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## ISSUES TO DEVELOP AT TRIAL

August 2016 – Vol. I, Issue 4

*This month's issue suggests ways to use the U.S. Supreme Court's decision in Caetano v. Massachusetts (March 21, 2016) to argue for the dismissal of fourth-degree weapon possession charges against your client. In particular, the concurring justices' reasoning in Caetano could be used to challenge the per se criminalization of certain weapons in New York.*

*Bottom Line:*

- **Move pretrial (in writing) to dismiss charges of fourth-degree criminal possession of a weapon under Penal Law § 265.01(1), on Second Amendment grounds (citing District of Columbia v. Heller and Caetano v. Massachusetts). As discussed further below, focus your arguments on the lawful, protected purposes of the weapon (including, but not limited to, self-defense). It can be argued that some of the more obscure items in PL § 265.01(1) are collectible items, or used for recreation.**

- **Also consider sufficiency challenges based on the statutory and/or common law definitions of certain per se weapons. Argue that the weapon doesn't fit the definition.**

**The Issue:** PL § 265.01(1) creates a per se ban on a suite of weapons. Insofar as PL § 265.01(1) criminalizes the possession of weapons that are commonly used for lawful purposes, and PL § 265.01(1) is not tempered by exceptions that accommodate those lawful purposes, PL § 265.01(1) violates the Second Amendment.

**Relevant Caselaw:**

*1. District of Columbia v. Heller, 554 U.S. 570 (2008)*

Heller concerned the constitutionality of a prohibition on the possession of handguns, and restrictions placed on firearms in Washington D.C. In Heller, the D.C. legislature had passed a law banning handgun possession in the home, and requiring that any lawful firearm possessed in the home be disassembled or bound by a trigger lock at all times. These restrictions effectively criminalized the possession of handguns and rendered other firearms possessed in the home useless for purposes of self-defense. The Court in Heller held that, under the Second Amendment, individuals have an absolute right to keep and bear arms, and that this right "extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding." As such, the Court found that the D.C. law violated D.C.

residents' rights to bear arms. With respect to handguns in particular, the Court noted that allowing the possession of other firearms (i.e., "long guns) does not satisfy the Second Amendment because "the handgun" is considered "the quintessential self-defense weapon," so that a complete prohibition of their use "is invalid."

Heller also outlined the scope of the Second Amendment. According to the Court, the "Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes." Weapons that are "dangerous and unusual" are assumed to not typically be possessed for lawful purposes. Moreover, weapons protected by the Second Amendment are subject to regulation, insofar as that regulation does not prevent the use of the weapon for lawful purposes. Examples of acceptable regulation of protected weapons include prohibitions on the possession of firearms by the mentally ill and by felons, and restrictions on where firearms can and cannot be carried.

2. *Caetano v. Massachusetts, 136 S.Ct. 1027 (2016)*

In Caetano, the Supreme Court reviewed a decision from the Supreme Judicial Court of Massachusetts, which held that only those weapons present at the time of the drafting of the Second Amendment were protected by the Second Amendment, and therefore, because stun guns were not contemplated during its drafting, the possession of stun guns could be criminalized completely throughout the state of Massachusetts.

The Court vacated the lower court's judgment as explicitly contrary to Heller and remanded back for further proceedings. As such, the Court held that the unusual nature of stun guns as a modern invention did not exclude them from protection under the Second Amendment.

Justices Alito and Thomas concurred, but would have gone further than the majority's holding and found that the Second Amendment protects stun guns. They reasoned that, because stun guns are commonly owned and used in self-defense, possessing them for self-defense could not be a criminal offense. The concurring also noted, relying on Heller, that the relative dangerousness of a weapon is irrelevant when the weapon belongs to a class of arms commonly used for lawful purposes. Under this reasoning, the Second Amendment would protect a wide variety of weapons, including stun guns.

**Preserving the issue:** Using Heller and Caetano as platforms, argue that the weapon your client is charged with possessing under PL § 265.01(1), is not unusual and dangerous insofar as it is commonly used for lawful purposes (e.g., it is used for a craft or trade; self-defense; recreation or hobby; or collecting), and that New York law does not include sufficient exceptions to the ban of the weapon to protect that lawful use.

