

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY, TRENTON DIVISION**

NEW JERSEY SECOND AMENDMENT)	
SOCIETY AND MARK CHEESEMAN)	
)	
Plaintiffs,)	HON. JUDGE SHIPP, U.S.D.J.
)	Case No. 3:16-cv-04906-MAS-DEA
v.)	
)	
CHRISTOPHER S. PORRINO, in his)	BRIEF IN SUPPORT OF PLAINTIFFS
Official Capacity as Acting Attorney)	MOTION FOR JUDGMENT ON THE
General of New Jersey, and COLONEL)	PLEADINGS
RICK FUENTES, in his Official Capacity)	
as Superintendent of the New Jersey State)	Hearing: December 19, 2016
Police)	
)	
Defendants.)	
_____)	

**BRIEF ON BEHALF OF PLAINTIFFS IN SUPPORT OF THEIR MOTION FOR
JUDGMENT ON THE PLEADINGS**

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PRELIMINARY STATEMENT

Plaintiffs New Jersey Second Amendment Society (hereafter “NJ2AS”) and Mark Cheeseman (hereafter “Cheeseman”) seek to purchase, own and carry Tasers for self-defense. Plaintiffs filed their Complaint on August 11, 2016 [ECF #1]. The declarations provided by NJ2AS and Mark Cheeseman are attached to the Complaint as Exhibits A and B, respectively. Mr. Cheeseman attempted to purchase a Taser Pulse on August 10, 2016, but was declined due to New Jersey’s ban on stun guns and Tasers. ECF No. 1-4. Both Mr. Cheeseman and NJ2AS members would own stun guns or Tasers if they were not illegal in New Jersey.

After the Complaint was served on August 15, 2016, Defendants moved for a Clerk’s Order extending time to respond to the Complaint. ECF No. 6. On September 20, 2016, Defendants moved for additional time to respond to the Complaint. ECF No. 9. That request was granted. On October 21, 2016, Defendants again requested an additional thirty days to respond to the Complaint. ECF No. 14. That request was opposed by Plaintiffs. ECF No. 15. The Court granted in part Defendants’ request for additional time and gave another fifteen days. ECF No. 16. The Defendants answered the Complaint on November 10, 2016. ECF No. 18.

Between requesting extensions and answering the Complaint on November 10, 2016, Defendant Christopher Porrino, in a case styled *State of New Jersey v.*

Kevin Lambert, Docket No. A-1996-15T5 (attached), conceded that the State of New Jersey’s “... stun-gun statute violates the Second Amendment...” *Id.* at 10. Further, the Attorney General’s concluded that “For all the foregoing reasons, this Court should rule that defendant’s conviction for possession of a stun-gun violates the Second Amendment...” *Id.* at 16. This concession came three days *before* the Defendants in the instant case filed their Answer; essentially denying that the stun gun ban violates the Second Amendment.

LEGAL STANDARD

Pursuant to Fed. R. Civ. P. 12(c), a motion for judgment on the pleadings will be granted only if “the movant clearly establishes there are no material issues of fact, and he is entitled to judgment as a matter of law.” *Sikirica v. Nationwide Ins. Co.*, 416 F.3d 214, 220 (3d Cir. 2005) (citations omitted). The Court must view “the facts presented in the pleadings and the inferences to be drawn therefrom in the light most favorable to the nonmoving party.” *Id.* “In deciding a motion for judgment on the pleadings, the court considers the pleadings and attached exhibits, undisputedly authentic documents relied on by plaintiffs and attached to the motion, and matters of public record.” *Est. of Rosario v. Paterson Police Dept.*, CV 14-5167 (WJM), 2016 WL 6540447, at *2 (D.N.J. Nov. 3, 2016) (citations omitted).

ARGUMENT

a. Plaintiffs are Entitled to Judgment as a Matter of Law

The Second Amendment to the United States Constitution provides: “A well regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.” U.S. Const., Amend. II. The Second Amendment guarantees individuals a fundamental right to keep and carry arms for self-defense and defense of others in the event of a violent confrontation. *District of Columbia v. Heller*, 554 U.S. 570 (2008); *McDonald v. Chicago*, 561 U.S. 742 (2010); *Caetano v. Massachusetts*, 577 U.S. __ (2016). 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. *Heller*, 554 U.S. at 582; *Caetano*, slip op. at 1 (per curiam).

Given the decision in *Heller*, New Jersey may not completely ban the keeping and bearing of arms for self-defense that are not unusually dangerous, deny individuals the right to carry arms in non-sensitive places, deprive individuals of the right to keep or carry arms in an arbitrary and capricious manner, or impose regulations on the right to keep and carry arms that are inconsistent with the Second Amendment. *See Caetano v. Massachusetts*, 577 U.S. __ (2016); *Heller v. District of Columbia*, 801 F.3d 264 (D.C. Cir. 2015); *Palmer v. District of Columbia*, 59 F.Supp.3d 173 (2014).

