoming

The Honorable William F. Downes and Nancy D. Freudenthal  
District Judge  
D.C. No. 11-CR-00072-WFD

**APPELLANT'S REPLY BRIEF  
ORAL ARGUMENT IS REQUESTED**

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**ISSUES PRESENTED FOR REVIEW**

1. ARE 18 U.S.C. § 922(g)(5)(a) and 924(a)(2) UNCONSTITUTIONAL AS A VIOLATION OF THE SECOND AMENDMENT?
2. DID THE COURT COMMIT SENTENCING ERROR?

**REPLY ARGUMENT**

D) ARE 18 U.S.C. § 922(g)(5)(a) and 924(a)(2) UNCONSTITUTIONAL AS A VIOLATION OF THE SECOND AMENDMENT?

A) STANDARD OF REVIEW

The statute must not undergo a means end scrutiny but instead an intermediate scrutiny. If the statute survives scrutiny it is constitutional. If not, it is invalid. United States v. Reese 627 F3d 792 (10<sup>th</sup> Cir. 2010)

B) DISCUSSION

The first thing that the Appellant asks for in his Reply Brief is that there be Intellectual Honesty.

The Liberals stress that everybody in the United States have the same constitutional Rights as those that are born and raised in the United States. They even fervently believe that foreign terrorists captured in the GWOT should be tried in America's Criminal Courts with the full panoply of Constitutional Rights.

Why do they now say that illegal aliens don't have Second Amendment rights?

Conservatives and strict constitutionalists believe that the Constitution is interpreted strictly linguistically and use interpretations present when the Constitution was written.

Why then do they say that “the people of the United States” only means a citizen?

District of Columbia v. Dick Anthony Heller 538 US 510 (2008) is the most important case protecting the rights of the American people from all enemies both foreign and domestic. As do all important and similar cases put forth by the Supreme Court, there will be multiple cases slicing, dicing and interpreting every word and phrase of the case and undoubtedly Heller and McDonald will not be the final word from the Supreme Court.

This Court must interpret Heller as a whole and not as the Appellee wants, a phrase or word at a time. Heller does say the Second Amendment protects the “right of law-abiding responsible citizens to use arms in defense of hearth and home.” Id. 635. The problem is that it also talks about “the people”. Heller made it very clear that it wasn’t purporting to “clarify the entire field” of the Second Amendment District of Columbia v. Dick Anthony Heller 128 S.Ct. 2783 at 2821. Heller does provide some guidance as to the meaning of the term “the people” of the Second Amendment. Heller held that the Second Amendment surely elevates “above all other interests the law-abiding, responsible citizens to use arms in defense of hearth and home.”

The Fifth Circuit in United States v. Portillo-Munoz 643 F3d 437 (5<sup>th</sup> Cir 2011)

held.

Furthermore, the Court noted in all ... other provisions of the Constitution that mention ‘the people’, the term unambiguously refers to all members of the political community, not an “unspecified subset” before going on to say that [w]e start therefore with a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans.

Prior to Heller, the Supreme Court has interpreted the meaning of the phrase in the context of other Amendments. In United States v. Verdugo-Urquidez 494 U.S. 259, 110 S.Ct. 1056, 108 S.Ct. 1056, 108 L.Ed. 2d 222 (1990) the Court said:

The Court held that its analysis of the Constitution suggests that “the people” protected by the Fourth Amendment, and the First and Second Amendments...refers to a class of persons who are part of a national community or who have otherwise developed sufficient connections with this country to be considered part of the community Portillo-Munoz at 442.

