

STATE OF NEW YORK
COUNTY OF ERIE : TONAWANDA TOWN COURT

THE PEOPLE OF THE STATE OF
NEW YORK

v.

NOTICE OF MOTION

Indictment No.

██████████

Please take notice that on ██████████ at 9:30 a.m. or as soon thereafter as counsel can be heard, the defendant will move to dismiss the indictment on the ground that Penal Law § 265.01(1), as it applies to stun guns, violates his personal right to keep and bear arms (US Const Amends II, XIV). By this motion, the defendant is also notifying the New York Attorney General as required by CPLR 1012(b)(1).

June __, 2023

██
Counsel for the Defendant

TO: Hon. ██████████

Erie County District Attorney
25 Delaware Ave.
Buffalo, New York 14202

Office of the New York Attorney General
Litigation Bureau
Justice Building, 2nd Floor
Albany, New York 12224

STATE OF NEW YORK
COUNTY OF ERIE : TONAWANDA TOWN COURT

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v.

SUPPORTING AFFIRMATION

Indictment No.

STATE OF NEW YORK)
COUNTY OF ERIE) ss.
CITY OF BUFFALO)

_____, being duly sworn, deposes and says:

1. I am an attorney duly licensed to practice law in the State of New York.
2. I am counsel for the defendant, _____, who is charged by misdemeanor complaint with criminal possession of a weapon in the fourth degree (Penal Law § 265.01[1]) for his alleged possession of two stun guns at _____
_____.
3. I make this affidavit in support of my motion to dismiss the complaint on the ground that Penal Law § 265.01(1), as it applies to stun guns, is unconstitutional. This affidavit is made upon information and belief, the sources of which are the charging papers and relevant statutory and case law.
4. Upon motion of a defendant, the Court may dismiss a misdemeanor complaint on the ground that it is defective within the meaning of CPL 170.35 (CPL 170.30[1][a]). A complaint is defective, in relevant part, if “the statute defining the offense charged is unconstitutional or otherwise invalid” (CPL 170.35[1][c]).
5. In this case, the statute defining the offense is unconstitutional because it violates the Second Amendment, which confers “an individual right to keep and bear arms” (*District of Columbia v. Heller*, 554 US 570, 595 [2008]).
6. The Second Amendment applies “to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding” (*District of Columbia v. Heller*,

554 US 570, 582 [2008]). This individual right to bear arms “is fully applicable to the States” (*McDonald v. City of Chicago*, 561 US 742, 750 [2010]).

7. In *Caetano v. Massachusetts*, the U.S. Supreme Court vacated a state court ruling declining to apply the Second Amendment’s protection to stun guns (577 US 411 [2016]). The concurring opinion observed that “stun guns are widely owned and accepted as a legitimate means of self-defense across the country,” and a state’s “categorical ban of such weapons therefore violates the Second Amendment” (*id.* at 420 [Alito and Thomas, JJ., concurring]).
8. In *Avitabile v. Beach*, the U.S. District Court for the Northern District of New York held that New York’s categorical ban on electronic arms, including stun guns, violates the Second Amendment because the state cannot “permissibly enact what amount to a total ban on an entire class of weapons that are in common use for the lawful purpose of self-defense” (368 FSupp3d 404 at 417 [NDNY 2019]).
9. While not binding, “[i]nterpretation of a federal constitutional question by the lower federal courts may serve as useful and persuasive authority” (*People v. Kin Kan*, 78 NY2d 54, 60 [1991]).
10. This Court should adopt the reasoning in *Avitabile*, which is consistent with the Second Amendment’s individual right to keep and bear arms. The defendant is charged under an unconstitutional statute.

Accordingly, the defendant respectfully requests that the complaint be dismissed.