N.J. Stat. Ann. § 2C:39-1 defines “Stun gun” to mean “any weapon or other device which emits an electrical charge or current intended to temporarily or permanently disable a person.” This same statute includes stun gun in the definition of a “weapon.” N.J. Stat. Ann. § 2C:39-3(h) provides that “[a]ny person who knowingly has in his possession any stun gun is guilty of a crime of the fourth degree.” Thus, New Jersey outlaws the private possession by plaintiffs of a Taser or stun gun within the state.

A first violation of New Jersey’s complete ban on the ownership or possession of Tasers or stun devices by non-law enforcement personnel is punishable as follows: “[i]n the case of a crime of the fourth degree, for a specific term which shall be fixed by the court and shall not exceed 18 months.” N.J. Stat. Ann. § 2C:43-6. A fine may also be levied “not to exceed ... \$10,000.00.” N.J. Stat. Ann. § 2C:43-3(b)(2).

The State of New Jersey has conceded, given the Supreme Court’s guidance in *Caetano v. Massachusetts*, 577 U.S. __ (2016), that its ban on stun guns violates the Second Amendment. See *State of New Jersey v. Kevin Lambert*, Docket No. A-1996-15T5, attached. There are no genuine issues of material facts taken in the light most favorable to the nonmovant which changes the outcome of New Jersey’s concession that its stun gun ban violates the Second Amendment.

In *Caetano*, the Supreme Court summarily reversed the Supreme Judicial Court of Massachusetts' holding that:

... a stun gun is not the type of weapon that is eligible for Second Amendment protection.” ... The court reasoned that stun guns are unprotected because they were “not ‘in common use at the time’ of enactment of the Second Amendment,” ... and because they fall within the “traditional prohibition against carrying dangerous and unusual weapons[.]”

Id. (citations omitted).

Justice Alito, joined by Justice Thomas, concurred and applied the Court's reasoning to argue that the “pertinent Second Amendment inquiry is whether stun guns are commonly possessed by law-abiding citizens for lawful purposes today.” (Alito, J. Concurring). The facts in *Caetano* demonstrated that “approximately 200,000 civilians owned stun guns as of 2009.” *Caetano*, 577 U.S. at 1032-33. The concurrence stated, “While less popular than handguns, stun guns are widely owned and accepted as a legitimate means of self-defense across the country.” *Id.* Additionally, as Justice Alito stated, “As the per curiam opinion recognizes, [dangerous and unusual] is a conjunctive test: A weapon may not be banned unless it is *both* dangerous *and* unusual.” *Id.* at 1031. The Supreme Court reiterated 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.* at 1027.

In a recent Fifth Circuit Court of Appeals case, the Fifth Circuit cited approvingly to *Caetano* for the proposition that stun guns are protected arms under the Second Amendment:

In addressing whether stun guns are in common use, Justice Alito, joined by Justice Thomas, implied that the number of states that allow or bar a particular weapon is important:

[T]he number of Tasers and stun guns is dwarfed by the number of firearms. This observation may be true, but it is beside the point.... The more relevant statistic is that [200,000] ... stun guns have been sold to private citizens, who it appears may lawfully possess them in 45 States.... While less popular than handguns, stun guns are widely owned and accepted as a legitimate means of self-defense across the country.

Caetano, 136 S.Ct. at 1032–33 (citations omitted). These two justices suggested that the 200,000 absolute number, plus that 45 states have “accepted [stun guns] as a legitimate means of self-defense,” was enough to determine that the stun gun is in common use.

Hollis v. Lynch, 827 F.3d 436, 449 (5th Cir. 2016). The District of Columbia was recently faced with a similar issue in *Crystal Wright, et al. v. District of Columbia, et al.*, Civil Action No. 1:16-cv-1556 (JEB), which was filed on August 2, 2016. Wright challenged the legality of the District of Columbia’s ban on stun guns and Tasers, similar to the current ban in New Jersey. A Stipulation of Relief was entered into on September 26, 2016 and now the District of Columbia is revising its statute to allow for some type of ownership of these weapons.

CONCLUSION

The instant case demonstrates a pure question of law: whether New Jersey's ban on possession of stun guns and Tasers violates the Second Amendment. New Jersey, in the *Lambert* case, agreed and conceded that it does. As such, Plaintiffs are entitled to judgment as a matter of law immediately for all relief sought in their Complaint.

Respectfully submitted,

/s/ Ryan S. Watson
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CERTIFICATE OF SERVICE

I, Ryan S. Watson, counsel of record for Plaintiffs, hereby certify that the foregoing document or pleading has been filed with the Clerk of the United States District Court, District of New Jersey, via ECF and that all counsel of record has received electronic notice of this filing.

Dated: November 13, 2016

/s/ Ryan S. Watson
Ryan S. Watson