UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

JAMES M. MALONEY,

Plaintiff,

CV 03-786 (ADS) (MLO)

- against -

ELIOT SPITZER, in his official capacity as Attorney General of the State of New York, and his successors,

Defendants.

----------X

MEMORANDUM OF LAW

James M. Maloney (JM-3352)
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INTRODUCTION

This motion for summary judgment in which no genuine material facts are in dispute is made in the context of an action for declaratory judgment, seeking a declaration that those portions of sections 265.00 through 265.02 of the New York Penal Law ("NYPL"), to the extent that these statutes define and punish as a crime the simple possession of "nunchaku" within one's home, are unconstitutional and of no force and effect. Verified Complaint (Exh. 1 to Maloney Declaration submitted herewith) at 8. This action does *not* challenge the application of the statutes to the possession of "nunchaku" in any other location than the possessor's home.

The "nunchaku" (a word that is properly used both as singular and plural) is . . .

> an Oriental martial arts weapon comprised of two pieces of wood or steel connected by a cord or chain and which can be held in the hands. It had its origin as a farm implement in Okinawa.

United States v. George, 778 F.2d 556, 558 n.1 (10th Cir. 1985). It is widely accepted as historical fact that the nunchaku was adapted for use as a weapon by the people of Okinawa as part of the development of karate during the early Seventeenth Century, after the Japanese invaded the island and banned the possession (presumably even in one's home) of traditional weapons such as sword and spear. *See* Maloney Declaration at ¶ 9; *see also* S. Halbrook, "Oriental Philosophy, Martial Arts and Class Struggle," 2 *Social Praxis* 135, 139 (1974) (Exh. 5) (noting that the invading Japanese Satsuma clan "banned all weapons but its own and brutally suppressed the population" and that a "people's revolutionary movement organized clandestinely, and its activities centered around the development of karate for peasant self-defense against the imperial dictatorship"). Ironically, the New York legislature, in having

defined as a crime the simple possession of nunchaku in its citizens' homes, has gone even further than did the Seventeenth Century "imperial dictatorship" in Okinawa.

A. The Banning of Nunchaku in New York: No Socially Acceptable Use?

The impetus for the banning of the nunchaku, which occurred in 1974, *see* Maloney Declaration at ¶ 10, appears to have been the sudden surge in popularity of the device among youths following the release in 1973 of the martial-arts film *Enter the Dragon*, which included a scene featuring the late Bruce Lee using the nunchaku with impressive skill and speed. *See* Maloney Declaration at ¶ 14 and sources cited therein. Notwithstanding a memorandum to the Governor dated April 4, 1974, from the State of New York Executive Department's Division of Criminal Justice Services, pointing out that nunchaku have legitimate uses in karate and other martial-arts training, and opining that "in view of the current interest and participation in these activities by many members of the public, it appears unreasonable--and perhaps even unconstitutional--to prohibit those who have a legitimate reason for possessing chuka sticks from doing so[,]" Maloney Declaration at ¶ 16 and Exh. 9, the bill was signed into law on April 16, 1974. This appears to have been due in part to an overwhelming amount of material addressed to the Governor stating that the nunchaku had *no* legitimate purpose. For example, a sponsor of the bill, Assemblyman Richard Ross, as well as Mayor Beame of New York City, both wrote that the nunchaku "is designed primarily as a weapon and has no purpose other than to maim or, in some instances, kill." Maloney Declaration at ¶ 12 and Exh. 7. The District Attorneys of the Counties of New York and of Dutchess, respectively, wrote that "there is no known use for chuka sticks other than as a weapon" and that "[t]here is no conceivable innocent used [sic] for this device and, accordingly, there can be no possible invasion of

anyone's right to use it innocently." *Id.*

Courts, however, have subsequently recognized that the nunchaku *has* socially acceptable uses. For example, the District of Columbia Court of Appeals noted in 1983:

> Since we are making a ruling concerning a weapon which apparently has not previously been the subject of any published opinions in this jurisdiction, it is worth making a few further observations about the nunchaku. Like the courts of other jurisdictions, we are cognizant of the cultural and historical background of this Oriental agricultural implement-turned-weapon. *We recognize that the nunchaku has socially acceptable uses within the context of martial arts and for the purpose of developing physical dexterity and coordination.*

In re S.P., Jr., 465 A.2d 823, 827 (D.C. 1983) (emphasis added). *Cf.* Verified Complaint at ¶ 12. In 1984, the Ohio Court of Appeals reversed a criminal conviction for possession of nunchaku, holding that "the evidence tends to indicate that the device was used only for lawful purposes" and that "[m]ere possession of an otherwise lawful article . . . does not make it illegal." *State v. Maloney*, 470 N.E.2d 210, 211 (Ohio Ct. App. 1984). Even an Arizona case sustaining a conviction for nunchaku possession inherently recognized that nunchaku have socially acceptable purposes, noting that "the use of nunchakus in the peaceful practice of martial arts or the possession for such use is not a crime." *State v. Swanton*, 629 P.2d 98, 99 (Ariz. Ct. App. 1981).