Consider these arguments for specific weapons, whose possession PL § 265.01(1) criminalizes:

- **Firearm:** under PL § 265.00(3), "firearm" is defined as

> (a) any pistol or revolver; or (b) a shotgun having one or more barrels less than eighteen inches in length; or (c) a rifle having one or more barrels less than sixteen inches in length; or (d) any weapon made from a shotgun or rifle whether by alteration, modification, or otherwise if such weapon as altered, modified, or otherwise has an overall length of less than twenty-six inches; or (e) an assault weapon. For the purpose of this subdivision the length of the barrel on a shotgun or rifle shall be determined by measuring the distance between the muzzle and the face of the bolt, breech, or breechlock when closed and when the shotgun or rifle is cocked; the overall length of a weapon made from a shotgun or rifle is the distance between the extreme ends of the weapon measured along a line parallel to the center line of the bore. Firearm does not include an antique firearm.

A challenge to your client's possession of a firearm is tricky since most of the exceptions-to-criminalization contained in PL § 265.20 apply to firearms, and the licensing regulations would likely be considered a reasonable restriction.[1] Still, there is room for argument given the broad Second Amendment protections pronounced by the Supreme Court:

- If the firearm is recovered from your client's home, argue that Heller protects self-defense in one's home as a lawful purpose, and NY's statutory scheme insufficiently preserves this constitutionally protected right**.**

- If the firearm is recovered outside of the home and it was unloaded, argue that the weapon was not dangerous when it was seized, and that the law unduly inhibits the lawful possession of the unloaded weapon (e.g. because it could have been an item in a collection, or because it could have been used to intimidate assailants and thus had a legitimate self-defense function, etc.).

- If the firearm is recovered outside of the home and it is loaded, challenge the scope of the exceptions applied to firearms, and argue that the exceptions (notwithstanding the contrary lower court authority) do not accommodate the lawful purposes, like self-defense, to which a loaded gun can be put. See New York State Rifle and Pistol Ass'n, Inc. v. Cuomo, 804 F.3d 242 (2nd Cir. 2015)

[1] E.g., The ban on firearms under PL § 265.01(1) is suspended for a "pistol or revolver," if the carrier of the sidearm possesses the appropriate license. PL § 265.20(a)(3). Lower New York courts seem to be settled on the legitimacy of this regulatory scheme. See People v. Ferguson, 21 Misc.3d 1120(A), 2008 W.L. 4694552, *4 (N.Y. Crim. Ct. 2008) (holding that the regulatory regime as it applies to the possession of handguns in New York is acceptable because the ban under PL § 265.01(1), tempered by PL § 265.20, is not absolute or unduly burdensome); see People v. Foster, 30 Misc.3d 596, 598-99 (N.Y. Crim. Ct. 2010) (refusing to dismiss an accusatory instrument charging defendant under PL § 265.01(1), because the ban on firearm possession in New York is not absolute).

(holding that PL §§ 265.20(a)(7-f) is unconstitutional because these provision are unduly burdensome on the right to bear arms), *cert. denied*, 2016 WL 632684 (June 20, 2016).

- **Gravity knife:** this term includes "any knife which has a blade which is released from the handle or sheath thereof by the force of gravity or the application of centrifugal force which, when released, is locked in place by means of a button, spring, lever or other device." PL § 265.00(5). Gravity knives have been the subject of litigation because people have been prosecuted for possessing so-called gravity knives, which they purchased at stores like Home Depot, and which were sold (and used) as regular folding knives. Current, pending legislation seeks to modify the definition of "gravity knife" to exclude ordinary folding knives, which are defined in the legislation as knives that have "a bias toward closure." N.Y. Assemb A9042A, 2016, (N.Y. 2016), available at http://assembly.state.ny.us/leg/?default_fld=&bn=A09042&term=2015&Summary=Y&Actions=Y&Votes=Y&Memo=Y&Text=Y. Given this context, if your client is charged with possessing a gravity knife, argue:

    - Aside from any constitutional challenge, argue that the weapon possessed is not a gravity knife because the knife does not meet the strict definition of a gravity knife, and/or that, even if it technically meets the definition, its obvious operation is as a folding knife that requires specialized skill to cause it to function as a gravity knife. See U.S. v. Irizarry, 509 F.Supp.2d 198, 205 (E.D.N.Y. 2007) (finding that a Husky utility knife "is not designed to open by use of centrifugal force," though it was possible to open the knife by forcibly flicking it, and therefore the knife was not a gravity knife); see also People v. Zuniga, 303 A.D.2d 773, 774 (2nd Dept. 2003)(court sustains sufficiency challenge, holding that a butterfly knife is not a "gravity knife" for purposes of the statute because the blade is manually locked in place after it is released from the weapon's sheath).

