STATE OF MICHIGAN
IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DEAN SCOTT YANNA,

Defendant-Appellee.
_____/

Court of Appeals No. 304293

Bay Circuit Case No. 10-10536-FH
Hon. Joseph K. Sheeran

BRIEF *AMICUS CURIAE* OF ARMING WOMEN AGAINST RAPE & ENDANGERMENT

Eugene Volokh*
UCLA School of Law
405 Hilgard Ave.
Los Angeles, CA 90095
(310) 206-3926
Counsel for *Amicus Curiae*
*Motion for temporary admission pending

THE SMITH APPELLATE LAW FIRM
By: Michael F. Smith (P49472)
1747 Pennsylvania Ave. N.W., Suite 300
Washington, DC 20006
(202) 454-2860
Co-counsel for *Amicus Curiae*

Dated: December 2, 2011

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions **Page**

Cases

Statutes and Rules

Treatises and Other Authorities

Briefs

INTRODUCTION AND STATEMENT OF INTEREST

Amicus curiae AWARE (Arming Women Against Rape & Endangerment) is a Massachusetts non-profit, tax-exempt charitable organization registered under chapter 501(c)(3) of the Internal Revenue Code. AWARE was founded in 1990 to provide information and training to enable people, particularly women, to avoid, deter, repel, or resist crimes ranging from minor harassment to violent assault.

AWARE's board members and instructors are certified to teach a wide range of self-defense techniques ranging from chemical defensive sprays to firearms. Its staff has been trained by many of the premier instructional organizations for training police and private citizens in the judicious use of force, including the American Society of Law Enforcement Training (ASLET), the International Association of Law Enforcement Firearms Instructors (IALEFI), the Annual Threat Management Conference, the American Women's Self-Defense Association, the Smith & Wesson Training Academy, and many other prominent organizations. Its staff members have given presentations at the American Society of Criminology and at annual training meetings of ASLET, Women in Federal Law Enforcement, and the International Women Police Association. One of its board members has published more than a hundred articles in various magazines and journals regarding the defensive use of firearms and other aspects of personal protection.

AWARE's staff members have often been sought out for interviews and commentaries on self-defense by magazines, newspapers, and the broadcast media.

This case is of significant interest to AWARE because it involves the issue of whether MCL 750.224a, which makes the mere possession of a stun gun or a Taser by a private citizen a four-year felony, improperly abridges the right to keep and bear arms protected by the Second Amendment.

ARGUMENT

I. Many People Have Good Reason to Choose Stun Guns or Tasers as Self-Defense Tools.

Michigan rightly allows people to possess and carry guns. *See* MCL 28.422. But different people have different self-defense needs, and they should be able to choose other means of defending themselves, as well—especially when those means are much *less* deadly than guns, as is the case for stun guns (electric weapons that require the user to touch the target with the weapon) and Tasers (electric weapons that shoot a probe that delivers the electric shock). See Appellant's Appendix VIII (parties' stipulations that such weapons are "generally nonlethal").

Some people, for instance, have religious or ethical compunctions about killing. For example, noted Mennonite theologian John Howard Yoder, noted Pentecostalist theologian David K. Bernard, and the Dalai Lama have expressed the view that while one ought not use deadly force even in self-defense, self-defense

using nondeadly force is permissible.[1] Some members of other religious groups, such as Quakers, share this view.[2] Other religious and philosophical traditions, such as the Jewish and Catholic ones, take the view that defenders ought to use the least violence necessary.[3] Some religious believers might therefore conclude that, when fairly effective nondeadly defensive tools are available, they should be used in preference to deadly tools.

