No. 14-10078

In the Supreme Court of the United States

JAIME CAETANO,

Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Judicial Court of Massachusetts

BRIEF FOR COMMONWEALTH SECOND AMENDMENT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Commonwealth Second Amendment (hereafter, "*Amicus*" or "Comm2A") is a Massachusetts based, non-profit dedicated to preserving and expanding the Second Amendment rights of individuals residing in New England and beyond. Comm2A works locally and with national organizations to promote a better understanding of the rights guaranteed by the Second Amendment to the United States Constitution. Comm2A has substantial expertise in the field of Second Amendment rights that would aid the Court.

The Court's ruling in the current case affects *Amicus* Comm2A's organizational interests, as well as those of its contributors and supporters, some of whom are directly affected by the law at issue in this case and who wish to enjoy the full exercise of their fundamental Second Amendment rights.

STATEMENT OF THE CASE

The case at bar challenges M.G.L. c. 140, § 131J; a statute prohibiting the use, and even possession, of a "stun gun." The statute defines them as any, "...portable device or weapon from which an electrical current, impulse, wave or beam may be directed, which current, impulse, wave or beam is designed to incapacitate temporarily, injure or kill."

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[1] All parties have been notified in writing on or before July 30th 2015 as to the filing of this *amicus* brief and have consented. No party, or counsel thereof, to this action has assisted in writing this brief nor provided funds intended towards or assisting with the preparation of this brief.

The Electronic Defense Weapons ("EDWs") at bar are *not* "designed…to kill." Their specific purpose is to provide *non*-lethal means of self-defense at very close range, usually direct contact. These units use the temporary, localized application of electrical current to cause pain and disrupt muscle control, rendering the assailant incapable of attacking the user.

ACCEPTANCE OF FACTS

Comm2A accepts the facts as articulated by Appellant Caetano, which largely comport with Commonwealth's version of events. Appellant Caetano possessed a simple stun gun, which she was provided by an acquaintance, to protect her from an abusive ex-partner who had already beaten her so badly she required hospitalization. She subsequently had to use that stun gun, a direct-contact weapon, to protect herself from that same ex-partner when he accosted her outside her workplace and again threatened her with violence, despite his having been previously subject to restraining orders.

Subsequently, Appellant Caetano was alleged to be in association with someone suspected of shoplifting and a consented to search of Appellant Caetano's property turned up the stun gun. While no connection between Caetano and the alleged shoplifting was ever shown, she was arrested for possession of the stun gun. Appellant Caetano was subsequently convicted for violating M.G.L. c. 140, § 131J, and appeals that conviction.

This case presents this court two Constitutional questions: Are non-lethal weapons, specifically, EDWs, protected under the Second Amendment; and, if so,

does an outright ban on their possession violate the Second Amendment?

SUMMARY OF THE ARGUMENT

This brief seeks to inform the court of the legal and practical context of this case. The commonwealth's arms control scheme has been in place in various forms statutorily since about 1850, but only since 1906 has the modern scheme been in effect, where the state banned various tools useful for self-defense. Prior to 1906, Massachusetts' arms control scheme was quite consistent with the originalist understanding of the Second Amendment.

This brief analyzes 1800s case law and legislative acts to illustrate the changing nature of the Commonwealth's arms control scheme. It then provides an overview of the Commonwealth's arms control scheme at the time of Appellant's arrest to illustrate Appellant Caetano had few viable options for employing effective self-defense. Lastly, this brief reviews the technology of the stun gun and places it in context of the Second Amendment meaning of "arms."

ARGUMENT

I. THE MASSACHUSETTS ARMS CONTROL SCHEME

A. History of Arms Control in the Commonwealth

The Ante-bellum arms control statutes in the Commonwealth of Massachusetts mirrored the British law brought to the then-colonies, as interpreted in Sir John Knight's Case, 87 Eng. Rep. 75 (KB)[1686]. In

that case, the Statute of Northampton was limited "to punish people who go armed to terrify the King's subjects." In much of the Commonwealth's history, going armed while committing other crimes operated effectively as a penalty enhancement, while no specific prohibition on going armed for self-defense purposes existed. See Commonwealth v. Martin, 17 Mass. 359 (1821) illustrating the operation of the Acts of 1818, c. 124, § 1 regarding Armed Robbery; and Tully v. Commonwealth, 45 Mass. 357 (1842), illustrating the Rev. Statutes. c. 126, § 10, regarding larceny of a dwelling in the night and the extent to which Common law principles were applicable to the now statutorily-defined elements of the crime. [2]