    - Argue that gravity knives are protected under the Second Amendment and PL § 265.01(1) unduly burdens their use. As the legislative initiative reflects, gravity knives are not both dangerous and unusual and therefore cannot be banned outright. Moreover, they are useful means of self-defense, and the exceptions contained in PL § 265.20 (for use while hunting, trapping, or fishing), fail to protect this legitimate use. Like stun guns, gravity knives could be used for self-defense and their novelty or sophistication is not determinative of whether they should be excluded from Second Amendment protection. Caetano, 136 S. Ct. at 1027-28.

- **Switchblade Knife:** A "switchblade knife" is "any knife which has a blade which opens automatically by hand pressure applied to a button, spring or other device in the handle of the knife." PL § 265.00(4). As with gravity knives, switchblade knives possessed by individuals "for

use while hunting, trapping or fishing" is legal, if the possessor of the knife has also obtained a valid hunting, trapping, or fishing license, under PL § 265.20(6), and switchblade knives can be legally kept in knife and cutlery museums and possessed by the agents of these institutions acting on an intuition's behalf under PL § 265.00(5-c). However, as with gravity knives, it can be argued that these exemptions do not sufficiently protect legitimate interests, such as self-defense. Moreover, switchblade knives are highly collectable items, evidencing that they are commonly used for lawful purposes. See http://www.autoknife.info/; http://iknifecollector.com/group/antiqueswitchbladecollectors; http://www.vintageswitchbladeknives.com/.

> Also as with gravity knives, you can argue, if possible, that, the weapon possessed by the defendant is not a "switchblade" because the weapon's blade is not "opened automatically by hand pressure applied to a button, spring or other device in the handle of the knife."

- **Pilum Ballistic Knife:** a "pilum ballistic knife" is "any knife which has a blade which can be projected from the handle by hand pressure applied to a button, lever, spring or other device in the handle of the knife." PL § 265.00(5-a). The only exemption from the criminalization of ballistic knives applies exclusively to prison employees, and restricts the use of the knives to detention purposes. PL § 265.20(2). Ballistic knives are also prohibited under federal law. See 15 U.S.C. § 1245(a) (prohibiting the possession, manufacture, sale, and importation of ballistic knives). Moreover, they are uncommon, and can only be obtained if they are built or purchased illegally. It follows from this that pilum ballistic knives are almost certainly dangerous and unusual, and therefore not protected by the Second Amendment. As such, if a defendant is charged with possession of a pilum ballistic knife, the defendant should argue that the weapon he or she possessed was not a pilum ballistic knife, and that the definition contained in PL § 265.00(5-a) is unconstitutionally vague.

> Attacking the possible breadth of the word "projected" might gain traction with the court hearing the issue, as the verb can be used to include any outward movement away from a point of origin, and so could be applied to something like a switchblade, which would make the definition of "pilum ballistic knife" unconstitutionally vague and redundant. See People v. Stuart, 100 N.Y.2d 412, 419 (2003) (a statute that includes a prohibition phrased so vaguely that "men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.") (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926)); see also Springer v. Bd. of Educ. of City School Dist. of City of N.Y., 27 N.Y.3d 102, 107 (2016) (holding that "all parts of a statute are intended to be given effect and . . . a statutory construction which renders one part meaningless should be avoided").

- **Metal Knuckle Knife:** a "metal knuckle knife" is "a weapon that, when closed, cannot function as a set of plastic knuckles or metal knuckles, nor as a knife and when open, can

function as both a set of plastic knuckles or metal knuckles as well as a knife." PL § 265.00(5-b).

> There are no exemptions to the prohibition on the possession of metal knuckle knives. As with gravity knives and switchblade knives, the defendant can argue that metal knuckle knives are often obtained and owned for the purpose of self-defense or as collectible items. Indeed, metal knuckle knives were manufactured by the United States government for use in both world wars, and the knives that have been preserved are valued by collectors. See http://www.snyderstreasures.com/pages/knuckle_knives.htm; see also http://www.militaryfightingknives.com/collection.html. As such, the statute falters because it bans metal knuckle knives without accommodating their lawful purposes.

