

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

JUNE SHEW, <i>et al</i> ,	:	
	:	
Plaintiffs,	:	Case No. 3:13-cv-00739-AVC
v.	:	
	:	
DANNEL P. MALLOY, <i>et al</i> ,	:	
	:	
Defendants.	:	January 15, 2014

PLAINTIFFS’ MOTION FOR LEAVE TO FILE SUR-REPLY

Pursuant to the Pretrial Preferences of the Honorable Alfred V. Covello, Plaintiffs respectfully request permission to file in Sur-Reply the attached Supplemental Declaration of Gary Kleck and Memorandum of Law in response to Defendants’ Reply Brief (Document 117) and the Supplemental Affidavit of Christopher Koper, filed by Defendants on January 7, 2014 (Document 117-2). The proposed Sur-Reply Declaration and Memorandum of Law are, respectively, six and eight pages long and are limited to addressing new arguments raised for the first time by Defendants in reply. *See Travelers Indem. Co. v. Excalibur Reinsurance Corp.*, 2013 U.S. Dist. LEXIS 110396, at *9-*10 (D. Conn. Aug. 5, 2013) (noting that a sur-reply is proper to address new arguments or evidence raised in reply). Plaintiff’s Sur-Reply does not address issues previously raised.

First, the proposed Sur-Reply addresses Defendants’ new arguments made after Mr. Koper took a second examination of data compiled by *Mother Jones*. Indeed, Mr. Koper’s Supplemental Affidavit expressly states that his initial Affidavit had been based on an erroneous overbroad definition of the term “assault weapon” in the *Mother Jones* data and that he has a new opinion on the significance of the data, which Defendants have now raised for the first time in reply. *See* Document 117-2 at ¶¶ 6-14.

Second, the proposed Sur-Reply address Defendants' reference to the decision in *New York State Rifle & Pistol Ass'n v. Cuomo*, 2013 WL 6909955 (W.D.N.Y. Dec. 31, 2013), which was not issued until after Plaintiffs' previous submissions.

Defendants' change in their position on the *Mother Jones* data could not have been anticipated by Plaintiffs when they filed their previous submissions nor was the *New York State Rifle & Pistol Ass'n v. Cuomo* decision yet released. Plaintiffs respectfully request that permission be granted to file the proposed Sur-Reply to provide the Court with the benefit of all parties' positions on the meaning and significance of the *Mother Jones* data and the *New York State Rifle & Pistol Ass'n v. Cuomo* decision.

Dated: January 15, 2013

Respectfully Submitted,

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CERTIFICATION

I hereby certify that on January 15, 2014, a copy of the foregoing PLAINTIFF’S MOTION FOR LEAVE TO FILE SUR-REPLY was filed electronically and served by mail upon anyone unable to accept electronic filing. Notice of this filing was will be sent by e-mail to all parties by operation of the Court’s electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court’s CM/ECF System.

GOLDBERG SEGALLA, LLP

By: /s/ Brian T. Stapleton
Brian T. Stapleton, Esq. (CT13418)

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SUPPLEMENTAL DECLARATION OF GARY KLECK

I, Gary Kleck, declare as follows:

1. I am a Professor of Criminology and Criminal Justice at Florida State University where I focus my scholarship and research on gun control and violence.
2. I previously submitted Declarations in this matter on June 25, 2013 and December 10, 2013.
3. This Declaration is submitted solely in response to the Supplemental Affidavit of Christopher Koper, sworn to January 6, 2014 (Document 117-2), which raises new issues in interpreting data set forth in a *Mother Jones* article.¹

**KOPER’S REVISED DATA INDICATES FAR LESS INVOLVEMENT OF
ASSAULT WEAPONS THAT HIS PRIOR AFFIDAVIT CLAIMED**

4. In his previous analysis, Koper concluded that 26 of 62 mass shootings (41.9%) in the *Mother Jones* article involved the use of so-called “assault weapons.”² Koper now

¹ See Mark Follman et al., *A Guide to Mass Shootings in America*, available at <http://www.motherjones.com/politics/2012/07/mass-shootings-map>.