None of the foregoing cases involved possession of nunchaku in the home (although that distinction is not relevant to the proposition for which they are cited here). In two of the three (*Maloney* and *Swanton*), possession in a car was at issue, while *In re S.P.* involved possession of nunchaku by a juvenile in public. The jurisdictions involved (Ohio, Arizona, and the District of Columbia, respectively) have apparently never criminalized possession in

the home; it appears that only New York and California have done so. Maloney Declaration at ¶ 3.

B. Recent Enforcement of the "Crime" of Home Possession of Nunchaku

Actual enforcement of the criminal statutes to prosecute persons for simple possession of nunchaku in their homes is relatively infrequent, both in New York and California, but it has occurred and appears to be occurring with increasing frequency. As noted in the Rule 56.1 Statement submitted herewith at ¶¶ 1-5, Plaintiff was the target of one such prosecution here in New York, and in 2003 (after this action was brought) learned of one such prosecution against a juvenile in California for nunchaku found in plain sight on the defendant's bed, *see* Maloney Declaration at ¶ 3 and Exh. 3, resulting in a conviction that was sustained on appeal. The appellate court, after noting that California (unlike New York) has a statutory exception for possession of nunchaku in a martial-arts school, opined: "Since appellant possessed the nunchaku at his home we fail to see how this exception applies to appellant." *In re David L.*, 2002 WL 31315856 (Cal. Ct. App., 6th Dist., Oct. 15, 2002). More recently, Plaintiff has learned of a new prosecution for simple home possession of nunchaku in California against an adult who has been a martial artist for over 30 years and who was the Virginia director of the U.S. National Karate Association. Maloney Declaration at ¶ 3. Whether the foregoing recent prosecutions indicate a trend in California is unclear (and not particularly relevant here), but, significantly, it *is* clear that in *New York* citizens have recently been forced by the Attorney General to surrender their nunchaku under threat of potential prosecution for simple home possession.

Specifically, as detailed in a press release from the Office of the Attorney General of

the State of New York dated October 17, 2002, a true copy of which is provided herewith as Exh. 4 to the Maloney Declaration, a 2002 settlement between a martial-arts equipment supplier in Georgia and the New York Attorney General included the conditions that the company provide the Attorney General with a list of New York customers who had purchased "illegal" weapons, including nunchaku, from the company, and that the company *deliver written notice to their New York customers advising them to surrender such "illegal" weapons to law enforcement agencies*. According to the press release, a similar settlement was reached with another martial-arts equipment supplier in 2000. The press release quotes the Attorney General as having commented that such weapons, which include nunchaku, "have no place on our streets or *in our homes* [emphasis added]."

While the Attorney General's effort to make our streets safer is laudable, the tactic of raising the specter of "Big Brother" entering a citizen's home with a search warrant based on lists obtained from a martial-arts equipment supplier, and charging the citizen with a crime that may carry up to a year's imprisonment, all based upon the mere possession in one's home of two wooden sticks connected by a cord, is disturbing. It is respectfully submitted that a modern American state's compulsion of a corporation to release computerized records of its customers, so that the state may disarm those customers (who happen to be the state's citizens) of one of the few weapons that the invading Japanese were unable to wrest from the Okinawan peasants in the Seventeenth Century, *see supra*, amounts to a sort of Orwellian irony.

C. Justiciability of the Constitutional Challenge

As detailed immediately above, the Attorney General has recently taken a proactive role in applying the criminal statutes that prohibit simple possession of nunchaku in one's own

home in a manner calculated to deprive citizens of such possession under threat of criminal prosecution. Accordingly, the Attorney General is properly named as a defendant in this action for declaratory relief. *Cf. Johnson v. Rockefeller*, 58 F.R.D. 42, 45 (S.D.N.Y. 1973) (state officer is proper defendant in suit to enjoin enforcement of state statute if he has some connection with enforcement of statute). Plaintiff nonetheless reserves his rights under Rule 17(a) of the Federal Rules of Civil Procedure (and under the Stipulation and Order dated April 15, 2003, dismissing defendant Denis Dillon) to join or substitute another party as needed.

As noted, Plaintiff has already been charged once with the "crime" of simple possession of nunchaku in his home, and must therefore choose between forgoing what is arguably constitutionally protected conduct (possessing nunchaku in his home) and risking another criminal prosecution. Plaintiff thus has standing to sue because there is an injury-in-fact, *Meese v. Keene*, 481 U.S. 465 (1987); *Innovative Health Systems, Inc. v. City of White Plains*, 117 F.3d 37 (2d Cir. 1997), and because a favorable decision in this action would redress that injury. *See, e.g., United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973). Also, because Plaintiff is forced to choose between risking further prosecution and possessing nunchaku in his home, the case is ripe for review. *See, e.g., Steffel v. Thompson*, 415 U.S. 452, 462 (1974) ("refusal on the part of the federal courts to intervene when no state proceeding is pending may place the hapless plaintiff between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding"); *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967); *see also* E. Chemerinsky, *Federal Jurisdiction* (3d ed. 1999) at § 2.4 (p. 119) (noting that "it is well

established that a case is ripe because of the substantial hardship to denying preenforcement review when a person is forced to choose between forgoing possibly lawful activity and risking substantial sanctions"). As Judge Wiseman of the Middle District of Tennessee noted in 1980, "it is well-established that a plaintiff does not have to wait until he is threatened with a prosecution before he may challenge a criminal statute that directly operates against him." *American Civil Liberties Union of Tennessee v. State of Tennessee et al.*, 496 F. Supp. 218, 221 (M.D. Tenn. 1980) (citing *Doe v. Bolton*, 410 U.S. 179, 188 (1973); *NAACP v. Button*, 371 U.S. 415, 428 (1963)).