Other people might feel they will be emotionally unable to pull the trigger on a deadly weapon, even when doing so would be ethically proper. Thus, for instance, Cao et al, *Willingness to Shoot: Public Attitudes Toward Defensive Gun Use*, 27 Am J Crim Just 85, 96 (2002), reports that 35 percent of a representative sample of Cincinnati residents age 21 and above said they would *not* be willing to shoot a gun at an armed and threatening burglar who had broken into their home. (The fraction

---

[1] *See* Yoder, *Nevertheless: The Varieties of Religious Pacifism* 31 (1971); Yoder, *What Would You Do?* 28-31 (1983); Bernard, *Practical Holiness: A Second Look* 284 (1985); Bernton, *Students Urged to Shape World: Dalai Lama Preaches Peace in Portland*, SEATTLE TIMES, May 15, 2001, at B1 (paraphrasing the Dalai Lama).

[2] *See* Gastil, *Queries on the Peace Testimony*, Friends J, Aug. 1992, at 14, 15 (noting the views of some Quakers); *Czubaroff v Schlesinger*, 385 F Supp 728, 739–40 (ED Pa, 1974) (describing a conscientious objector application that expressed such a view as a matter of humanist philosophy).

[3] *See Catechism of the Catholic Church*, http://www.vatican.va/archive/ENG0015/__P7Z.HTM, at ¶ 2264 (accessed November 30, 2011); *Babylonian Talmud*, Sanhedrin 74a (I. Epstein ed., Jacob Schacter & H. Freedman trans., Soncino Press 1994); *The Code of Maimonides*, Book Eleven, The Book of Torts 197-98 (Hyman Klein trans., Yale Univ Press 1954).

was higher for women respondents. *Id* at 100.) It seems likely that many of the 35 percent feel they would be psychologically unprepared to shoot an attacker, even if they were ethically permitted to do so.

Others might worry about erroneously killing someone who turns out not to be an attacker. Still others might be reluctant to kill a particular potential attacker, for instance when a woman does not want to kill her abusive ex-husband because she does not want to have to explain to her children that she killed their father, even in self-defense. Others might fear a gun they own might be misused, for instance by their children or by a suicidal adult housemate. Still others, such as people with past criminal convictions, may be barred from owning firearms. *See People v Swint*, 225 Mich App 353, 362; 572 NW2d 666 (1997) (upholding MCL 750.224f's ban on gun possession by felons because it "[a]rguably" "does not completely foreclose defendant's constitutional right to bear 'arms,' i.e., nonfirearm weapons, in defense of himself"). And even people who own guns may still want to have both a gun and a stun gun or Taser accessible, so that they can opt for a nonlethal response whenever possible, and for a lethal one when absolutely necessary. (This, of course, is part of the reason that police officers carry both kinds of weapons.)

These are not just aesthetic preferences, such as a person's desire to have a particular gun that she most likes when other equally effective guns are available.

These are preferences that stem from understandable and even laudable moral belief systems, emotional reactions, or pragmatic concerns. Members of Arming Women Against Rape & Endangerment generally believe that killing in self-defense is morally proper. But people who take the opposite view should be presumptively free to act on their beliefs without having to forgo effective self-defense tools; and people who have practical reasons to prefer nonlethal self-defense weapons should likewise be presumptively free to have the weapons that they need to effectively defend themselves.

II. The "Right to Keep and Bear Arms" Extends Beyond Just Firearms.

The Second Amendment and the Michigan Constitution each speak of the "right to keep and bear arms," not of a right to keep and bear guns or firearms. US Const, Am II; Const 1963, art 1, § 6; *see* Addendum, pg. 19. And the United States Supreme Court, the Michigan Supreme Court, this Court, and courts of other states have treated the right as extending beyond firearms.

A. The United States Supreme Court Has Treated the "Right to Keep and Bear Arms" as Extending Beyond Just Firearms.

The Supreme Court concluded in *District of Columbia v Heller*, 554 US 570; 128 S Ct 2783; 171 L Ed 2d 637 (2008), that "arms" refers to "weapons of offence, or armour of defence," or "any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another," *id* at 647 (quotation marks and citations omitted)—terms that cover more than just guns. And the Court, in the

section discussing the phrase "keep and bear arms," *id* at 581–92, four times expressly discussed non-firearms as "arms."