- **Electronic stun gun:** an "electronic stun gun" is "any device designed primarily as a weapon, the purpose of which is to stun, cause mental disorientation, knock out or paralyze a person by passing a high voltage electrical shock to such person." PL § 265.00(15-c). Like electronic dart guns, stun guns are ubiquitous, readily purchased, and frequently used for self-defense. Caetano, 136 S. Ct. at 1033 (2016) (Alito, J., concurring); see also Pantherstunguns.com, http://www.pantherstunguns.com/electronic_stun_gun.htm. Moreover, their lawful use for self-defense is not accommodated by New York law. As such, electronic stun guns are protected under the Second Amendment and their possession in New York is unconstitutionally burdened by PL § 265.01(1).

- **Electronic dart gun:** an "electronic dart gun" is "any device designed primarily as a weapon, the purpose of which is to momentarily stun, knock out or paralyze a person by passing an electrical shock to such person by means of a dart or projectile." PL § 265.00 (15-a). This definition arguably captures weapons like Tasers, which fire small barbs at different angles to create a paralyzing electrical current that passes through an assailant with whom one of the barbs has made contact. PL § 265.20 does not include an exemption for the use of weapons like Tasers. As such, consider the following argument:

> Electronic dart guns are widely used by law enforcement and by individuals for self-defense. Indeed, shares of the Taser Company are traded on the NASDAQ, and electronic dart guns are widely available and easily obtained. See http://www.thehomesecuritysuperstore.com/self-defense-taser-c=37. The ubiquity of electronic dart guns indicates the popularity of these weapons for self-defense. As such, electronic dart guns are protected under the Second Amendment, and New York law effaces that protection by failing to provide for their lawful use. See Heller, 554 U.S. at 628 (reasoning that a total ban on handguns amounted to "a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for" the "lawful purpose" of self-defense), and Caetano v. Massachusetts, 136 S. Ct. 1027, 1033 (2016) (Alito, J., concurring) (arguing that a per se ban on stun guns was unconstitutional because, "while

less popular than handguns, stun guns are widely owned and accepted as a legitimate means of self-defense across the country").

- **Billy:** "Billy" is not defined in PL § 265.00. PL § 265.20(16)(b), however, refers to a "type of billy" known as a police baton, and describes the dimensions of that instrument as being between "twenty-four to twenty-six inches in length and no more than one and one-quarter inches in thickness." Police batons may be possessed by members of police forces, and members of auxiliary police forces. Id.

In addition to this partial definition of "billy," the Appellate Division, Third Department has offered a more general definition of "billy." According to that court, "the term 'billy' must be strictly interpreted to mean a heavy wooden stick with a handle grip which, from its appearance, is designed to be used to strike an individual and not for other lawful purposes." People v. Talbert, 107 A.D.2d 842, 844 (3rd Dept. 1985). Under this narrow definition of "billy," according to which a billy must be wooden and used for no other purpose than to strike people, the clearest argument against the criminalization of billies is that the object possessed by your client is not a billy.

> If the court rejects the Talbert definition in favor of a more expansive definition of "billy," or if the item appears to fit the definition, you can argue that billies, the definition of which likely includes common household items like recreational equipment, are protected under the Second Amendment insofar as they are commonly possessed and used for lawful purposes.

- **Blackjack/Bludgeon:** blackjacks, like billies, are not defined in the statute. They are permitted when they are possessed by persons "employed while fulfilling contracts with New York State," "while employed in fulfilling contracts with sister states," or "while employed in fulfilling contracts with foreign countries." PL § 265.20(16)(c)(1-3). Wardens and superintendents of prisons may also possess blackjacks. PL § 265.20(2). Finally, the manufacturers of blackjacks are permitted to possess them. PL § 265.20(8).

> There is no precise definition for "bludgeon" in the statute either. New York courts have defined a "bludgeon" as "a stick with one end loaded or thicker or heavier than the other end." People v. Ford, 122 Misc.2d 716, 717-18 (N.Y. Crim. Ct. 1984); People v. McPherson, 220 N.Y. 123, 125 (1917). No exceptions apply to the possession of a bludgeon.
>
> The defendant could argue that the weapon he or she was charged with possessing is not a blackjack or bludgeon, that the definitions of these objects are unconstitutionally vague, and that if the court finds that what the defendant possessed was a blackjack or bludgeon and the statute is constitutional under the Fourteenth Amendment, it is unconstitutional

under the Second Amendment because blackjacks and bludgeons are items commonly possessed for the lawful purpose of self-defense.