It is of no consequence that Plaintiff did not challenge the constitutionality of the criminal statute in the context of the now-terminated state criminal prosecution, *cf.* Defendant's Rule 56.1 Counter-Statement at ¶ K, nor would a *Younger* abstention under the present circumstances be appropriate, since this Court's adjudication of the case now will not "result in duplicative legal proceedings or disruption of the state criminal justice system." *Steffel, supra*, 415 U.S. at 462. Finally, fairness dictates that what Defendant describes as Plaintiff's failure to have alleged "that he is planning to acquire or purchase nunchuks, or that he currently owns nunchuks," *see* Defendant's Rule 56.1 Counter-Statement at ¶ G, should not be fatal to this action for declaratory judgment. As explained above, all that is required for ripeness is that Plaintiff be forced, as here, to choose between forgoing possibly lawful activity and risking substantial sanctions. Indeed, were Plaintiff to have alleged current possession of nunchaku in his home, he would have opened the door (both literally and figuratively) to another state criminal prosecution ("the Scylla of intentionally flouting state law" mentioned in *Steffel*, *supra*). In any event, Plaintiff certainly has an intent to possess nunchaku in his home,

provided that he may do so lawfully. It is respectfully submitted that paragraph 16 of the Verified Complaint adequately alleges that intent, and that Plaintiff's past conduct of having possessed nunchaku in his home is corroborative on that point. *See id.* at ¶ 11.

ARGUMENT

The application of the New York statutes to ban simple possession of nunchaku in one's home may be challenged on the basis of: (1) an enumerated right (the right to keep and bear arms, guaranteed by the Second Amendment, which will be discussed in Point I, *infra*); and/or (2) an unenumerated right that has textual support in the Bill of Rights as well as case law and scholarly analysis that supports its application here (discussed in Point II, *infra*).

POINT I

THE SECOND AMENDMENT BARS ENFORCEMENT OF THE NEW YORK STATUTES TO PROHIBIT POSSESSION OF NUNCHAKU IN THE HOME

The most obvious provision of the Bill of Rights toward which to look for protection against the statute as applied would be the Second Amendment, which 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." But before the Second Amendment may be held to be applicable here, interpretation of its text must resolve three binary choices in Plaintiff's favor. They are: (1) whether the Second Amendment guarantees an individual or "collective" (i.e., states') right; (2) if the Second Amendment does guarantee an individual right, whether it is applicable as against the states ("incorporation"); and (3) whether nunchaku constitute "Arms" as contemplated by the Second Amendment. Each consideration will be addressed in turn.

1. The Second Amendment Guarantees an Individual Right

Ten years ago, Professor William Van Alstyne of Duke Law School published an essay, "The Second Amendment and the Personal Right to Arms," 43 Duke L.J. 1236 (1994), in which he described the "arrested jurisprudence" of the Second Amendment:

> The main reason there is such a vacuum of useful Second Amendment understanding . . . is the *arrested jurisprudence* of the subject as such, a condition due substantially to the Supreme Court's own inertia--the same inertia that similarly afflicted the First Amendment virtually until the third decade of this twentieth century when Holmes and Brandeis finally were moved personally to take the First Amendment seriously (as previously it scarcely ever was).

Id. at 1240 (emphasis added) (footnote omitted). Professor Van Alstyne compared the state of Second Amendment jurisprudence in 1994 to that of the First Amendment in 1904, *id.* at 1239, noting that such basic questions as whether the Second Amendment provides a personal or "collective" (states') right remained unanswered when he authored the essay.

During the ten years that have passed since those observations were made, this Court (among others) has expressly held that the Second Amendment does *not* guarantee a personal right, *Hamilton v. Accu-Tek*, 935 F. Supp. 1307, 1318 (E.D.N.Y. 1996) (a decision that Plaintiff urges be revisited for the reasons that follow), while other courts have held to the contrary. Particularly noteworthy are the decisions in *United States v. Emerson* of the Fifth Circuit and of the Northern District of Texas, 270 F.3d 203 (5th Cir. 2001) and 46 F. Supp. 2d 598 (N.D. Tex. 1999), respectively, both of which included scholarly opinions to which this Court is respectfully referred. Meanwhile, the U.S. Supreme Court has provided no guidance, having denied *certiorari* in the *Emerson* case, 536 U.S. 907 (2002).

