

SECOND AMENDMENT – IMPLICATIONS OF *BRUEN* FOR PROSCRIPTION ON FIREARM POSSESSION BY PERSONS SUBJECT TO RESTRAINING ORDERS

Feb. 27, 2023

This is a supplement to FDAP’s recently posted [article](#), “*Bruen* Challenges to Firearm-Related Offenses” (Jan. 31, 2023) by Richard Braucher. As discussed in that article, the Supreme Court’s landmark Second Amendment decision in *New York State Rifle & Pistol Association v. Bruen* (2022) __ U.S. __, 142 S.Ct. 2111, may provide grounds for challenging the constitutionality of some of California’s firearm licensing statutes, as well as some applications of its various prohibitions on possession of firearms by certain classes of people or of certain kinds of firearms.

A new Fifth Circuit opinion suggests that California’s proscriptions on possession of firearms by persons *subject to restraining orders* may be especially vulnerable to such challenges. *United States v. Rahimi* (5th Cir. Feb. 2, 2023) 59 F.4th 163.

The Fifth Circuit struck down a federal statute criminalizing firearm possession by a person subject to a domestic violence restraining order. The Circuit identified the “key features of the statute” as: “(1) forfeiture of the right to possess weapons (2) after a civil proceeding [fn.] (3) in which a court enters a protective order based on a finding of a ‘credible threat’ to another specific person, (4) in order to protect that person from ‘domestic gun abuse.’” *Rahimi*, 59 F.4th at p. 174.

We will not attempt to synopsize the reasoning of the Fifth Circuit’s application of *Bruen* to the federal statute. Suffice to say that the Circuit found that a regimen prohibiting firearm possession based on a civil determination that a person posed a “credible threat” to a specific person was not consistent with the scope of firearm regulation at the time of adoption of the Second Amendment. See *Id.*, pp. 176-177.

The *Rahimi* court noted: “The distinction between a criminal and civil proceeding is important because criminal proceedings have afforded the accused substantial protections throughout our Nation’s history. It is therefore significant that [the federal statute] works to eliminate the Second Amendment rights of individuals subject merely to civil process.” *Id.*, p. 174, fn. 6.

Implications for Pen. Code § 29825

The reasoning of the Fifth Circuit opinion appears to provide grounds for challenging the facial constitutionality of Pen. Code § 29825. That statute establishes a wobbler offense criminalizing firearm possession by anyone subject to a restraining order, injunction, or protective order issued pursuant to a number of statutes: Code Civ. Proc. §§ 527.6, 527.8, 527.85; Family Code § 6218; Pen. Code §§ 136.2, 646.91; Welf. & Inst. Code § 15657.03 (as well as any out-of-state order that is “similar or equivalent to” an order under one of the specified California statutes).

Counsel with a case involving a conviction under Pen. Code § 29825 should consider raising a Second Amendment claim based on the reasoning of *Rahimi*. If necessary, counsel should consider filing a supplemental brief or leave to add a claim to a pending petition for review.

In assessing the viability of a claim based on *Rahimi*, counsel should consider the specific statute under which the relevant restraining or protective order was issued. In view of the *Rahimi* court’s emphasis on the distinction between “civil” orders and the higher burden of proof and other procedural protections accorded in criminal proceedings, counsel should consider the statutory threshold for issuance of the order.

Other California statutes potentially subject to *Bruen* challenges

Bruen has effectively put into play questions regarding the constitutionality (both facial and as-applied) of numerous prohibitions on gun possession. For instance, there is now a conflict among federal district courts on the constitutionality of statutes prohibiting firearm possession by person *charged*

in criminal proceedings. Compare *United States v. Quiroz* (W.D. Tex. 2022, No. PE:22-CR-00104-DC) 2022 WL 4352482 (one of several opinions from district courts in “red states” declaring the relevant federal statute unconstitutional) with *United States v. Bartucci* (E.D. Cal. 2023, No. 1:19-cr-00244-ADA-BAM) 2023 WL 2189530 (disagreeing with those decisions and upholding the statute). The reasoning of district court decisions such as *Quiroz* could provide grounds for challenging California statutes criminalizing possession of a firearm by a person with knowledge of an “outstanding warrant” for a felony or misdemeanor offense. Pen. Code §§ 29800(a)(3), 29805(a)(2).