First, in showing that "keep and bear arms" included civilian possession of arms for self-defense, the Court noted that, "Timothy Cunningham's important 1771 legal dictionary" "gave as an example of usage: 'Servants and labourers shall use bows and arrows on *Sundays,* & c. and not bear other arms,'" *id* at 581 (citation omitted). Including the Cunningham quotation would have been pointless—indeed, counter-productive to the Court's argument—if the Court saw "arms" as limited to firearms.

Later in that section, the Court said that various "legal sources frequently used 'bear arms' in nonmilitary contexts," *id* at 587, and cited several examples. One such citation was a repeat of the Cunningham quote. *See id* at 587–88 ("Cunningham's legal dictionary, cited above, gave as an example of its usage a sentence unrelated to military affairs ('Servants and labourers shall use bows and arrows on *Sundays,* & c. and not bear other arms')"). The other quoted the great international law scholar Vattel. *See id* at 587 n10 ("E. de Vattel, The Law of Nations, or, Principles of the Law of Nature 144 (1792) ('Since custom has allowed persons of rank and gentlemen of the army to bear arms in time of peace, strict care should be taken that none but these should be allowed to wear swords')"). Both examples treated "arms" as including non-firearms; again, both would have been pointless and counterproductive if the Court believed "arms" meant only guns.

Three pages later, the majority mentioned knives as an example of "arms." The dissent had pointed to a proposed version of the Second Amendment that included a conscientious-objector provision—a provision that was deleted as the Bill of Rights made its way through Congress—in support of its view that "bear arms" must have been limited to military contexts. The majority disagreed:

> [The deleted provision] was not meant to exempt from military service those who objected to going to war but had no scruples about personal gunfights. Quakers opposed the use of *arms* not just for militia service, but for any violent purpose whatsoever—so much so that Quaker frontiersmen were forbidden to use *arms* to defend their families, even though "[i]n such circumstances the temptation to seize a hunting rifle or *knife* in self-defense ... must sometimes have been almost overwhelming." [554 US at 590 (emphasis added) (citation omitted)].

The Court thus included knives alongside rifles as examples of "arms" for Second Amendment purposes.

To be sure, *Heller* speaks mostly about guns. But the law challenged in *Heller* was a gun ban, so it makes sense that guns would be the Court's primary focus. The quotes given above, though, show that the Court's references to firearms were not intended to limit the Second Amendment to a right to bear only firearms.

B. The Michigan Supreme Court Has Treated the "Right to Keep and Bear Arms" as Extending Beyond Firearms.

The Michigan Supreme Court in interpreting the Michigan Constitution appears to likewise view the phrase "right to keep and bear arms" as covering weapons other than guns. In *People v Brown*, 253 Mich 537; 235 NW 245 (1931), the

Court noted that the right to keep and bear arms is subject to regulations, but stressed that such regulations "cannot constitutionally result in the prohibition of the possession of those arms which, by the common opinion and usage of law-abiding people, are proper and legitimate to be kept upon private premises for the protection of person and property." 253 Mich at 541. And in noting the narrowness of the statute in question, the Court stressed that the law "does not include ordinary guns, *swords*, revolvers, or other weapons usually relied upon by good citizens for defense or pleasure." *Id* at 542 (emphasis added).

Brown thus makes clear that, for 70 years, Michigan law has viewed "the right to keep and bear arms" as extending beyond firearms, treating swords and revolvers analogously as potentially the sort of "arms" that "are proper and legitimate to be kept . . . for the protection of person and property," and that are therefore constitutionally protected.