Since "the ultimate touchstone of constitutionality is the Constitution itself and not what

[the Supreme Court] ha[s] said about it," *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 491-92 (1939) (Frankfurter, J., concurring), the text of the Amendment itself remains a good starting point. That text states that it is "the right of *the people* to keep and bear Arms" that "shall not be infringed" (emphasis added). As Professor Van Alstyne, 43 Duke L.J. at 1243 n.19, and both opinions in *Emerson*, 270 F.3d at 227-229, 46 F. Supp. 2d at 601, point out, the use of the phrase "the people" must guarantee a personal, rather than a collective (states') right, just as the phrase "the people" as used in the First, Fourth and Ninth Amendments (in the contexts, respectively, of the right "peaceably to assemble," to "be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," and to hold rights that, although not enumerated, have been "retained") guarantees personal rights. Moreover, the phrase "the people" is used in contradistinction from the states in the Tenth Amendment. Finally, as all three of the above-cited authorities note in varying degrees, the Supreme Court, in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), has indicated that "the people," as that term is used in all the foregoing constitutional provisions (including the Second Amendment), is a term of art referring to "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Id.* at 265. *See* 43 Duke L.J. at 1243 n.19, 270 F.3d at 228, 46 F. Supp. 2d at 601. Unless "the people" has a different meaning in the Second Amendment than it has everywhere else in the Bill of Rights, the Second Amendment must confer "the right . . . to keep and bear Arms" on the same beneficiaries who have been granted the right "peaceably to assemble" by the First Amendment and the right to "be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" by

the Fourth. *See* L.A. Powe, Jr., "Guns, Words, and Constitutional Interpretation," 38 William & Mary L. Rev. 1311, 1338-39 (1997) (noting the "conscious parallelism" of the phrase "right of the people" in all the aforementioned constitutional provisions and pointing out that no constitutional scholar "has attempted to explain why 'the right of the people' in the First and Fourth Amendments is an individual right, but 'the right of the people' in the Second Amendment is not"); *id.* at 1335 ("If the drafters' goal was to create an individual right to bear arms, they hardly could improve on the statement that 'the right of the people to keep and bear Arms, shall not be infringed.' Conversely, if the goal were to create instead a collective right, no amendment would have been necessary because existing traditions and the explicit text of the Constitution already recognized such a right.") (footnotes omitted).

Nor should the Second Amendment's preamble negate its guarantee of an individual right. As the Fifth Circuit explained in *Emerson*, "the preamble implies that the substantive guarantee is one which tends to enable, promote or further the existence, continuation or effectiveness of that 'well-regulated Militia' which is 'necessary to the security of a free State[,]'" 270 F.3d at 233, but this "does *not* support an interpretation of the amendment's substantive guarantee in accordance with the collective rights or sophisticated collective rights model[,]" *id.* (emphasis added), either of which would posit that the Amendment guarantees only the rights of states to have militias but not "the right of the people to keep and bear Arms." Simply put, the preamble cannot reasonably be read to negate the plain meaning of the substantive text that follows. As the Fifth Circuit summarized:

> Taken as a whole, the text of the Second Amendment's substantive guarantee is not suggestive of a collective rights or sophisticated collective rights interpretation, and the

> implausibility of either such interpretation is enhanced by consideration of the guarantee's placement within the Bill of Rights and the wording of the other articles thereof and of the original Constitution as a whole.

Id. at 232.

As noted, this Court held in 1996 that the Second Amendment does *not* guarantee a personal right, *Hamilton v. Accu-Tek*, *supra*, as did the Southern District in *Dew v. United States*, 1998 WL 159060, *6 (S.D.N.Y. 1998), *aff'd on other grounds,* 192 F.3d 366 (2d Cir.1999) ("It is settled constitutional law that the Second Amendment is not a source of individual rights."). Both those decisions, however, preceded the Fifth Circuit's opinion in *Emerson*, which, it is submitted, is persuasively reasoned and admirably supported. Subsequently, the Northern District has considered and rejected the *Emerson* position in *Bach v. Pataki*, 289 F. Supp. 2d 217 (N.D.N.Y. 2003). As noted in *Bach*, *id.* at 224, the Second Circuit has commented that "the right to possess a gun is clearly not a fundamental right." *United States v. Toner*, 728 F.2d 115, 128 (2d Cir. 1994). This commentary was made in the context of the Second Circuit's addressing an equal protection argument that was part of an appeal of a criminal conviction by an Irish National Liberation Army member, a foreign national who had purchased twenty M-16 full-automatic rifles from an undercover FBI agent. Specifically, the Second Circuit wrote:

> Murphy was convicted . . . of violating 18 U.S.C. App. section 1202 (a)(5) . . . which makes it a felony for an illegal alien to receive, possess or transport "in commerce or affecting commerce . . . any firearm." Because receiving, possessing or transporting firearms in interstate commerce is not in and of itself a crime . . . and because being an illegal alien is not in and of itself a crime, Murphy argues that his Fifth Amendment right to equal protection of the law is violated by section 1202(a)(5). He concedes, however, that the statute passes constitutional muster if it rests on a rational basis, a concession which is clearly

> correct since the right to possess a gun is clearly not a fundamental right . . . and since illegal aliens are not a suspect class.

Id. (citations and quotations omitted). The above-quoted text comprises the only analysis of any right to bear arms (specifically limited to "the right to possess a gun") in which the *Toner* Court engaged. *Toner*, which was decided in 1994, did not directly involve any Second Amendment-based challenge nor any analysis of the Amendment, and the *Bach* court in 2003 cited no more recent Second Circuit authority on the question of whether the Second Amendment guarantees an individual or "collective" (i.e., a states' or "militia-based") right, so it appears that the Second Circuit has not yet taken a position on the issue now before this Court.