Portillo-Munoz did an excellent job of slicing and dicing the different types of illegal aliens and saying why certain illegal aliens were protected by the Constitution and others weren't. Portillo-Munoz on 442 says:

Moreover, even if these were precedent for the proposition that illegal aliens generally are covered by the Fourth Amendment, we do not find that the use of “the people” in both the Second and the Fourth Amendment mandate a holding that the two amendments cover exactly the same groups of people. The purpose of the Second and Fourth Amendment are different. The Second Amendment grants an affirmative right to keep and bear arms, while the Fourth Amendment is at its core a protective right against abuses by the government. Attempts to *precisely* analogize the scope of these two amendments is misguided, and we find it reasonable that an affirmative right would be extended to fewer groups than it would a

protective right. The Second Circuit laid out compelling reasons for why an illegal alien could not claim that a predecessor statute to section 922(g)(5) violated the Fifth Amendment right to equal protection by saying that “illegal aliens are those who ... are likely to maintain no permanent address in this country, elude detection through an assumed identity, and – already living outside the law – resort to illegal activities to maintain a livelihood.” ... The Court went on to approvingly quote the district court’s statement that “one seeking to arrange an assassination would be especially eager to hire someone who had little commitment to this nation’s political institutions and who could disappear afterwards without a trace...”<sup>1</sup>

The record is clear the Appellant was totally committed to our country.

- a. He was brought here at age three;
- b. Lived his entire life in the United States;
- c. Has never been to Mexico;
- d. Went to school here;
- e. Dropped out of school in order to work;
- f. No criminal history;
- g. Little if any periods of unemployment.

Therefore, the Appellant is entitled to the Second Amendment right pursuant to Matthews v. Diaz 426 U.S. 67, 96 S.Ct. 1883, 48 L.Ed. 2d 478 (1976).

The Court pointed out in its opinion that the crucial question was whether discrimination among different types of aliens was permissible, as contrasted with discrimination between aliens and citizens held “[n]either the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, nor the illegal entrant, can advance even a colorable constitutional claim to a share in the

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<sup>1</sup> I believe that the Trial Court in Portillo-Munoz should have majored in US History instead of whatever it did because he/she would have known that all successful presidential assassins have been Americans i.e. Oswald for JFK, John Wilkes Booth for Lincoln, etc.

bounty that a conscientious sovereign makes available to its own citizens and Some of its guests”...The Court went on to say that [i]n the exercise of its broad power over naturalization and immigration Congress regularly makes rules that would be unacceptable if applied to citizens.

Our circuit has taken the same position in an unpublished opinion United States v. Yanez-Vasquez 2010 WL 411112 (D. Kan.).

Appellant would agree with the Appellee’s recitation of cases from the Fifth and Eighth Circuit, but would state that they ruled incorrectly. Counsel disagrees when the lower Courts rule the same way as the Fifth and Eighth Circuits based upon the allegations that aliens are not among “the people”.

Counsel disagrees with Appellee that the inquiry is at the end because the Second Amendment doesn’t apply because the Appellant is an alien.

Counsel disagrees with pages 10 and 11 of Appellee’s Brief that 922(g)(5)(A) “certainly passes muster under means-end scrutiny.” Counsel states that the Court should apply intermediate scrutiny to Second Amendment clauses like United States v. Reese 627 F3d 792 (10<sup>th</sup> Cir 2010), Clark v. Jeter 486 U.S. 456 (1988), United States v. Chester 628 F3d 673 (4<sup>th</sup> Cir 2010), and United States v. Williams 616 F3d 685 (7<sup>th</sup> Cir 2010).

The Fourth Circuit in United States v. Chester 628 F3d 673 (2010) used intermediate level scrutiny because the Second Amendment should be interpreted thusly because it is content as to time, place and manner.

Appellant submits that this Circuit in United States v. Reese 627 F3d 792 (2010) found that there was little doubt that the challenged law<sup>2</sup> imposed a burden on conduct that generally fell within the scope of the rights guaranteed by the Second Amendment. Reese felt that Heller didn't state the level of scrutiny to be applied so it looked to other circuits as to what level of scrutiny should be applied. Reese eventually ruled that (g)(8) cases should be subject to intermediate scrutiny.

