

# TEXAS LAWYER

COMMENTARY

## Do convicted felons facing new indictments retain their constitutional right to receive a gun?

Elisa Reiter and Daniel Pollack | December 27, 2022



Based on a 2022 U.S. Supreme Court ruling, *NYSRPA v. Bruen*, the U.S. District Court for the Western District of Texas struck down a federal law prohibiting access to guns if those people are subject to domestic violence protection orders.

In this highly unusual ruling, the court reasoned that it was compelled to question the constitutionality of firearm regulation in the United States in a post-*Bruen* world.

Whatever one's political perspective, one must revel in the written word of this memorandum opinion, *United States of America v. Jose Gomez Quiroz*, from the U.S. District Court for the Western District of Texas, Pecos Division, which begins, "This Court faces a predicament similar to Plato's allegory of the cave."

## **Lessons Learned**

What do we learn from this allusion? Education serves the purpose of pulling students from the cave, by enlightening them in the real world with real objects. To talk about gun control is far different from the reality of facing a gun wielded by a person who has been convicted of a violent crime so grave as to warrant being placed on probation.

Is it also a condition which curtails a person's ability to be allowed to exercise their Second Amendment freedom to purchase a gun? When out of the cave, we learn that there is the opportunity to learn from real life and real objects. Prisoners are involved in the allegory, just as they are in the *Quiroz* opinion.

Once one has the opportunity to emerge from the cave and learn, the enlightened can return to the cave to assist others. However, with knowledge, reverting to the cave becomes impossible.

In *Quiroz*, the court holds that: "The Second Amendment is not a 'second class right.' No longer can courts balance away a constitutional right. After *Bruen*, the Government must prove that laws regulating conduct

covered by the Second Amendment’s plain text align with this Nation’s historical traditions. The Government does not meet its burden.”

The court goes on to analyze 18 USC § 922(n). That provision provides: “(n) It shall be unlawful for any person who is under indictment for a crime punishable by imprisonment for a term exceeding one year to ship or transport in interstate or foreign commerce any firearm or ammunition or receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.”

## **The *Quiroz* Case**

In *Quiroz*, the defendant was indicted in a Texas state court for burglary. *Quiroz* failed to appear for a hearing regarding the burglary charge, and was therefore later charged with jumping bail and failing to appear. The charges against *Quiroz* included both a second-degree felony (burglary) and a third-degree felony (jumping bail).

Approximately 18 months later, while those charges were pending, *Quiroz* attempted to purchase from a local arms dealer a M1911, a semi-automatic .22 caliber firearm. As part of the purchase, *Quiroz* filled in paperwork (ATF Firearms Transaction Record Form 4473) denying that he was under indictment. The National Instant Criminal Background Check System (NICS) provided a delayed response; *Quiroz* waited seven days and then picked up the .22 on Dec. 30, 2021.

Early in 2022, NICS advised ATF that *Quiroz* made an illegal firearm purchase. As a result, *Quiroz* was indicted for violating 18 U.S.C. Section 922(n). A jury convicted him. *Quiroz* then filed a motion to set aside the

verdict per Rule 29 of the Federal Rules of Criminal Procedure, and seeking dismissal in light of the Supreme Court's holding in *Bruen*.

Federal Rule of Criminal Procedure 29(c) allows a defendant to move for a judgment of acquittal within 14 days of entry of a guilty verdict or after a court discharges the jury, whichever is later.

The essence of such a review is whether, viewing the evidence in a manner most favorable to the prosecution, a rational trier of fact could find the government met its burden in establishing the essential elements of a crime beyond a reasonable doubt.

## **Second Amendment Claims**

Much has been written about the Second Amendment. Prior to *Bruen*, the Supreme Court established a new two-step framework regarding Second Amendment claims, "combining a historical analysis with means-end scrutiny."

Step one involves establishing the Second Amendment's original scope via a historical analysis. If the regulated conduct falls outside the Second Amendment's original scope, the analysis stops there, as the regulated activity is "categorically unprotected." If not outside the Second Amendment's scope, or if the analysis proves inconclusive, the court proceeds to step two.

Step two involves whether the core Second Amendment right of self-defense in one's home was tested. The court would then apply strict scrutiny. If something other than self-defense in one's home is involved, then intermediate scrutiny is to be applied, in which the court considers

“whether the Government has shown that regulation is ‘substantially related to the achievement of an important governmental interest.’”

In the instant case, the court notes that the prohibited conduct under Section 922(n) is simply “receipt” of a firearm. By mixing in “while under felony indictment,” to the Defendant’s conduct, the court notes that “the Government conflates *Bruen’s* first step with its second.”

The court notes that “the plain meaning of the verbs ‘have’ or ‘possess’ include the act of receipt.” The court reasons that “receipt is the condition precedent to possession – the latter is impossible without the former.”

The Pecos Division reasons that “if receiving a firearm were illegal, but possession or carrying one remained a constitutional right, one would first need to break the law to exercise the right.”

Legislative history establishes that Congress enacted the Federal Firearms Act in 1938 “to combat roaming criminals crossing state lines,” in an attempt to keep ex-convicts from simply crossing from one state to another to get around their terms of probation or parole. The goal was to “eliminate the guns from the crooks’ hands, while interfering as little as possible with the law-abiding citizen.”

## **The *Quiroz* Appeal**

The Pecos Division faults the government’s argument in concluding that it is grounded on a logical fallacy. It compares the government’s argument that “sharing a history with felon-in-possession laws makes Section 922(n) constitutional in the same way a dog is a cat because both have four legs.”

The court tracks historical precedent, concluding that “[w]hether this Nation has a history of disarming felons is arguably unclear – it certainly isn’t clearly ‘longstanding.’ And what’s even more unclear– and still unproven– is a historical justification for disarming those indicted, but not yet convicted, of any crime.”

*Quiroz* is being appealed. In an era when gun violence is on the rise, will Justice Clarence Thomas’ analysis in *Bruen* stand? In the surety laws discussed in the *Bruen* holding, Thomas notes that “the 1795 surety laws required a person ‘reasonably likely to breach the peace,’ and who, standing accused, could not prove the need for self-defense, to post a bond before carrying a firearm.”

Thomas notes that the surety cases appeared to involve Black defendants possibly marked “for selective or pretextual enforcement.” In *Quiroz*, the court concludes that Section 922 (n) unlawfully restricts a person’s right to receive a firearm indefinitely following indictment by a grand jury, and such an indictment is not an adversarial proceeding nor a conviction.

Are those “under indictment” nonetheless “of the people”? The court concludes that “little evidence supports excluding those under indictment in any context.”

What will happen on further appeal? It’s a shot in a dark cave for now.

*Elisa Reiter is board certified in family law and in child welfare law by the Texas Board of Legal Specialization, and is a senior attorney with Underwood Perkins in Dallas.*

*Daniel Pollack is a professor at Yeshiva University's School of Social Work in New York City. He was also a commissioner of Game Over: Commission to Protect Youth Athletes, an independent blue-ribbon commission created to examine the institutional responses to sexual grooming and abuse by former USA Gymnastics physician Larry Nassar.*

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