Recently, in *NAACP v. Acusport, Inc.*, 271 F. Supp. 2d 435 (E.D.N.Y. 2003), Judge Weinstein of this Court, in the context of a brief Second Amendment discussion within that lengthy opinion, listed *Toner* as among the cases that support the collective or "militia-based" understanding of the Second Amendment. 271 F. Supp at 462. As noted above, however, *Toner* did not directly involve any Second Amendment-based challenge nor any analysis of the Amendment. Thus, it is respectfully submitted that the case does not include any holding by the Second Circuit on the issue, which accordingly remains unresolved in this Circuit.

This Court thus remains free to decide independently the question of whether the Second Amendment guarantees an individual or collective right. It is submitted that textually and historically based modes of constitutional analysis both support a finding that the right is an individual one, *see, e.g.*, Powe, *supra* at 11, at 1334-66. Beyond this, it is worthwhile to ask the question whether the "states' militia" or collective rights approach, if adopted, would

have any meaning. Professor Powe posits an interesting thought experiment based on relatively recent history:

> Now fast-forward to Little Rock in 1957. With the Arkansas National Guard preventing the desegregation of Central High School, President Eisenhower made the decisions to send in the 101st Airborne and to federalize the Guard to remove it as a potential opposition force. Does anyone believe that Governor Orval Faubus successfully could have opposed federalizing the Guard on the ground that the Second Amendment secured an independent military to the States to oppose national tyranny?
>
> If the collective rights theory is correct, then its view of the Second Amendment must have some meaning, and that meaning has to include an independent state right to void a national order federalizing the Guard. Otherwise, what could a collective rights constitutional amendment do and mean? We know that Governor Faubus could not have exercised any constitutional right with respect to the Arkansas National Guard, and this necessarily means the collective rights theory either is wrong or dead.

Powe, *supra*, at 1385 (footnotes omitted). It is respectfully submitted that any attempt to read the Second Amendment as guaranteeing a collective or states' right, rather than an individual one, would amount to nothing less than a deliberate misreading in order to avoid recognizing a right that may be "dangerous." But the text that would have to be misread in order to achieve that utilitarian end (i.e., avoiding "obstacles" to legislative control of dangerous weaponry) is nothing less than constitutional text. For courts to engage in such deliberate misreading would be more dangerous than recognizing that a personal right exists and then balancing that right in a manner comparable to that which has occurred in First Amendment jurisprudence. The personal right to "keep and bear Arms" may reasonably and constitutionally be circumscribed so as to permit legislative measures that would restrict such activities as the carrying of weapons and the ownership of certain types of weapons, which, it is submitted, is far preferable to pretending that the right does not exist at all.

2. A State May Not Violate the Second Amendment Rights of Its Citizens

Since the Supreme Court has not yet decided the question of whether the Second Amendment guarantees a personal right, it could not have decided whether that right was "incorporated" against the states through the Fourteenth Amendment. Resolution of the first issue must precede resolution of the second, for if the "collective rights theory" were to be validated, incorporation would make no sense. As Professor Powe put it: "The collective rights theory obviates . . . problems dealing with incorporation. If no individual can claim the right to bear arms, there is no issue. If the 'right' exists in the State, incorporation against state interference is utterly incomprehensible." Powe, *supra*, at 1374. Or, as one law student recently wrote: "[A] collective application applied to the states would effectively prohibit the states from prohibiting the states from arming a militia. It is easy to see how this application would not make sense . . . ." M. Busch, Comment, "Is the Second Amendment an Individual or a Collective Right: *United States v. Emerson*'s Revolutionary Interpretation of the Right to Bear Arms," 77 St. John's L. Rev. 345, 360 (2003).

If, however, as argued in the preceding section, the right to keep and bear arms is an individual right, it must be determined whether it is applicable as against the federal government only, or also as against the states. The Supreme *has* spoken on this point, although not more recently than 118 years ago. *See, e.g., United States v. Cruikshank*, 92 U.S. 542, 553 (1875) (stating that the Second Amendment "is one of the amendments that has no other effect than to restrict the powers of the National Government"); *Presser v. Illinois*, 116 U.S. 252 (1886). Some Circuit Courts of Appeal have recently cited these two cases for the proposition that the Second Amendment does not apply to the states. *See Peoples Rights*

Org., Inc. v. City of Columbus, 152 F.3d 522, 538 n.18 (6th Cir.1998); *Love v. Pepersack*, 47 F.3d 120, 123 (4th Cir.1995). However, both the Fifth and the Ninth Circuits, even though they disagree with each other on the issue of whether the Second Amendment guarantees an individual right, agree that *Cruikshank* and *Presser* are valueless as precedent. *Emerson*, 270 F.3d at 221 n.13 (cases "came well before the Supreme Court began the process of incorporating certain provisions of the first eight amendments into the Due Process Clause of the Fourteenth Amendment" and "ultimately rest on a rationale equally applicable to all those amendments"; *Silveira v. Lockyer*, 312 F.3d 1052, 1067 n.17 (9th Cir. 2003) (cases "rest on a principle that is now thoroughly discredited"). Neither the Fifth nor the Ninth Circuit, however, has yet taken a position as to the present-day status of the question of whether the Second Amendment binds the states. *Bach v. Pataki*, 289 F. Supp. 2d at 226 n.4.