C. This Court Has Treated the "Right to Keep and Bear Arms" as Extending Beyond Just Firearms.

Likewise, this Court has treated the "right to keep and bear arms" in the Michigan Constitution as covering weapons other than guns. In *Swint*, this Court upheld Michigan's ban on gun possession by felons, relying expressly on the view that the "right to keep and bear arms" covered more than just guns (and thus left felons with other weapons for self-defense):

> We also note that while [Const 1963,] art 1, § 6 ensures a Michigan citizen's right to keep and bear "arms," that term is not defined. Black's Law Dictionary (6th ed.), p 109, defines "arms" as "anything that a man wears for his defense, or takes in his hands as a weapon." While MCL § 750.224f; MSA § 28.421(6) only precludes a former felon's use, possession, receipt, sale or transportation of a "firearm," it is silent regarding other "weapons." Arguably, MCL § 750.224f; MSA § 28.421(6) does not completely foreclose defendant's constitutional right to bear "arms," i.e., nonfirearm weapons, in defense of himself. [*Swint*, 225 Mich App at 362].

As the Court went on to note,

> [A]s long as our citizens have available to them *some types of weapons* that are adequate reasonably to vindicate the right to bear arms in self-defense, the state may proscribe the possession of other weapons without infringing on the constitutional right to bear arms. [*Id* at 362 (emphasis in original) (citation and internal quotation marks omitted)].

Swint thus made clear that "arms" includes "nonfirearm weapons," and expressly relied on that in concluding that the ban on felon gun possession was constitutional because it left felons free to possess "some types of weapons"—other than guns—"that are adequate reasonably to vindicate the right to bear arms in self-defense." *Id*.

Note that *Heller* does not undermine the soundness of *Swint* with regard to felons' continuing rights to possess some non-firearms weapons. The Supreme Court in *Heller* held only that "nothing in [the] opinion should be taken to cast doubt on longstanding prohibitions on the possession of *firearms* by felons." *Heller*, 554 US at 626 (emphasis added).

D. Other Courts Have Treated the "Right to Keep and Bear Arms" as Extending Beyond Just Firearms.

More recently, state courts in Delaware, Ohio, and Oregon have likewise concluded that the right to keep and bear arms extends beyond just firearms. *See State v Griffin*, 2011 WL 2083893, *7 n62; 2011 Del Super LEXIS 193, *26 n62 (Del Super Ct, May 16, 2011) (holding that the "right to keep and bear arms" under the Delaware Constitution extends to knives, and concluding that the Second Amendment right does the same); *City of Akron v Rasdan*, 105 Ohio App 3d 164, 171-172; 663 NE2d 947 (1995) (treating a restriction on knife possession as implicating the "right to keep and bear arms" under the Ohio Constitution, though concluding that the restriction is constitutional because "[t]he city of Akron properly considered this fundamental right by including in [the knife restriction] an exception from criminal liability when a person is 'engaged in a lawful business, calling, employment, or occupation' and the circumstances justify 'a prudent man in possessing such a weapon for the defense of his person or family'"); *State v Delgado*, 298 Or 395, 397-404; 692 P2d 610 (1984) (holding that the "right to keep and bear arms" under the Oregon Constitution extends to knives); *State v Blocker*, 291 Or 255, 257-258; 630 P2d 824 (1981) (same as to billy clubs), *citing State v Kessler*, 289 Or 359; 614 P2d 94 (1980); *also Barnett v State*, 72 Or App 585, 586; 695 P2d 991 (1985) (same as to blackjacks).

Likewise, Florida's Attorney General has expressly concluded that the right to keep and bear arms covers stun guns and Tasers, determining that "the term ['arms'] is generally defined as 'anything that a man wears for his defense, or takes in his hands as a weapon.'" 1986 Fla Op Att'y Gen 2, 1986 Fla AG LEXIS 107 (January 6, 1986). And the Attorney General relied on this to conclude that county-level regulation of stun guns and Tasers is unconstitutional, because the Florida Constitution's right to bear arms reserves regulation of arms—including stun guns and Tasers—to the legislature.