- **Plastic knuckles/ Metal knuckles:** neither plastic knuckles nor metal knuckles are defined in the statute. Metal knuckles have been defined by New York courts, however, using a three part test. Courts ask

> (1) whether a blow by a fist wearing the instrument in question causes metal to come into contact with the victim's body; (2) whether the instrument is designed so that it readily can be used offensively against the human body; and (3) whether the design is such that it cannot reasonably be put to any use other than to enable the wearer to inflict a blow with a fist covered by metal or pieces of metal.

People v. Laurore, 30 Misc.3d 1237(A), *1 (2011). There is no definition for "plastic knuckles" at present, but the court might adopt a similar three-part test to determine what is and is not a set of plastic knuckles.

The defendant should argue that the object in his or her possession either was definitionally not a set of metal or plastic knuckles, and alternatively, that metal and plastic knuckles are protected under the Second Amendment because they are commonly possessed for self-defense or as collectible items. See http://www.brassknucklescompany.com/CRE/knuckles-paperweights.

- **Cane Sword:** a "cane sword" is "a cane or swagger stick having concealed within it a blade that may be used as a sword or stiletto." PL § 265.00(13). Arguably, cane swords, like gravity knives and switchblades, are constitutionally protected because they are easily obtainable and are often collectable items, like metal knuckle knives, evidencing that they are commonly used for lawful purposes. See http://www.trueswords.com/sword-canes-c-103.html; http://www.budk.com/Sword-Canes-2893; http://www.fashionablecanes.com/Weapon_Sword_Canes.html; see also http://www.walmart.com/ip/Assassin-s-Creed-Syndicate-Cane-Sword-Universal-Universal/45079067?wmlspartner=wlpa&selectedSellerId=319&adid=22222222227033082897&wl0=&wl1=g&wl2=c&wl3=67308977312&wl4=&wl5=pla&wl6=131211090272&veh=sem.

- **Chuka Sticks/ Kung Fu Star:**

> "Chuka stick" means any device designed primarily as a weapon, consisting of two or more lengths of a rigid material joined together by a thong, rope or chain in such a manner as to allow free movement of a portion of the device while held in the hand and

> capable of being rotated in such a manner as to inflict serious injury upon a person by striking or choking. These devices are also known as nunchakus and centrifugal force sticks.

PL § 265.00(14). A "Kung Fu star" is "a disc-like object with sharpened points on the circumference thereof and is designed for use primarily as a weapon to be thrown." PL § 265.00(15-b). Neither of these weapons is exempted under PL § 265.20 in any context.

> Both of these weapons are used in martial arts, and therefore the defendant can argue that they are typically possessed for the lawful purpose of practicing martial arts or self-defense. See Maloney v. Singas, Slip Copy, 2016 WL 3211472 (E.D.N.Y. Apr. 15. 2016) (preserving the possibility that chuka sticks are protected under the Second Amendment by refusing to dismiss a case involving chuka sticks because their unusualness was an issue of fact that needed to be resolved at trial). As such, both chuka sticks and Kung Fu Stars are protected under the Second Amendment.

- **Sandbag/Sandclub:** neither sandbags nor sandclubs are defined in the statute, nor are they permitted in any circumstance or context. In addition, there is no case law defining what these items are. As such, the defendant can argue that the statute is unconstitutionally vague in regards to these items. Moreover, depending on what the court decides constitutes a sandbag or sandclub, items typically possessed for lawful purposes could fall into these categories and therefore the statute would be in violation of the Second Amendment. Indeed, if "sandbag" includes plastic bags filled with sand, then sandbags used to balance ballast light stands used by photographers and cinematographers would be illegal. http://www.sandbagstore.com/filled-heavy-duty-saddle-sandbag-25lb-black.html?utm_source=googlepepla&utm_medium=adwords&id=18283950120&gclid=Cj0KEQjwncO7BRC06snzrdSJyKEBEiQAsUaRjKY5voFONvOm7QoN7m7aaX8JrkYm9otm-yFCBxCWTyIaAm2I8P8HAQ.

- **Wrist-Brace Type Slingshot/ Slungshot:** neither "wrist-brace type slingshot" nor "slungshot" is defined in the statute. Moreover, neither weapon is exempted in any circumstance or context. As such, the defendant can argue that the statute is unconstitutionally vague in regards to these items under the Fourteenth Amendment. Moreover, slingshots and slungshots might both be protected under the Second Amendment because they are commonly possessed and typically used for lawful purposes, such as recreation. See http://simple-shot.com/blog/2015-east-coast-slingshot-tournament/.

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