Thus, the Supreme Court's only decisions on the incorporation of the Second Amendment (*Cruikshank* and *Presser*, in 1875 and 1886, respectively) rely on a now-discredited jurisprudence of non-incorporation of *any* of the Bill of Rights provisions, i.e., that which derived from the *Slaughter-House Cases*, 83 U.S. 36 (1873). *See, e.g.*, Van Alstyne, *supra*, 43 Duke L.J. at 1239 n.10; *id.* at 140-41 n.15 ("The *Slaughter-House Cases* denied that the Privileges and Immunities Clause of the Fourteenth Amendment extended any protection from the Bill of Rights against the states. Within three decades, however, the Court began the piecemeal abandonment of that position (albeit by relying on the Due Process Clause instead). . . ."). As noted above, both the Fifth and the Ninth Circuits have expressed their agreement that *Presser* and *Cruikshank* (which are built upon the discredited jurisprudence of the *Slaughter-House Cases*) are of no precedential value. Accordingly, the Second

Amendment's place in the Bill of Rights, coupled with the modern jurisprudence of incorporation of individual rights against the states through the Fourteenth Amendment, mandates that the Second Amendment be recognized as protecting an individual right against state infringement. *See, e.g.*, Van Alstyne, *supra*, 43 Duke L.J. at 1254 ("[S]erious people begin with a constitutional understanding that declines to trivialize the Second Amendment or the Fourteenth Amendment, just as they likewise decline to trivialize any other right expressly identified elsewhere in the Bill of Rights."). Significantly, in the 1866 report to the Senate on behalf of the Joint Committee on Reconstruction, the "right to keep and bear arms" was expressly listed among those rights to be protected from state infringement through the Fourteenth Amendment's Privileges and Immunities Clause. Cong. Globe, 39th Cong., 1st Sess. 2765 (1866); *see also* Van Alstyne, *supra*, 43 Duke L.J. at 1252 (quoting from same). Moreover, the Supreme Court, 126 years after the *Slaughter-House Cases*, has finally "breathed new life" into the previously dormant Privileges and Immunities Clause of the Fourteenth Amendment. *Saenz v. Roe*, 526 U.S. 489 (1999). It follows that *Presser* and *Cruikshank* (built upon the discredited jurisprudence of the *Slaughter-House Cases*, which for more than a century rendered the Privileges and Immunities Clause a "dead letter") cannot reasonably pose an obstacle to the incorporation of the right to keep and bear arms as against the states. It is urged that this Court take a decisive step in restoring the scope of citizenship to that which was originally intended in the Fourteenth Amendment by holding accordingly.

3. Nunchaku Are "Arms" as Contemplated by the Second Amendment

Like the First Amendment, the Second Amendment must be subject to a "rule of reason." Just as the First Amendment does not guarantee the right to shout "Fire!" in a crowded movie theater, so the Second Amendment cannot reasonably be read so as to guarantee the right to carry weapons freely in all locations or even to possess weapons of a certain type. The Supreme Court's only relatively recent discussion of the subject, in *United States v. Miller*, 307 U.S. 174 (1939), held:

> In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.

Id. at 178. Thus, a "sawed-off shotgun" was held not to be a weapon protected by the Second Amendment. However, as military technology advances, fewer weapons that are "part of the ordinary military equipment," *id.*, will likely be consistent with a "rule of reason" approach to Second Amendment jurisprudence, since the tendency in military applications is to increase destructive capacity by such means as explosives, fully automatic weapons, etc. *See, e.g.,* S. Wasser, "From Civilian Tool to Military Weapon," Reserve and National Guard Magazine (2004), at page 2 (copy attached as Exh. 11 to Maloney Declaration submitted herewith).

What is clear, however, is that the nunchaku has a historical connection to a citizens' militia (albeit one in Asia) that preexisted the ratification of the Constitution by nearly two centuries. Rule 56.1 Statement at ¶ 7; Verified Complaint at ¶¶ 18-19; Maloney Declaration at ¶ 9. Defendant does not dispute this factual assertion, but, rather, challenges its relevance to

an interpretation of the Second Amendment, in part on the basis that "use of nunchuks on Okinawa" was unknown to the Framers. Rule 56.1 Counter-Statement at ¶ 7.

As to the *contemporary* relevance of the nunchaku as an "arm" of the militia, the weapon is used for controlled non-lethal force by "over 200 law enforcement agencies across the United States," *see* Maloney Declaration at ¶ 19 and source cited therein, and appears to have had some military application during the 20th Century, *see* M. Ayoob, *The Truth About Self-Protection* 300 (1983) (noting that the weapon was used by SEALs in Vietnam). Perhaps most significantly in the "citizen-militia" context, the nunchaku is particularly effective against an opponent armed with a knife or other edged weapon without resort to lethal force and without creating the risk inherent in the use of a projectile-firing weapon in the aircraft situation, such that it would have been an appropriate and probably effective weapon in preventing the hijackings that led to the use of commercial aircraft as weapons of mass destruction of September 11, 2001. It is submitted that it would be unjust to hold that the right of citizens to keep and bear arms should not extend to a weapon with such history and characteristics.

POINT II

TO THE EXTENT THAT THE STATUTES PROHIBIT SIMPLE POSSESSION OF NUNCHAKU IN THE HOME, THEY VIOLATE UNENUMERATED RIGHTS

In *Lawrence v. Texas*, 123 S. Ct. 2472 (2003), the Supreme Court's majority opinion began:

> Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home.