We do not know of any recent cases that have disagreed with this consensus, and that have read "arms" as limited to guns. Indeed, the only two cases cited by the State as supposedly limiting "arms" to guns, *Wooden v United States*, 6 A3d 833 (DC, 2010), and *Mack v United States*, 6 A3d 1224 (DC, 2010), held only that the question was unresolved in the D.C. courts. This is all the D.C. Court of Appeals needed to decide in those cases, because the defendants in both cases failed to properly object at trial, and their convictions were thus reviewed only for "plain" or "obvious" error. *Wooden*, 6 A3d at 839; *Mack*, 6 A3d at 1236–37.

Thus, *Wooden* noted that *Heller* focused only on firearms—understandable, since the law at issue in *Heller* was a gun ban—and went on to acknowledge that "[p]erhaps a detailed *Heller*-type analysis would result in a conclusion that some kinds of knives today" "may qualify for Second Amendment protection." 6 A3d at

839. Likewise, *Mack* said only that "it is not at all clear that the Second Amendment right to keep and bear arms applies to the ice pick carried by Mr. Mack." 6 A3d at 1235. The court was, in the words of *Mack*, "disinclined" in both cases "to delve further into these questions when our review is limited by the plain error standard." 6 A3d at 1236-37.

III. The Second Amendment "Right to Keep and Bear Arms" Covers Stun Guns and Tasers.

The Supreme Court in *Heller* did stress that the Second Amendment does not cover all arms:

> We also recognize another important limitation on the right to keep and carry arms. [*United States v Miller*, 307 US 174; 59 S Ct 816; 83 L Ed 1206 (1939)] said, as we have explained, that the sorts of weapons protected were those "in common use at the time." We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of "dangerous and unusual weapons." See 4 Blackstone 148-149 (1769); 3 B. Wilson, Works of the Honourable James Wilson 79 (1804). [*Heller*, 554 US at 627 (some citations omitted)].

Thus, "dangerous and unusual" weapons are seen as historically excluded from the scope of the right to keep and bear arms.

But this suggests that the exception is indeed limited to weapons that are not only "unusual" but also "dangerous." *See Amerisure Ins Co v Plumb*, 282 Mich App 417, 428-429; 766 NW2d 878 (2009) ("and" is a conjunction between two phrases that, when given its plain, ordinary meaning, requires that both conditions be met). And since all weapons are "dangerous" to some extent, the reference to "dangerous .

. . weapons" must mean weapons that are more dangerous than some threshold, or more dangerous than the norm—likely weapons that are unusually dangerous.

Whatever else might fall under that description, stun guns and Tasers are not unusually dangerous weapons. They are much less dangerous than guns, which are constitutionally protected and broadly allowed in Michigan. They are less dangerous even than knives, clubs, and other such devices—including, in some circumstances, bare hands. *Caldwell v Moore*, 968 F2d 595, 602 (CA 6, 1992) ("It is not unreasonable for the jail officials to conclude that the use of a stun gun is less dangerous for all involved than a hand to hand confrontation").

To be sure, all attacks are potentially deadly: pushing or punching someone may cause him to fall the wrong way and die. But stun guns and irritant sprays are so rarely deadly that they merit being viewed as tantamount to generally non-deadly force, such as a punch or a shove. The best estimates seem to be that deliberate uses of Tasers are deadly in less than 0.01% of all cases, as compared to an estimated 20% death rate from gunshot wounds in deliberate assaults, and an estimated 2% death rate from knife wounds in deliberate assaults). Eugene Volokh, *Nonlethal Self-Defense, (Almost Entirely) Nonlethal Weapons, and the Rights to Keep and Bear Arms and Defend Life*, 62 Stan L Rev 199, 205 (2009). This is why we label stun guns as "nonlethal" or "nondeadly" weapons, consistent with the

parties' stipulations in this case that stun guns are "generally nonlethal," Appellant's Appendix VIII (stipulation and amended stipulation).