In Chapter 194 of the Acts of 1850, the legislature passed a general statute which exceeded the common law prohibition against being armed while committing a breach of the peace or upon being arrested for a warrant:

> Section 1: Any person arrested upon a warrant of a magistrate, issued against him for any alleged offence against the laws of this Commonwealth, and any person committing any criminal offence against the laws of this Commonwealth, or any breach or disturbance of the public peace, who may, at the time of the commission of such offence, or breach or disturbance of the public peace, be arrested by any sheriff, deputy sheriff, constable or police

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[2] See Also: "MA acts of 1719-20 Ch. 0001. An Act For The Punishing And Preventing Of Dueling", "MA acts of 1835 Ch. 0140 An Act More Effectually To Suppress Riots.", et al.

> officer, in this State, and who shall, at the time of such arrest, be armed with any dangerous weapon, of the kind usually called slung shot, shall be punished by a fine not exceeding fifty dollars, or imprisonment in the common jail or house of correction for a term not exceeding one year.

Chapter 199 of the Acts of 1859 further expanded the list of weapons declared dangerous *per se* to include "metallic knuckles, billies or any other weapons of a like dangerous character, the malicious use of which would endanger life and limb." This act retained the qualifier that the statute applied solely to those going armed while committing other crimes or otherwise breaching the public peace; not to simply possessing or carrying those weapons.

Not until Chapter 172 of the Acts of 1906 was enacted was there a prohibition on simply carrying arms, and which applied to all people, regardless of the absence of criminal activity. It prohibited most commonly used arms, with an exemption license issuable to an "applicant [that] has a good reason to fear an injury to his person or property, and that he is a suitable person to be so licensed." This post-Reconstruction era statute created and imposed the blanket prohibition of carrying of arms, with limited exemption for licensure, Massachusetts has today.

Many changes to the law surrounding the carrying of arms and possession of firearms have occurred since

then.[3] The result is that Ch. 194 of the Acts of 1850 has largely morphed into M.G.L. Ch 269 § 10(b); while the firearms related statutes are consolidated in M.G.L. Ch 140, §§ 121-131 *et seq*, with certain criminal prohibitions placed in M.G.L. Ch. 269, § 10.

Relevant to the case at bar, the Colonial approach of punishing the carrying of arms only when committing a breach of peace or otherwise violating the *malum in se* statutes of the Commonwealth has been supplanted by a blanket ban on the possession and carrying of arms in the Commonwealth. There is now only an even smaller number of arms permitted at all, and then only through issuance of limited licensure exemptions to those residents deemed "suitable."

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[3] A non exhaustive list: Ch. 548, § 1, Acts of 1911; Ch. 207, § 1, Acts of 1919; Ch. 485, Acts of 1922; Ch. 284 § 4, Acts of 1925; Ch. 284, § 4, Acts of 1926; Ch. 395, § 3; Acts of 1927, c. 326, § 5; Acts of 1957, Ch. 688, § 23; Acts of 1968, Ch. 737, § 7, (now G.L. c. 140, §§ 129B, 129C and 129D); Acts of 1968, § 737. (Now at G.L. c. 269, §§ 10(a), 10(h)); Acts of 1975, c. 113, § 2; Acts of 1982 Ch. 254; Acts of 1983 Ch. 516, §§ 2, 3; Ch. 180, Acts of 1998; The Acts of 2014, Ch. 284.