² See Affidavit of Christopher S. Koper, sworn to September 30, 2013 at ¶ 22 (Page 97 of 386 on Document 80-1).

acknowledges, however, that the definition of “assault weapon” in the *Mother Jones* data set was imprecise and erroneous.³ Using the revised definition of assault weapons, which more closely accords with that used in the Connecticut law, Koper’s more recent analysis finds that assault weapons were used in only 14 of the 62 incidents, or just 22.6%. Koper’s acknowledgement of the error in the definition of assault weapons means that the prevalence of assault weapons of the type banned by Connecticut law is actually 46% lower in the studied mass shootings than Koper’s previous results indicated ($((.419-.226)/.226=.46)$). Thus, the potential for the assault weapon ban to affect the outcomes of mass shootings is only about half of that which Koper’s earlier results implied.

**KOPER PROVIDES NO RATIONALE FOR WHY THE BAN WOULD
PRODUCE THE BENEFITS HE CLAIM AND HE MAKES INCORRECT
COMPARISONS BETWEEN TYPES OF FIREARMS**

5. In paragraph 4 of his Supplemental Affidavit, Koper states his conclusion that “if criminals are forced to use substitute weapons and magazines, that will reduce the number of shots fired in gun attacks, which could yield lower gunshot victimization rates and lower gun death rates.” Thus, he asserts that if criminals substitute other firearms for the types of firearms banned by the Connecticut ban, it will reduce the number of shots fired, number of victims shot, and number of victims killed. He does not, however, provide a logical rationale for *why* such effects should occur. The Connecticut assault weapon ban did not prohibit all semi-automatic firearms, or even all semi-automatic firearms capable of accepting detachable, potentially large-capacity magazines (“LCMs”). Instead, it only banned semi-automatic firearms capable of accepting detachable magazines, *and* which also had one or more so-called “military-style” features (“MSFs”), such as flash suppressors or pistol grips. Thus, semi-automatic firearms that

³ See Supplemental Affidavit of Christopher Koper, sworn to January 6, 2013 at ¶¶ 8-10 (Document 117-2).

were fully capable of accepting LCMs but that lacked any MSFs were left legally available, and could be substituted for the banned firearms. Moreover, because these legal firearms lacking MSFs are most similar to the banned firearms, they are also the types most likely to be substituted. Thus, for example, a person is far more likely to substitute another semi-automatic firearm capable of accepting a detachable magazine (but without MSFs) for a banned semi-automatic firearm than to substitute either a gun that is not semi-automatic or one that is semi-automatic but cannot accept a detachable magazine.

6. A comparison between use of these banned and unbanned types of semi-automatic firearms capable of accepting detachable magazines is the comparison that is relevant to Koper's assessment of the Connecticut assault weapon/LCM ban, not a comparison of banned firearms with *all* other types of firearms – the comparison Koper actually makes. Koper never states why substitution of (1) unbanned semi-automatic firearms capable of accepting detachable magazines *without* MSFs for (2) banned semi-automatic firearms capable of accepting detachable magazines *with* MSFs should reduce number of shots fired, victims injured, or victims killed. He never actually addresses this policy-relevant comparison, never explains (in either his original affidavit or his supplemental affidavit) why substitution of type (1) firearms for type (2) firearms should produce any of the benefits he lists, and never performs any empirical comparison of the outcomes of incidents in which type (1) guns were used with the outcomes of incidents in which type (2) guns were used. In sum, despite his implicit claims to the contrary, he never actually addresses what would happen if “if criminals are forced to use substitute weapons” – at least not if “substitute weapons” is interpreted to mean the unbanned guns most similar to the banned firearms, and thus the weapons most likely to be substituted.

**KOPER IGNORES THE LIKELIHOOD THAT THE ASSOCIATIONS
HE REPORTS ARE COMPLETELY SPURIOUS**

7. Leaving aside the irrelevance of Koper's comparisons, his new analysis of the *Mother Jones* data ignores the central methodological difficulty of assessing the impact of assault weapons and LCMs on the outcomes of shootings just as much as his previous analysis did. The central difficulty is determining whether the associations found in both sets of analyses reflect an actual causal effect of assault weapon/LCM use on numbers of shots fired and persons hurt, or whether they are spurious, *noncausal* associations, and merely reflect the common impact of a criminal's lethality of intentions on both the outcomes of shootings and the weapons and magazines that shooters choose to use in their crimes.