Likewise, though stun guns and Tasers can be used in crimes as well as in lawful self-defense, that is true of all weapons. If private ownership of arms posed no risks, there would be no movements to ban arms, and no need to secure constitutional protection of arms. The premise of the constitutional right to keep and bear arms in self-defense is that self-defense is a basic right, and that people must be able to possess the tools needed for effective self-defense *despite* the risk that some people will abuse those tools. And if that is true for deadly weapons such as handguns, it is *especially* true for almost entirely nonlethal weapons, such as stun guns and Tasers.

Of course, stun guns and Tasers were unknown when the Second Amendment was enacted, but *Heller* expressly rejected the view "that only those arms in existence in the 18th century are protected by the Second Amendment." 554 US at 582. Instead, *Heller* held, "[j]ust as the First Amendment protects modern forms of communications [such as the Internet], and the Fourth Amendment applies to modern forms of search [such as heat detection devices], 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* (citations omitted).

People v Smelter, 175 Mich App 153, 155; 437 NW2d 341 (1989), did conclude that stun guns were not protected by the Michigan Constitution's Second Amendment analog, Const 1963, art 1, § 6, because the state may "prohibit weapons whose customary employment by individuals is to violate the law." But *Smelter* does not control here, for several reasons. First, it predates 1990, and thus is not binding under MCR 7.215(J)(1). Second, it based its analysis solely on the Michigan constitutional provision and not the Second Amendment, and in any event predated *Heller*. Third, *Smelter* offered no evidence in support of its bald assertion that stun guns were customarily used to violate the law in the late 1980s; and the briefs to this Court (as well as the application papers to the Supreme Court) offered no such evidence, either. *See* 11/10/87 Brief of Appellant, *People v Smelter*, (Docket No. 100234), available at http://www.law.ucla.edu/volokh/smelter/ctapp1.pdf and 2/24/88 Brief of Appellee, *People v Smelter*, (Docket No. 100234), available at http://www.law.ucla.edu/volokh/smelter/ctapp2.pdf; *see also* 3/14/89 Application for Leave to Appeal, *People v Smelter*, SC No. 85674, available at http://www.law.ucla.edu/volokh/smelter/sct1.pdf and 4/17/89 Answer in Opposition to Application, *People v Smelter*, SC No. 85674, available at http://www.law.ucla.edu/volokh/smelter/sct2.pdf. Indeed, Taser Corp. reports that it has sold 241,000 Tasers to civilians as of September 30,[4] and there is also an unknown number of non-Taser stun guns that

[4] Taser Corp., *Press Kit*, http://www.taser.com/press-kit (accessed Dec. 1, 2011).

have been lawfully sold to civilians in the 43 states that do not ban Tasers and stun guns. *See* Volokh, *supra*, 62 Stan L Rev at 244 (collecting statutes). Naturally, there is no census of how many of the buyers are criminals; but there is no evidence at all that such criminal buyers form a majority, or even a large minority, of all buyers.

The State cites 25 published cases nationwide, over a nearly 20-year period (1993-2011), in which stun guns or Tasers were possessed or used by criminals, Appellant's Brief at 22–26. It argues that "[t]hese cases clearly demonstrate that Tasers and stun guns are *not* 'typically possessed . . . for lawful purposes' as required by *Heller*," *Id* at 26. But those cases demonstrate no such thing. Even if they represent only 1 percent of all the criminal uses of stun guns and Tasers, so that there were 2,500 hypothetical criminal uses nationwide over those three decades—or nearly 140 hypothetical cases per year—those cases would tell us nothing about the typical behavior of the over 200,000 civilian owners of stun guns, the overwhelming majority of whom no doubt are law-abiding women and men who, like AWARE's members, carry them solely for self-protection.