B. The State of Arms Control in the Commonwealth at the Time of the Arrest of Appellant Caetano

The possession and carrying[4] of *per se* dangerous arms is largely prohibited (See G. L. Ch. 269, §10), subject to a limited licensure exemption (See G. L. Ch. 140 § 131). The court below in this case relies in part on the technicality that Appellant Caetano had other options and that "[b]arring any cause for disqualification the defendant could have applied for a license to carry a firearm. See G. L. c. 140, §§ 129B, 131 (c). In addition, again barring any disqualification, possession of mace or pepper spray for self-defense no longer requires a license but did so when Appellant Caetano was charged and convicted. See G. L. c. 140, § 122D, inserted by St. 2014, c. 284, § 22."[5]

At the time of Appellant Caetano's arrest, there were two legal options for Appellant Caetano; carry a gun or carry a defensive spray (mace or pepper spray). At all relevant times, both options required a license; between the arguments in the court below and the decision, the license requirement for sprays was removed.

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[4] The definition of "carry" as related to arms is possession on one's person outside the home. See *Seay*, 376 Mass. at 740-42 additionally holding that common areas outside an apartment were not in "the home". Home means domicile ("…was not the defendant's home") Commonwealth v. McCollum, 79 Mass. App. Ct. 239, 258 (Mass. App. Ct. 2011)

[5] Commonwealth v. Caetano, 470 Mass. 774, 783 (2015)

At the time of Caetano's arrest, defensive sprays were statutorily classified as "ammunition," the possession and carry of was restricted to licensed individuals. A license good only for defensive spray was available to Massachusetts residents through their police department; for non residents, from the colonel of the state police. Issuance of said license would normally take between 30 and 90 days (despite the statutory requirement of 40 days) after the submission of the application.

To obtain a permit to actually carry a handgun, Appellant Caetano would have to receive a "License To Carry Firearms/Class A," without the common restrictions against carrying on her person placed on first time applicants[6]. To be issued that license, Caetano would have had to pass an approved safety course, paid for by herself, and pay a one hundred dollar application fee. Appellant Caetano would have then been subjected to an arbitrary, undefined "suitability" requirement ("applicant is a suitable person to be issued such license") and would have had her license - if actually issued - "subject to such restrictions relative to the possession, use or carrying

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[6] From a civil case challenging a town with such a policy. "With three exceptions, Chief Grimes [of Weymouth, MA] "ordinarily" imposes a "target & hunting" restriction on Class A licenses for first-time applicants. (Id. ¶ 9). The three exceptions are that Chief Grimes will "usually" give unrestricted licenses to first-time applicants who are (1) members of law enforcement, (2) members of the military, or (3) "business owners who substantiate they handle large amounts of cash."" Davis v. Grimes, 9 F. Supp. 3d 12, 18 (2014).

of firearms as the licensing authority deems proper."[7] At the time of this incident, the licensing process was taking three months or more.

Had Appellant Caetano acquired an LTC, she also would have been required to report all address changes "within 30 days of occurrence" to three authorities:

1. The authority which issued the LTC;
2. The authority for the municipality she moved to; and
3. The state Firearms Records Bureau.

The requirement is found in M.G.L. 140 §131, but that statute does not specify what address she could possibly use, as she had no fixed address at the time of the encounter with her abusive ex-boyfriend. It also does not state whether all changes within the 30 days were required to be reported, or simply any change that lasted more than 30 days[8].

The absence of a fixed address is itself a bar to licensing, as most police departments demand utility bills, a driver's license, rental contracts, etc, even though they are not statutorily required, or on the state application.

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[7] See M.G.L. c. 140, § 131.

[8] Suspensions/revocations of LTCs do occur for the reason of failing to notify the licensing authorities of an address change. See Commonwealth vs. Phillips; MA Appeals Court docket #2014-P-1530 (2014). Mr. Philips was temporarily homeless and had his LTC suspended for failing to report his address change.

The Supreme Judicial Court declared that Caetano had options other than to unlawfully possess for her own defense a stun gun; a device specifically designed to be non-lethal:

> Barring any cause for disqualification the defendant could have applied for a license to carry a firearm. See G. L. c. 140, §§ 129B, 131 (c). In addition, again barring any disqualification, possession of mace or pepper spray for self-defense no longer requires a license. See G. L. c. 140, § 122D, inserted by St. 2014, c. 284, § 22.[9]

There are two clear errors of law in that assertion. First, the only license to carry a "firearm" under Massachusetts law is *the* License To Carry Firearms, issued under M.G.L. c. 140, § 131. The license issued under M.G.L. c. 140, § 129B is a mere Firearms Identification Card "FID", which, bizarrely, does not permit even owning "firearms" (which means "handguns" under Massachusetts law[10]), still less carrying them loaded in public. The only guns an FID Card authorizes possession of are non-"large capacity" long arms; hardly a viable means of self-defense outside the home. The court's inclusion of the FID Card as an means for Caetano to protect herself with a firearm outside her home is erroneous.