To pass constitutional muster under intermediate scrutiny, the government has the burden of demonstrating that its objective is an important one and that its objective is advanced by means substantially related to that objective. United States v. Williams 616 F3d 685 (7<sup>th</sup> Cir 2010)

The Reese Court then went on to list the vast number of studies that showed that it was important to keep firearms out of the hands of people that were prone to domestic violence. As previously stated at the Trial Court and in the Appellants Opening Brief, that the keeping of firearms from aliens doesn't have the same justification as keeping firearms from felons, mentally ill people, etc.

## II) DID THE COURT COMMIT SENTENCING ERROR?

### A) STANDARD OF REVIEW

Both Counsels agree as to the Standard of Review.

### B) DISCUSSION

Appellant stands upon his Initial Brief as to the Sentencing Issues.

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<sup>2</sup> In Reese, it was 922(g)(8) Persons under a domestic relations Order not being to possess a firearm

The sadness of the situation is that even though the Appellant is correct as to his submission as to the Court's errors as to Sentencing; it is moot because the Appellant will probably be deported to Mexico by the time that the Court issues a ruling.

However, one Sentencing Issue that the Court should address concerns the Sporting Exception.

Assuming arguendo that the Appellee is correct as to the large magazine capacity issue; the Court should definitely rule as to whether or not the Sporting Exception is limited to hunting and the collection of firearms. The most recent case in instant is United States v. Hanson 534 F3d 1315 (10<sup>th</sup> Cir 2008) and rose from the District of Wyoming.

Hanson dealt with an individual that testified that he possessed the firearm for "plinking" purposes and for eradication of jackrabbits. Hanson was a prohibited person because he was an unlawful user of controlled substances.

The Court held that possession of a gun for plinking was within the scope of the sporting exception reduction. However, in this case because of Hanson's extensive drug history; he was not entitled to the sporting exception.

That is not he case in instant.

In instant, it was clear that the Appellant had minimal criminal history.

Assuming arguendo that the Appellant has the petty offenses alleged by the Appellee, does that mean that a Defendant can NEVER EVER get a sporting exception if he has “any” criminal record?

To give that broad a meaning to the Sporting Exception would mean that the exceptions shallow the whole and there us no “sporting” exception in this Court.

### **CONCLUSION**

The Appellant submits that the Second Amendment means what it says.

Even though Heller puts out the proposition that all citizens may possess firearms with certain very limited exceptions, the Constitution does not use the term CITIZEN in relation to who may possess firearms.

Heller is wrong when it restricts “the people” to only citizens.

As set forth on the opening page of this reply brief; there needs to be Intellectual Honesty.

When the Constitution was enacted there were no citizens; there were only “the people”.

Therefore, the above entitled conviction must be vacated and the Appellant be allowed to go free and Petition for Citizenship without the deathblow of having a felony.

### **ORAL ARGUMENT**

After reviewing the Appellee’s brief, it is very obvious that Oral Argument is needed in the above entitled matter.

RESPECTFULLY submitted this 12<sup>th</sup> day of January 2012.

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**CERTIFICATE OF COMPLAINE WITH TYPE-VOLUME  
REQUIREMENTS**

As required by Fed R. App. P 32(a)(7)(c), I certify that this Brief is proportionally spaced and contains 2,563 words. I rely upon my word processor, Microsoft Word, to obtain the count. I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

DATED this 12<sup>th</sup> day of January 2012.

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the Corrected Appellant's Brief has been served via United States Mail, first class postage, prepaid this 12<sup>th</sup> day of January 2012 addressed to Todd Shugart, Asst U.S. Attorney and includes the Statement as to Oral Argument and Statement as to Related Appeals.

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**CERTIFICATE OF DIGITAL SUBMISSION**

I hereby certify that pursuant to the Courts General Orders dated August 10, 2007 that there are no required redactions to be made to the document and that it has been scanned for viruses with AVG Anti-Virus Free Edition version 2012.0.1809 (updated September 29, 2011) and are free of viruses.

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