Indeed, in just the past 36 months, this Court has seen more than a dozen cases in which a baseball bat was used to inflict serious injury or death,[5] and others

[5] *People v Grullon*, unpublished per curiam opinion of the Court of Appeals, issued November 15, 2011 (Docket No. 299410); *People v Archey*, unpublished per curiam opinion of the Court of Appeals, issued August 30, 2011 (Docket No. 296757); *People v Jones*, unpublished per curiam opinion of the Court of Appeals, issued December 21, 2010 (Docket No. 293824); *People v Green*, unpublished per

in which a bat was used in furtherance of crimes such as felonious assault, vehicle theft, and witness intimidation.[6] Yet we would not infer from these cases that the "customary employment" of a baseball bat is crime, as opposed to the Tuesday night softball league. Likewise, the State's cases do not show that the "customary employment" of stun guns is crime, as opposed to lawful possession for lawful self-defense.

Finally, as noted above, this Court in *Swint* held that felons may be barred from owning firearms because they remain free to own "nonfirearm weapons." 225

---

curiam opinion of the Court of Appeals, issued December 16, 2010 (Docket No. 294741); *People v Conner*, unpublished per curiam opinion of the Court of Appeals, issued August 19, 2010 (Docket No. 290284); *People v Buchanan*, unpublished per curiam opinion of the Court of Appeals, issued July 15, 2010 (Docket No. 290942); *People v Scarborough*, unpublished per curiam opinion of the Court of Appeals, issued January 12, 2010 (Docket No. 286545); *People v Edwards*, unpublished per curiam opinion of the Court of Appeals, issued October 22, 2009 (Docket No. 288037); *People v Hector*, unpublished per curiam opinion of the Court of Appeals, issued June 23, 2009 (Docket No. 283849); *People v Cobb*, unpublished per curiam opinion of the Court of Appeals, issued May 5, 2009 (Docket No. 278973); *People v Kelley*, unpublished per curiam opinion of the Court of Appeals, issued April 28, 2009 (Docket No. 276269); *People v Mott*, unpublished per curiam opinion of the Court of Appeals, issued February 17, 2009 (Docket No. 280671); *People v Muntaqim-Bey*, unpublished per curiam opinion of the Court of Appeals, issued February 5, 2009 (Docket No. 280323). Copies of the unpublished cases cited in nn 5 and 6 are attached at Ex A.

[6] *People v Thomas*, unpublished per curiam opinion of the Court of Appeals, issued October 13, 2011 (Docket No. 297763); *People v Warren*, unpublished per curiam opinion of the Court of Appeals, issued June 16, 2009 (Docket No. 285029); *People v Goble*, unpublished per curiam opinion of the Court of Appeals, issued June 11, 2009 (Docket No. 283889); *People v Atkins*, unpublished per curiam opinion of the Court of Appeals, issued June 9, 2009 (Docket No. 282697).

Mich App at 362-363. And it expressly relied on that in concluding that the ban on felon possession of guns was constitutional because it left felons free to possess "some types of [nonfirearm] weapons that are adequate reasonably to vindicate the right to bear arms in self-defense." *Id* at 362. Any such nonfirearm weapons—such as knives or clubs—necessarily involve some risk of abuse and injury, and indeed considerably greater risk of death than stun guns do. *See*, nn 5 & 6. It would make little sense for the right to bear arms to be read as allowing felons to possess quite lethal nonfirearm weapons, while at the same time denying everyone (felon or not) the right to possess much less lethal stun guns.

CONCLUSION

For these reasons, AWARE asks the Court to affirm the Circuit Court decision.

Respectfully submitted,

THE SMITH APPELLATE LAW FIRM

/s/ Michael F. Smith
By: Michael F. Smith (P49472)
1747 Pennsylvania Ave. N.W., Suite 300
Washington, DC 20006
(202) 454-2860
Co-counsel for *Amicus Curiae*

and

Eugene Volokh*
UCLA School of Law
405 Hilgard Ave.
Los Angeles, CA 90095
(310) 206-3926
Counsel for *Amicus Curiae*
*Motion for temporary admission pending

December 2, 2011

ADDENDUM - CONSTITUTIONAL AND STATUTORY PROVISIONS

US Const, Am II:

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.