The court's second stated remedy available to Caetano was obtaining a "spray-only" FID Card. At the

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[9] Commonwealth v. Caetano, 470 Mass. 774, 783 (2015)

[10] See M.G.L. c. 140, § 121.

time of her arrest and conviction, that card was required for sprays, and was "shall issue" for a fee of twenty-five dollars. It used the same application form and had the same requirements, but for the safety course, as that used for LTCs and full FID Cards.

To obtain either of the Supreme Judicial Court's stated available remedies, Caetano, a marginally employed, homeless woman, must:

1. Successfully complete an approved safety course, usually a $75 to $125 fee (not required for a Spray Only FID Card);
2. Be deemed to be a resident of MA by her licensing authority;
3. Pay another $100 to file the license application; then
4. Be deemed suitable to be licensed to carry a gun by her licensing authority, if seeking an LTC, and;
5. Wait from one to four months to actually receive a license.

Moreover, as a first-time licensee, Caetano's LTC, if actually issued, would likely have been crippled by the "Target & Hunting" restriction commonly placed on first licenses. This would preclude her carrying a loaded firearm, which was the entire object of the exercise.

In general, applicants found unsuitable for a license to carry a firearm must bear the burden of proving they are otherwise suitable, subject to rational basis review and the Supreme Judicial Court has held there is no

Second Amendment right to carry a handgun concealed for the purposes of self-defense.[11]

The licensing authority has no duty to prove the "unsuitability" of an applicant the authority has denied. Quite the opposite; Massachusetts residents who wish to keep and carry arms bear the burden of proving "suitability" and a "good reason" to carry said arm.[12]

Even after one satisfies all the formalities and meets all the requirements, Federal case law suggests that the even holding a license is no protection against arrest. The First Circuit has upheld that police seizure of one's firearm, despite holding a facially valid license to carry, is perfectly acceptable if the officer is unable to independently verify the validity of the license.[13]

As a result of her conviction for possessing a non-lethal means of defense against a proven threat, Appellant Caetano is prohibited from possessing even a defensive spray for five years;[14] and prohibited for life from possessing any type of firearm for self-defense in

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[11] See Chief of Police of the City of Worcester v. Holden, 470 Mass. 845 (2015).

[12] See Commonwealth v. Humphries, 465 Mass. 762, 767 (2013); also, Commonwealth v. Farley, 64 Mass. App. Ct. 854, 857 (2005).

[13] Schubert v. City of Springfield, 589 F.3d 496 (1st Cir. Mass. 2009).

[14] See M.G.L. c.140 § 122D.

the Commonwealth.[15] The conviction triggers the lifetime Federal prohibition as well.[16]

C. The court below applied the wrong standard for Arms in Common use.

The court below analyzed the constitutionality of M.G.L. c. 140, § 131J by first finding that all EDWs, including Caetano's stun gun, were dangerous and unusual arms which fell outside the ambit of Second Amendment protection:

> The ban on the private possession of stun guns will not burden conduct that falls within the scope of the Second Amendment if a stun gun is a weapon not "in common use at the time" of enactment of the Second Amendment and would be dangerous per se at common law without another, primary use, i.e., as a tool. See *Heller*, 554 U.S. at 624-625, 627, quoting *Miller*, 307 U.S. at 179. For reasons that follow, there can be no doubt that a stun gun was not in common use at the time of enactment, and it is not the type of weapon that is eligible for Second Amendment protection. See *Heller*, supra at 622. [17]

It also analyzed constitutionality by looking to the stun guns' "military adaptability":

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[15] See M.G.L. c.140 § 131(d).

[16] See 18 U.S.C. 922(g); also, Caron v. United States, 524 U.S. 308 (1998).

