



REVIEW OF RECENT CASES:  
***Caetano v. Massachusetts***

## YOU HAVE THE RIGHT TO OWN A GUN, BUT NOT A STUN GUN?

Audra Ibarra

**T**he Second Amendment provides “the right of the people to keep and bear arms shall not be infringed.” The right to bear arms “vindicates the ‘basic right’ of ‘individual self-defense.’” *Caetano v. Massachusetts*, No. 14-10078, 2016 WL 1078932, at \*2 (U.S. Mar. 21, 2016) (Justice Alito, concurring). The Second Amendment protects our right to own a gun throughout the country. Guns are of course lethal, but stun guns are nonlethal.<sup>1</sup> Stun guns shock, but almost never kill. Yet several states including Hawaii, Massachusetts, New Jersey, New York, and Rhode Island outlaw ownership of a stun gun. Under this legal anomaly, states permit possession of lethal weapons, but not nonlethal ones.

Does the Second Amendment protect our right to own a gun, but not a stun gun to defend ourselves? This remains an open question even though the Supreme Court recently considered it in *Caetano v. Massachusetts*. *Id.* at \*1 (per curiam).

Jamie Caetano’s former boyfriend physically abused her and eventually sent her to the hospital. Afterward she was homeless and afraid for her life. He was a hundred pounds heavier and a foot taller than she. She got multiple restraining orders, but they did not keep him away. So she got a stun gun for self-protection. It worked. One night after work, he approached her and screamed at her. She

threatened to use the stun gun if he did not leave her alone. He got scared and left. But Massachusetts law prohibits possession of a stun gun.<sup>2</sup> So when the police later discovered the weapon, she was arrested. She moved to dismiss the charge on Second Amendment grounds, but the trial court denied the motion. She was tried and convicted. The Supreme Judicial Court of Massachusetts upheld the conviction.

The U.S. Supreme Court granted Caetano’s petition for writ of certiorari. But rather than order merit briefing and oral argument on the issue of whether the Second Amendment extends to stun guns, the Court simply filed an opinion per curiam summarily vacating the judgment of the Massachusetts court and remanding it for further proceedings.

## MAJORITY OPINION

In its very brief majority opinion, the Supreme Court concluded “the explanation the Massachusetts court offered for upholding the law [prohibiting stun guns] contradicts this Court’s precedent.” *Id.* The Massachusetts court found the Second Amendment did not extend to stun guns basically because they were not in use when the amendment was enacted and because they are not readily adaptable to military use. Referring to its opinion in *District of Columbia v. Heller*, 554 U.S. 570 (2008), by the late Justice Antonin Scalia, the Supreme Court reiterated “The Court has held that ‘the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.’” *Id.* The Court also noted “*Heller* rejected the proposition ‘that only those weapons useful in warfare are protected.’” *Id.* However, the Court did not explicitly address whether the Second Amendment extends to stun guns.

Referring to the Massachusetts court’s suggestion that Caetano should have simply gotten a firearm instead of a stun gun to defend herself, Justices Alito and Thomas warned, “Courts should not be in the business of demanding that citizens use more force for self-defense than they are comfortable wielding.”

## CONCURRING OPINION

The concurring opinion written by Justice Samuel Alito and joined by Justice Clarence Thomas went further. They found “Massachusetts’ categorical ban of [stun guns] violates the Second Amendment.” *Id.* at 6. They explained, “Electronic stun guns are no more exempt from the Second Amendment’s protections, simply because they were unknown to the First Congress, than electronic communications are exempt from the First Amendment, or electronic imaging devices are exempt from the Fourth Amendment.” *Id.* at 3. According to them, “the pertinent Second Amendment inquiry is whether stun guns are commonly possessed by law-abiding citizens for lawful purposes today.” *Id.* at 6. They found “[h]undreds of thousands of Tasers and stun guns have been sold to private citizens, who it appears may lawfully possess them in 45 states,” and stun guns are “accepted as a legitimate means of self-defense across the country.” *Id.* Finally, they found “[t]he reasoning of the Massachusetts court poses a grave threat to the fundamental right of self-defense.” *Id.* Referring to the Massachusetts court’s suggestion that Caetano should have simply gotten a firearm instead of

a stun gun to defend herself, Justices Alito and Thomas warned, “Courts should not be in the business of demanding that citizens use *more* force for self-defense than they are comfortable wielding.” *Id.* (emphasis in original).

## SIGNIFICANCE

The Supreme Court has yet to answer the question of whether the Second Amendment encompasses the right to own a stun gun. Five states currently prohibit ownership of stun guns. The Court’s majority opinion in *Caetano v. Massachusetts* did not invalidate that prohibition even though Justices Alito and Thomas found it to be unconstitutional. So while possession of a lethal gun is legal, possession of a nonlethal stun gun may not be.

One reason for this anomaly is that money spent on lobbying for firearms dwarfs money spent on lobbying for nonlethal weapons according to Eric Markowitz, a senior writer for *International Business Times*.<sup>3</sup> For example, in 2014, the National Rifle Association spent \$28 million on political expenditures according to the Center for Responsive Politics.<sup>4</sup> But Taser only spent \$3.4 million according to its annual report, and most of it was directed toward law enforcement use.<sup>5</sup>

Outlawing stun guns and other nonlethal weapons raises practical problems. It limits the consumer market and consequently money that is put into research and development for improving nonlethal weapons according to Frank Minter, a contributor to *Forbes*.<sup>6</sup> More importantly, it may force a victim who wants to defend herself to choose between a lethal weapon or no weapon at all.

*Audra Ibarra is a civil and white-collar appellate attorney. She is a former supervising assistant U.S. attorney, deputy district attorney, and litigator at a large national law firm. She cur-*

*rently serves on the standing Committee on Appellate Courts for the State Bar of California, and as the chair of the Amicus Committee of California Women Lawyers (CWL). She is on the Executive Committee of the Board of Governors of CWL, and the Board of Directors of the California Minority Counsel Program. For more information, please go to [www.aiappeals.com](http://www.aiappeals.com) and [www.calapplaw.com](http://www.calapplaw.com).*

### Notes

1. Stun guns “are designed to stun a person with an electrical current” by running a current between two metal prongs on the device and placing the prongs in direct contact with the person. [Cite.] A similar device popularly known by the brand name ‘Taser,’ shoots out wires tipped with electrodes that can deliver an electrical current from a distance. [Cite.] Tasers can also be used like a stun gun without deploying the electrodes—a so called ‘dry stun.’” *Id.* at \*3 n. 2. “[T]hese sorts of electrical weapons are ‘non-lethal force’ ‘designed to incapacitate’—‘not kill’—a target.” *Id.*
2. Except for law enforcement and suppliers, Massachusetts prohibits possession of 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.” Mass. Gen. Laws, ch. 140, § 131J (2014).
3. See “Thanks to the Gun Lobby, in Some States It’s Easier to Carry a Handgun Than a Taser,” by Eric Markowitz, <http://www.ibtimes.com/thanks-gun-lobby-some-states-its-easier-carry-handgun-taser-2329892> (as of April 12, 2016).
4. See note 3.
5. See note 3.
6. See “Should Stun Guns Be Protected by the Second Amendment?” by Frank Minter, <http://www.forbes.com/sites/frankminter/2015/08/13/should-stun-guns-be-protected-by-the-second-amendment/#2ba4b0d631b6> (as of April 12, 2016).