Const 1963, art 1, § 6:

Every person has a right to keep and bear arms for the defense of himself and the state.

MCL 750.224a:

Portable device or weapon directing electrical current, impulse, wave, or beam; sale or possession prohibited; exceptions; use of electro-muscular disruption technology; violation; penalty; definitions.

Sec. 224a.

(1) Except as otherwise provided in this section, a person shall not sell, offer for sale, or possess in this state 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.

(2) This section does not prohibit any of the following:

> (a) The possession and reasonable use of a device that uses electro-muscular disruption technology by any of the following individuals, if the individual has been trained in the use, effects, and risks of the device, and is using the device while performing his or her official duties:
>
> > (i) A peace officer.
> >
> > (ii) An employee of the department of corrections who is authorized in writing by the director of the department of corrections to possess and use the device.

(iii) A local corrections officer authorized in writing by the county sheriff to possess and use the device.

(iv) An individual employed by a local unit of government that utilizes a jail or lockup facility who has custody of persons detained or incarcerated in the jail or lockup facility and who is authorized in writing by the chief of police, director of public safety, or sheriff to possess and use the device.

(v) A probation officer.

(vi) A court officer.

(vii) A bail agent authorized under section 167b.

(viii) A licensed private investigator.

(ix) An aircraft pilot or aircraft crew member.

(x) An individual employed as a private security police officer. As used in this subparagraph, "private security police" means that term as defined in section 2 of the private security business and security alarm act, 1968 PA 330, MCL 338.1052.

(b) Possession solely for the purpose of delivering a device described in subsection (1) to any governmental agency or to a laboratory for testing, with the prior written approval of the governmental agency or law enforcement agency and under conditions determined to be appropriate by that agency.

(3) A manufacturer, authorized importer, or authorized dealer may demonstrate, offer for sale, hold for sale, sell, give, lend, or deliver a device that uses electro-muscular disruption technology to a person authorized to possess a device that uses electro-muscular disruption technology and may possess a device that uses electro-muscular disruption technology for any of those purposes.

(4) A person who violates this section is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $2,000.00, or both.

(5) As used in this section:

(a) "A device that uses electro-muscular disruption technology" means a device to which all of the following apply:

(i) The device is capable of creating an electro-muscular disruption and is used or intended to be used as a defensive device capable of temporarily incapacitating or immobilizing a person by the direction or emission of conducted energy.

(ii) The device contains an identification and tracking system that, when the device is initially used, dispenses coded material traceable to the purchaser through records kept by the manufacturer.

(iii) The manufacturer of the device has a policy of providing the identification and tracking information described in subparagraph (ii) to a police agency upon written request by that agency.

(b) "Local corrections officer" means that term as defined in section 2 of the local corrections officers training act, 2003 PA 125, MCL 791.532.

(c) "Peace officer" means any of the following:

(i) A police officer or public safety officer of this state or a political subdivision of this state, including motor carrier officers appointed under section 6d of 1935 PA 59, MCL 28.6d, and security personnel employed by the state under section 6c of 1935 PA 59, MCL 28.6c.

(ii) A sheriff or a sheriff's deputy.

(iii) A police officer or public safety officer of a junior college, college, or university who is authorized by the governing board of that junior college, college, or university to enforce state law and the rules and ordinances of that junior college, college, or university.

(iv) A township constable.

(v) A marshal of a city, village, or township.

(vi) A conservation officer of the department of natural resources or the department of environmental quality.

(vii) A law enforcement officer of another state or of a political subdivision of another state or a junior college, college, or university in another state, substantially corresponding to a law enforcement officer described in subparagraphs (i) to (vi).

(viii) A federal law enforcement officer.