[17] Commonwealth v. Caetano, 470 Mass. 774, 780-781 (2015)

> Even were we to view stun guns through a contemporary lens for purposes of our analysis, there is nothing in the record to suggest that they are readily adaptable to use in the military. Indeed, the record indicates "they are ineffective for … hunting or target shooting."[18]

The Heller court noted that handguns were but one class of "weapons," and acknowledged that knives are also "arms." Both knives and guns are personal defense weapons; recognized as such by centuries of such use. Under that analysis, EDWs also constitute "arms;" moreover, they are specifically designed for personal defense. Under the same analysis which shows guns and knives are protected "arms," citizens correctly claim a right to "keep and bear" EDWs.

The Second Amendment has already been acknowledged by the *Heller* court to protect a spectrum or "class" of arms, including knives and handguns. The *Heller* court specifically applied it to modern handguns; repeating arms non-existent at the time of Ratification.

Just as the First Amendment embraces and protects new means of communication, and the Fourth Amendment protects against new technologies for intrusion and surveillance, the Second Amendment applies to new technologies. It necessarily follows that, *in pari materia*, the Second Amendment must be read to protects these new technologies; defensive sprays and Electronic Defense Weapons.

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[18] *Id*. at p. 781.

II. THE NATURE AND PURPOSE OF AN ELECTRONIC DEFENSE WEAPON

A. EDWs Are Effective Self-Defense Arms.

An Electronic Defensive Weapon (also known as Conducted Energy Weapon or Electronic Control Weapon) is an electronic device that stuns, incapacitates and/or causes significant sensations of pain to interrupt an impending attack. It uses high voltage, but low amperage, to ensure that the current needed to be effective can bridge the gap between the skin and the device's probes/contacts caused by clothing, but with no burns or likely permanent harm. When activated, the current is discharged from the stun gun in a series of very short pulses, each only milliseconds long; as opposed to a continuous discharge of current.

There are two types of Electronic Defense Weapons ("EDWs") available. The first is the traditional "stun gun," which requires direct contact with an attacker to apply the charge. The second is the "TASER" (the brand name coined by its creator); a projecting weapon using compressed gas to launch two barbed needles connected to the pistol-like launch unit via two separate thin wires. Stun guns are distinct from TASERs; the latter are distance weapons, as acknowledged by a Massachusetts court:

> A TASER is "used for a gun that **fires** electrified darts to stun and immobilize a person," Merriam-Webster's Collegiate Dictionary 1279

> (11th ed. 2003), **and differs from the weapon at issue here** [a stun gun].[19]

The *Odimegwu* court further noted the temporary nature of the effects:

> Not until the defendant opened the door on cross-examination by probing Westhaver's knowledge of the differences between TASERs and stun guns did the judge permit the prosecutor to elicit Westhaver's knowledge of the differences between TASERs and stun guns, and of **the fact that stun guns are designed to incapacitate temporarily**. *Id.* at fn. 4 (**bold** added).

Both types of EDW, when activated, cause significant, but temporary, sensations of pain and localized neuromuscular disruption; i.e. the attacker losses muscle control around the area where the contacts are placed. The significant differences between a stun gun and a TASER is that the former is far more compact and requires contact with the attacker to work. The TASER is larger because it requires a launcher, making it a "stand-off" or distance weapon.[20] Appellant Caetano possessed a simple stun gun that required physical contact with her attacker, as indicated by Appellant's lower court brief at page 4.

Electronic Defensive Weapons are categorized as "non-lethal" arms. While a death is possible from a

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[19] Com. v. Godwin Odimegwu, 08-P-1911 (2009) at fn. 2 (**bold** added).

[20] See People v. Yanna, 297 Mich. App. 137.

stun gun or TASER discharge, that is not the result they are designed for. For that reason, such incidents are uncommon, and usually involve those with pre-existing medical conditions.

TASER International routinely demonstrates the TASER on willing participants at trade shows and other events,[21] as well as its own employees.[22] Police recruits are also shocked as part of their training[23] in order to familiarize them with the effects of EDW use. This training protocol for law enforcement is on par with that employed for pepper spray use,[24] and for the same reason: familiarization with the effects.

