



# Legal Update

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March 26, 2015

**The SJC holds that a stun gun is not afforded the same protection under the Second Amendment!**

*Commonwealth v Jaime Caetano*, SJC No. 11718 (2015):

**Background:** In 2011, Ashland police officers were dispatched to a supermarket for a possible shoplifting. Upon arrival, the supermarket manager directed police to a man who was standing next to a motor vehicle in the parking lot. The police approached the vehicle and located the defendant, Jaime Caetano, (hereinafter referred to as “Caetano”) who was sitting in the passenger seat. Caetano consented to police searching her purse and they recovered a stun gun. Caetano told police that she kept the stun gun as protection from her ex-boyfriend. In Massachusetts, since private citizens are prohibited from possessing a stun gun police charged Caetano with violation of G. L. c. 140, § 131J for possessing a stun gun. Caetano filed an appeal arguing that under G.L. c. 140 § 131J a stun gun should be considered an "arm" for purposes of the Second Amendment and is a weapon used primarily for self-defense. Caetano’s motion was denied and the case went to trial. Although a judge found Caetano guilty of illegally possessing a stun gun, the case was placed on file. A few months later, Caetano filed a motion challenging the disposition of her case. A district court judge heard the motion and Caetano’s right of appeal was preserved. The SJC agreed to hear the case through direct appellate review.

**Conclusion:** The issue before the SJC was whether the Massachusetts ban on stun guns violates the Second Amendment. The SJC concluded that G. L. c. 140, § 131J, does not violate the Second Amendment right articulated in *Heller* and it affirms Caetano’s conviction for possession of an electrical weapon in violation of G. L. c. 140, § 131J. Pursuant to MGL c. 140, § 131J, it is illegal to possess a private "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" except by specified public officers or suppliers of such devices, if possession is "necessary to the supply or sale of the device or weapon" to agencies utilizing it. Anyone who violates this section can face a fine or potentially imprisonment in the House of Correction.

In *Heller*, 554 U.S. at 635, the United States Supreme Court held that "a ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense." The *Heller* Court was confronted with a total ban on handgun possession in the home, and a further requirement that any lawful firearm kept in the home be rendered inoperable. *Id.* at 628. The Court reasoned that "the inherent right of self-defense has been central to the Second Amendment right. The handgun ban amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Caetano argues that Massachusetts' law prohibiting private citizens from possessing stun guns violates the rights that were established in *Heller*. After *Heller*, most courts have consistently recognized that the possession of operative firearms for use in defense of the home constitutes the core of the Second Amendment." *Commonwealth v. McGowan*, 464 Mass. 232, 235 (2013), quoting *Hightower v. Boston*, 693 F.3d 61, 72 (1st Cir.2012). However the Supreme Court in *Heller* did not find that the Second Amendment individual right to keep and bear arms is unlimited. 554 U.S. at 595. In the present case, Caetano's conduct was used for protection outside of the home and therefore not covered under *Heller*. See *Hightower* 693 F.3d at 72 & n.8, quoting *Heller*, 554 U.S. at 627.

The second issue the SJC had to consider is how a stun gun would be categorized. Since the stun gun is not a firearm that was around when the Second Amendment was enacted would it be designated as a firearm or dangerous weapon per se. According to the statute, a stun gun is "a 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." G. L. c. 140, § 131J. From this statutory definition, we easily conclude that any weapon regulated by § 131J would be classified as dangerous per se at common law. Accordingly, we consider the stun gun a per se dangerous weapon at common law. Because the stun gun that the defendant possessed is both dangerous per se at common law and unusual, but was not in common use at the time of the enactment of the Second Amendment, the SJC concluded that the stun guns fall outside the protection of the Second Amendment. See *Heller*, 554 U.S. at 622, 627.