8. I know of no one who questions that shooters who want to shoot more people are, on average, more likely to actually do so. Though the correspondence is not perfect, on average the stronger the person's intention to hurt many victims, the more victims they will hurt. Yet, given the extensive planning that goes into the more serious mass shootings, one would also expect that these same intentions to shoot more victims would also cause the shooter to prepare to do so by selecting weaponry and magazines that they believed (correctly or not) were better suited to this task. As gun control scholar Philip Cook observed long ago, "the assailant's choice of weapon is a good indicator of his intent in assault offenses." (Cook, Philip J. 1982. "The role of firearms in violent crime." pp. 236-291 in Criminal Violence, edited by Marvin E. Wolfgang and Neil Alan Weiner. Beverly Hills: Sage.).

9. I also know of no one, including Professor Koper, who denies that criminals planning to hurt many people are more likely to choose weapons and magazines that they believe will be suited to doing so.

10. These propositions imply, in short, that the lethality of a shooter's intentions has a positive causal effect on both (a) use of assault weapons and LCMs, and (b) the number of victims hurt in shootings. This means that lethality of intent will create a spurious positive association between (a) use of assault weapons or LCMs and (b) the number of victims killed or injured. Unless an analyst statistically controls for lethality of intent, he will fail to detect the spurious character of the association between (a) and (b), and will erroneously conclude, as Koper apparently did, that the association instead reflected an actual causal effect of (a) on (b). Koper never controlled for lethality of the shooter's intent, and thus did nothing to rule out the likelihood that the association between (a) and (b) is entirely spurious. Indeed, to my knowledge, Koper has not even explicitly addressed this issue at a theoretical or conceptual level.

**KOPER'S STATISTICAL ANALYSES ARE HIGHLY SENSITIVE TO THE
INCLUSION OF EXTREME OUTLIERS IN HIS SMALL SAMPLE OF ASSAULT
WEAPON-INVOLVED SHOOTINGS**

11. In his Supplemental Affidavit, Koper compares a tiny sample of 14 assault weapon-involved incidents with 48 non-assault weapon incidents with regard to the number of deaths and injuries. When such very small samples are used, however, results can be extremely sensitive to the inclusion or exclusion of just a few cases, especially if the cases are extreme outliers. A prudent step to take in response to this possibility is to re-estimate results with the few outliers deleted, to see if results are substantially affected by this modest change in the composition of the sample. Koper did not do this.

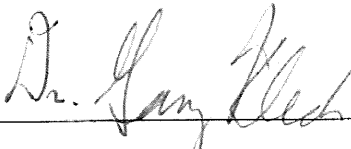
12. I tested how sensitive his conclusions about assault weapon/LCM use and the death toll in mass shootings are to the exclusion of just two incidents from his sample of assault weapon-involved incidents. His analysis indicated that there were an average of 10.4 deaths per

assault weapon-related incident, compared to just 7.7 deaths per non-assault weapon incident – a ratio of 1.39. Examining the same *Mother Jones* data as Koper did, I excluded the two outlier assault weapon-involved incidents with the highest death toll, the Newtown, Connecticut shooting by Adam Lanza in 2012 (26 deaths), and the McDonalds shooting in San Ysidro, California by James Huberty in 1984 (21 deaths). Without these two extreme incidents, the average number of deaths per assault weapon-related incidents drops to 8.25, virtually the same as the non-assault weapon average of 7.7 deaths per incident.

13. In sum, Koper's case that the death toll in assault weapon-involved mass shootings is substantially larger than the death toll in non-assault weapon incidents relies almost entirely on the inclusion of these two outlier cases. Had the *Mother Jones* investigators chosen to extend their analysis back only to 1985, the McDonalds incidents would not even have been included in the sample Koper analyzed. Likewise, had the investigators ended their study in 2011, the Newtown incident would not have been included. The point is not that it was wrong to include these two incidents, but rather that either or both of them easily could have been absent from the sample of mass shootings examined by Koper, and that, had they been absent, support for Koper's case for a substantial difference in death tolls would have collapsed. Thus, Koper's claims are highly sensitive to slight changes in sample composition and should not be considered robust enough to draw conclusions about the effect of assault weapon use on the death toll in mass shootings.

I declare under the penalty of perjury under the laws of the United States of America pursuant to 28 USC § 1746 that the foregoing is true and correct.

Dated: January 15, 2014



Dr. Gary Kleck