Alternate non-lethal weapons, such as batons and billies, require impact, which causes more trauma; mace and pepper spray cause significant visual and respiratory distress and for a longer duration, with resulting possible trauma. This places EDWs at the

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[21] For an example, see https://www.youtube.com/watch?v=zxEuImiNoTc sec37-40. (last visited Oct. 15, 2014).

[22] http://www.TASER.com/about-TASER "As a measure of this commitment, TASER employees regularly undergo voluntary exposures with our various TASER CEWs. This includes our founders: Rick Smith, CEO and his brother Tom Smith, former Chairman of the Board." (last visited Oct. 15, 2014)

[23] (https://www.youtube.com/watch?v=MP9GHluE9ao, https://www.youtube.com/watch?v=J4WAsxTRJRw, https://www.youtube.com/watch?v=8Ev-jroGy6U, https://www.youtube.com/watch?v=AUquJQ_OgeE (last visited Oct. 15, 2014)

[24] https://www.youtube.com/watch?v=TQqY-4MYwQc (last visited Oct. 15, 2014)

very low-harm, low-risk end of the trauma spectrum. Appellant Caetano possessed such a simple stun gun.

The United States Department of Justice publishes guidelines[25] on the use of EDWs, the primary guiding principle of which is that they be considered less lethal. Although the guidelines are directed primarily at law enforcement, the document indicates that Electronic Defense Weapons commonly used fall on the Use of Force Continuum between manual holds and deadly force.[26]

The use of these devices as pain compliance tools in a law-enforcement manner by the average citizen is unlikely; citizens use them for self-defense. The issues found in police use of EDW's are uncommon and implausible in a self-defense situation. The victims usually flee once the attackers have been neutralized, allowing the victim to escape.

B. EDWs Are Effective Self-Defense Arms.

Citizens who take self-defense seriously want to defend themselves, and those around them whom they care for, from bodily injury safely and effectively. They do not act maliciously, or in any way to intentionally harm others. Self-defense is the fundamental instinct to survive unwanted violent altercations unscathed if they can't be avoided. Their lack of lethality, yet efficacy, makes EDWs desirable as an effective defense tool, just as defensive sprays are. It also puts them in

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[25] http://cops.usdoj.gov/Publications/e021111339-PERF-ECWGb.pdf (last visited Oct. 15, 2014)

[26] Id. at p. 26.

the category of defensive arms that firearms and knives are. As such, stun guns are entitled to the same Second Amendment recognition and protection as those self-defense tools are.

This case presents as its core issue the difference in how sprays are favored under Massachusetts law, yet which criminalizes the electronic equivalent. The use of force principles for self-defense are well known and apply to non-lethal and lethal defensive tools alike; a) a reasonable belief that one is under attack or about to be, b) that the person so believing did what was reasonable to avoid the physical conflict, and c) that force was met with reasonable force.[27] Those rules do not change simply because the means of self-defense are electronic, rather than chemical or ballistic.

In her brief, Appellant Caetano described having previously been beaten so badly that she ended up in the hospital.[28] Appellant was well aware of her former partner's propensity to violence firsthand, including, as noted in another case, his "...specific violent acts or reputation for violence…[and] had a reasonable apprehension for [her] safety." Appellant's brief also cites multiple restraining orders and refers to incidents when the Appellant's former partner repeatedly violated those orders ("she described how J.A. would continually appear at her workplace to threaten and harass her"). [29]

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[27] See Model Jury Instruction 9.260, 2009 Ed.

[28] Appellant's lower court (Supreme Judicial Court) Brief at pg. 5.

[29] Allen v. United States, 150 U.S. 551, 561 (1893).

Caetano's former partner precipitated the incident creating the case at bar. Her restraining order was, again, useless at stopping the abuse. Appellant's threatened use of her stun gun did:

> I said, 'I'm not gonna take this anymore. Somebody gave me this and I don't wanna have do it to you, but if you don't leave me alone, I'm gonna have to.' And he ended up leaving. I guess, got scared and left me alone.[30]

The paper wall of multiple domestic restraining orders did not stop Caetano's attacker; neither did criminal charges, a phone call to 911, or Caetano's co-workers. Appellant Caetano's stun gun, a tool - an "arm" - specifically designed for non-lethal self-defense did. It allowed Caetano to quickly halt an immediate, violent threat to her. Nothing protects a diminutive woman in the face of a raging attacker more than the evident ability to defend herself. Stun guns, an effective, non-lethal tool legal in most states,[31] but criminalized in Massachusetts, provide that empowerment and protection.