Id. Although *Lawrence* involved a criminal prosecution for a different activity,

namely, engaging in consensual homosexual sex, the principles that decided it are equally applicable here. Simple possession of two sticks connected by a cord, for martial arts practice or for defense of one's home, is an activity no less entitled to constitutional protection under the various theories of unenumerated liberty rights than is the activity of engaging in gay sex. Indeed, the only difference, constitutioanlly, is that the former activity is arguably also protected by a specific provision in the Bill of Rights, namely, the Second Amendment (*see supra* Point I), arguably making an unenumerated-rights approach superfluous.

However, should this Court decline to find that the Second Amendment protects citizens from a state statute that defines and punishes as a crime the mere possession of nunchaku in the privacy of one's home, it is urged that it consider the tradition of which the *Lawrence* Court speaks, that the state "is not omnipresent in the home," and that it locate the liberty interest to be protected within the constitutional sources of that tradition.

Although "substantive due process" has traditionally been the approach taken by the federal courts in developing a jurisprudence of unenumerated rights, it is not the only possible approach, nor is it necessarily the best-supported in terms of either text or history. It is, however, established. Thus, it is one possible approach that this Court may take to find that the statutes at issue here, although constitutional as applied generally, unduly infringe on liberty and privacy interests when applied so as to criminalize simple in-home possession of a martial-arts instrument.

But, as the late Professor John Hart Ely reminded us, the phrase "substantive due process" is "a contradiction in terms." J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review* 18 (1980). More recently, the late Professor Charles L. Black, Jr., in the last

book he published during his life, argued passionately and persuasively that the doctrine of substantive due process should be replaced by a jurisprudence of unenumerated rights that relies on the Ninth Amendment, looking to the Declaration of Independence for content, and made applicable as against the states through the Privileges and Immunities Clause of the Fourteenth Amendment. C.L. Black, Jr., *A New Birth of Freedon: Human Rights, Named and Unnamed* (1997). Of substantive due process, Professor Black wrote the following:

> Necessity, it is said, is the mother of invention. Sometimes the necessity is so pressing that it gives birth to an invention that doesn't work very well. That is how we got "substantive due process." It was unthinkable that in a supposedly free country the component States could at their own will [engage in various deprivations of liberty] . . . . "[S]ubstantive due process" is an invention that now and then works a little bit in practice, but *does not work* intellectually. It has had perhaps a good transitional function, like the wood-frame support of an arch before you put the keystone in.

Id. at 106 (emphasis in original).

Professor Black's "keystone" is the Ninth Amendment, which, as he puts it, "declares as a matter of law--of constitutional law, overriding other law--that some other rights are 'retained by the people,' and that these shall be treated as *on equal footing* with rights enumerated." *Id.* at 13 (emphasis in original).

The Ninth Amendment has received respect (although, at first glance, not much content) from the federal courts in various opinions. *E.g., United States v. Bifield*, 702 F.2d 342, 349 (2d Cir. 1983) (noting that the Ninth Amendment means that "[t]he full scope of the specific guarantees is not limited by the text"); *Henne v. Wright*, 904 F.2d 1208, 1216 (8th Cir. 1990) ("There are such things [as unenumerated rights] in constitutional law . . . . We know that much . . . from the Ninth Amendment.") (Arnold, J., concurring in part and

dissenting in part). As to its content, Professor Black's thesis is that the Declaration of Independence, particularly its assertion of the "unalienable Rights [including] Life, Liberty, and the Pursuit of Happiness," provides a textual basis for the content of the Ninth Amendment. Black, *supra*, at 38.

Another approach to defining the content of the Ninth Amendment, an approach not at all inconsistent with Professor Black's, would be to look to the rest of the Bill of Rights for clues as to what sort of rights should be protected. This approach is evident in the Supreme Court's opinion in *Griswold v. Connecticut*, 381 U. S. 479 (1965), the case that is generally accepted as having begun the series of decisions that, most recently, has culminated in *Lawrence*, *supra*:

> [S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Griswold, 381 U.S. at 484 (citations omitted).

Thus, although it is widely cited as the seminal substantive due process or "right to privacy" case of the Twentieth Century, *Griswold* could equally be viewed as the seminal Ninth Amendment case, for (at least from a textualist perspective) the "penumbras and emanations" of the various Bill of Rights provisions cited could *only* have given rise to an

unenumerated right that was to "be treated as on equal footing with rights enumerated," *cf.* Black, *supra*, *if* the Ninth Amendment had been implicitly given some recognition in the process. Justice Douglas in *Griswold* continued:

> The Fourth and Fifth Amendments were described . . . as protection against all governmental invasions "of the sanctity of a man's home and the privacies of life." We recently referred . . . to the Fourth Amendment as creating a "right to privacy, no less important than any other right carefully and particularly reserved to the people."

Id. at 484-85 (citations omitted).