Attackers have tactical superiority; surprise and, usually, a force superior to their unarmed victim. The victims of criminals have no such advantages, and "...detached reflection cannot be demanded in the presence of an uplifted knife."[32]

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[30] Appellant's SJC Brief, pg. 6

[31] See both Commonwealth's Brief at 26 and Defendant's Brief at 12.

[32] Brown v. United States, 256 U.S. 335, 343 (1921).

> The law acknowledges exigent circumstances do not permit leisurely reflection, and does not demand a person facing an attacker; "must be regarded as exercising the deliberation of a judge in passing upon the law and of a jury in passing upon the facts, in arriving at a determination as to the existence of the danger and the necessity of using the particular means to avert it.[33]

The law requires only that the victim of an attack reasonably react as circumstances permit, and make a reasonable response to the threat as perceived, including the reasonable level of force to end the assault in the circumstances. Caetano's use of her non-lethal stun gun against a violent attacker whose previous beatings had required her hospitalization, was clearly necessary and eminently reasonable under the circumstances. That no further harm was done, to her, her attacker or society in general, is also in keeping with public policy.

Had she used a defensive spray, there would have been no charges. Because she used an electronic equivalent, she was criminally charged. That speaks volumes about the legitimacy of the statute under which she was charged. It also documents the appropriateness of EDWs as modern "arms" for self-defense, as the Yanna court so found.

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[33] People v. Yanna, 824 N.W.2d 241 (2012).

CONCLUSION

Amicus Comm2A asserts the Second Amendment's recognition of the "right of the people to keep and bear arms" is not limited to firearms, but encompasses a range of personal defensive weapons. In the case at bar, it is the class of personal defense arms known as "Electronic Defense Weapons" or EDWs.

Such weapons as pistols, knives, swords, etc., were common when the Constitution was written and ratified. The Second Amendment was conceived when these defensive arms were commonly carried, and there is no reason to believe they were not protected by the Constitution. Indeed, the Commonwealth of Massachusetts only began to ban the carrying personal defense weapons in 1906. Until then, criminal charges for the carrying weapons was interpreted per the *Sir John Knight's* case interpretation of the Statute of Northampton.

The Second Amendment has already been acknowledged by the Heller court to protect a spectrum or "class" of arms, including knives and handguns. The Heller court specifically applied it to modern handguns; repeating arms non-existent at the time of Ratification. Applying the same legal analysis by which the First and Fourth Amendments were found to apply to, and protect, new technologies, the Second Amendment also applies to, and protects, them. That means it protects not just repeating firearms, but defensive sprays and Electronic Defense Weapons.

Second Amendment protects the individual right to carry a weapon in case of dangerous confrontation. The statute case at bar, M.G.L. c. 140, § 131J, criminalizes

not just carrying EDWs, but even possessing them in one's home. This infringement of a fundamental right is subject to the same heightened scrutiny as laws restricting or prohibiting firearms are.

The statute criminalizes possessing EDWs, which are in *pari materia* with those "arms" already recognized and permitted to be both owned, and carried outside the home. This statute is subject to the same heightened scrutiny as other laws which prohibit or otherwise restrict the fundamental right to "bear arms" are.

The statute fails under that standard of review. A state which acknowledges the right to use deadly force in self-defense cannot argue that a non-lethal EDW is "dangerous and unusual;" still less that, where pepper spray is now sold over the counter, an EDW is not an "arm" suitable for self-defense. Denying people access to a proven, *non*-lethal means of self-defense serves no rational purpose; rather, it forces a choice between deadly force and defenselessness. The statute also violates the fundamental right to "bear arms."

Based upon the above analysis, *amicus* Comm2A argues that this law, M.G.L. c. 140, § 131J, is unconstitutional, both as written and as applied.

Respectfully submitted,

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