Thus, the *Griswold* approach was to look to other Bill of Rights provisions relating to the inviolability of the home and of the person (primarily the Third and Fourth Amendments) as a basis for the "right to privacy" that was then incorporated against the states through the Due Process Clause of the Fourteenth Amendment (the latter step having been necessary because in 1965--right up until *Saenz, supra*, in 1999--the Fourteenth Amendment's Privileges and Immunities Clause was considered a "dead letter"), and which has been built upon in the Court's jurisprudence ever since, right up to an including *Lawrence v. Texas, supra.*

It would be paradoxical indeed if the Ninth Amendment--or substantive due process or whatever approach one takes toward defining unenumerated rights--should protect the right to personal autonomy with respect to *procreation* but not with respect to *self-preservation*. Indeed, such an approach would be as biologically unfounded as it is jurisprudentially unsound. The Supreme Court in *Griswold* found an unenumerated "right to privacy" in the context of procreation and sex by looking to the other provisions in the Bill of Rights for clues in defining the parameters of unenumerated rights. Building upon the *Griswold* approach, the right to personal and family protection in one's own home may be said to draw not only from

the Third, Fourth and Fifth Amendments (as in *Griswold*) but also from the Second Amendment (which, if it does not protect the right *ex proprio vigore*, ought certainly contribute to unenumerated-rights jurisprudence under the very approach taken by the Supreme Court in *Griswold*) and even the First (*see* Maloney Aff. at ¶ 20; *cf. Schad v. Mount Ephraim*, 452 U.S. 61 (1981) (recognizing that nude dancing is protected by the First Amendment)). Finally, as Professor Nicholas Johnson of Fordham has pointed out with wit and common sense:

> A predominant reason to protect a right of self-defense and personal security is that such an interest may be a prerequisite to exercising and enjoying those rights that are explicitly enumerated. The dead probably have little use for the First, Fourth and Fifth Amendments.

N. Johnson, "Beyond the Second Amendment: An Individual Right to Arms Viewed Through the Ninth Amendment," 24 Rutgers L.J. 1, 38 (1992). (Professor Johnson goes on to make a well-reasoned and well-supported argument for locating a right to armed self-protection in the Ninth Amendment.)

Here, the "arm" at issue is not even a firearm, but merely a pair of sticks connected by a cord--a weapon that, unlike a firearm, is *not* inherently dangerous by virtue of the possibility of accidental discharge, but which nonetheless can be particularly effective in defense against an intruder armed with that ubiquitous but deadly weapon, the knife. And here, the home is the *only* locus for which the right to possess nunchaku is being asserted.

It is submitted that liberty is intolerably compromised, with no countervailing public benefit, by the state's criminalizing simple possession of nunchaku in the home.

In closing, the words of a dissenting judge in a 1913 state-court case that sustained the "Sullivan Law" against a constitutional challenge to its application in the home are apt:

> The best police force in the world cannot always, or even usually, anticipate and prevent crimes of violence. They can and usually do preserve peace and order, and sometimes discover the perpetrators of crimes; but they can seldom prevent. A law-abiding citizen in his walks abroad can usually avoid dangerous localities, and if he is compelled to traverse them can obtain a license to carry a defensive weapon; but in his own house, wherever it may be situated, he can never be entirely secure against the midnight marauder. For protection there he is compelled to rely upon himself and upon such means of defense as he may have at hand. The construction now sought to be given to the act would deprive him of such protection.

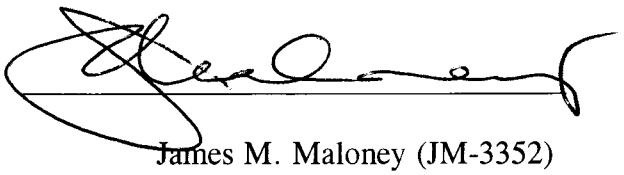
People ex rel. Darling v. Warden of City Prison, 154 A.D. 413, 427, 139 N.Y.S. 277, 288 (App. Div., 1st Dep't 1913) (Scott, J., dissenting) (3-2 decision).

The above observations, made in dissent nearly a century ago, are equally applicable today in this comparable context of a defensive weapon in the home. Here, however, in stark contrast to the situation involving a pistol, there are *no* rational arguments in the state's favor for criminalizing the mere possession in one's home of two sticks connected by a cord.

CONCLUSION

For all of the foregoing reasons, Plaintiff's motion should be granted and the application of the New York statutes to criminalize simple possession of nunchaku in one's home should be declared unconstitutional and of no force and effect.

Dated: August 8, 2004
Port Washington, New York



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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

JAMES M. MALONEY,

Plaintiff,

- against -

ELIOT SPITZER, in his official capacity as Attorney General of the State of New York, and his successors,

Defendants.

----------X

CV 03-786 (ADS) (MLO)

AFFIRMATION OF PERSONAL SERVICE

Plaintiff, James M. Maloney, declares and affirms under penalty of perjury as follows:

On the 9th day of August, 2004, I personally served the annexed

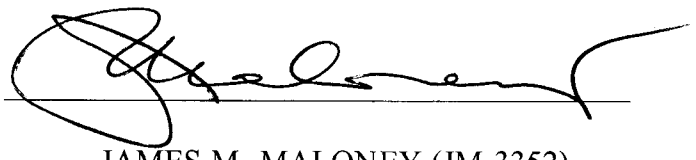
MEMORANDUM OF LAW

upon the attorney listed below at the reception area of the address listed below by handing a true copy of same to a person of suitable age and discretion authorized to accept such service.

Dorothy Oehler Nese, Esq.
Assistant Attorney General, State of New York
200 Old Country Road, Suite 460
Mineola, NY 11501

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: August 9th 2004
Port Washington, New York



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