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,
GEORGE PATAKI, in his official capacity as
Governor of the State of New York, and
DENIS DILLON, in his official capacity as
District Attorney of the County of Nassau, and
their successors,

Defendants.

--X

MEMORANDUM OF LAW
IN OPPOSITION TO
12(b) MOTION BY
DEFENDANTS SPITZER and PATAKI

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PRELIMINARY STATEMENT

This memorandum of law opposes the Rule 12(b) motion to dismiss made by Defendants SPITZER and PATAKI. This is an action for declaratory judgment, seeking a declaration that those portions of sections 265.00 through 265.02 of the New York Penal Law, to the extent that those statutes define and punish as a crime the simple possession of "nunchaku" (the Japanese term for a martial arts weapon of Okinawan origin, properly used for singular and plural, and further defined *infra*) within one's home, are unconstitutional and of no force and effect. This action does *not* challenge the application of the statutes to the possession of nunchaku in any other location than the possessor's home.

INTRODUCTION

Abraham Lincoln is credited with having said that "[t]he best way to get a bad law repealed is to enforce it strictly." But the application of the law as challenged herein, i.e., New York's 32-year old ban on the simple possession of nunchaku even for peaceful use in the privacy of one's home, is very rarely enforced at all in that context (i.e., simple in-home possession). Thus, the application of the law as challenged herein is hardly "strictly enforced," and, although Plaintiff (who is one of the few, or perhaps even the only one, who

have/has ever been so prosecuted) has written to his state legislators asking for reform, and has even created a website (www.nunchakulaw.com) (a virtually obligatory step these days), there is hardly a movement under way to repeal or amend the challenged statute to provide for legal in-home possession. Nor, given the rarity of such prosecutions, is any such campaign likely to be mounted and joined by sufficient numbers of voters to gain any attention in the legislature.

The *threat* of prosecution, however, remains, as against any inhabitants of this state who would possess nunchaku in their homes for peaceful use in martial arts practice. Under the clear terms of the applicable statutes (codified at sections 265.00 through 265.02 of the New York Penal Law), such simple in-home possession of "chuka sticks" (synonymous with "nunchaku" and statutorily defined, in brief, as "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," New York Penal Law § 265.00 (14)) could subject the possessor to conviction of a misdemeanor and one year in prison.

That the threat of such prosecution by the authorities of this state remains viable is perhaps best illustrated by the fact that, in 2000 and 2002, the Attorney General, in settling civil actions against out-of-state martial-arts-equipment suppliers, required, as a term of settlement, that the suppliers provide the names

and addresses of all their New York customers to the Attorney General, and also that the settling suppliers send letters to all such customers advising them to surrender their weapons to law enforcement agencies. *See* Amended Complaint at ¶¶ 56-58 and Exhibit 4. The prohibited "weapons" included nunchaku. (It is on the basis of the ancillary relief sought, i.e., an order requiring the Attorney General to notify those customers of their right to possess nunchaku in their homes should this Court so rule, that the Attorney General has been retained as a party in this action. *See* Amended Complaint at ¶¶ 59-64.)

Notably, before the ban on nunchaku was signed into law in 1974, New York's own Division of Criminal Justice Services sent a memorandum, dated April 4, 1974, to the office of the Governor, 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." *See* Amended Complaint at ¶¶ 33-34 and Exhibit 1.

Similarly, the Committee on the Criminal Court of the New York County Lawyers' Association sent the Governor a memorandum stating that "[w]hile the possession of [nunchaku] with demonstrable criminal intent is a proper subject of

legislation, the proposed legislation goes further, making the mere possession (even absent criminal intent) a criminal offense. If it is the desire of the legislature to prohibit the use of nunchakus in criminal conduct, a more narrowly drawn statute can be fashioned to achieve this end." *See* Amended Complaint at ¶ 35 and Exhibit 2.

It is widely accepted as historical fact that the nunchaku was an agricultural implement first adapted for use as a martial-arts weapon by the people of Okinawa as part of the development of karate during the early Seventeenth Century, just after the Japanese had invaded that island and banned the possession of "traditional" weapons such as the sword and spear. *See, e.g., In re S.P., Jr.*, 465 A.2d 823, 827 (D.C. 1983) (court noting its "cognizan[ce] of the cultural and historical background of this Oriental agricultural implement-turned-weapon" and "recogniz[ing] that the nunchaku has socially acceptable uses within the context of martial arts and for the purpose of developing physical dexterity and coordination"); S. Halbrook, "Oriental Philosophy, Martial Arts and Class Struggle," 2 *Social Praxis* 135, 139 (1974) (copy previously filed with the Court as Exhibit 5 to the Declaration of James M. Maloney dated August 8, 2004) (Item #24 on the Docket Sheet) (noting that the invading Japanese 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 (which banned "traditional" weapons but not the nunchaku, which, in turn, was simply an agricultural implement before being adapted for use in the martial arts). The question now before this Court is whether any part of the Constitution of the United States, as amended and interpreted over more than two centuries, offers any protection whatsoever against a state's legislative decision to criminalize the simple possession of "two or more lengths of a rigid material joined together by a thong, rope or chain" in the private homes of its citizens. That the statutory ban is only very rarely enforced as to simple in-home possession is of no *direct* consequence to that constitutional inquiry, although a converse application of Abraham's Lincoln's principle, *see supra* at page 1, would at least imply that judicial review is the only likely avenue of redress available here. Indeed, no New York legislator appears ever to have been inclined to champion a reform of the state's complete nunchaku ban during the nearly 33 years that it has been in effect,

and the extreme rarity of enforcement of that ban in the context of simple in-home possession makes the democratic process a highly unlikely avenue for change, since a "critical mass" of voters motivated enough to demand reform is unlikely to materialize. Only a very tiny minority of New Yorkers (of which Plaintiff is one) has ever been prosecuted for simple in-home possession of nunchaku.

DISCUSSION PRELIMINARY TO ARGUMENT: THE SECOND AMENDMENT AND THE *BACH* DECISION

The most obvious provision of the Bill of Rights toward which to look for protection against the statute as applied would have been 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 the Second Circuit in 2005 decided that it was "compelled by the Supreme Court's opinion in *Presser v. Illinois*, 116 U.S. 252, 6 S.Ct. 580, 29 L.Ed. 615 (1886)" to hold that the Second Amendment is inapplicable as against the states. *Bach v. Pataki*, 408 F.3d 75, 84 (2d Cir. 2005), *cert. denied*, 126 S.Ct. 1341, 164 L.Ed.2d 56 (2006).

In an opinion that hinted (with little subtlety) at a dire need for Supreme Court review on the proper scope and application of the Second Amendment, Judge Wesley wrote: "Theories regarding constitutional protections for the 'right

to keep and bear arms' have moved from the pages of law reviews to those of the Federal Reporters. *Perhaps soon they will make their way into the United States Reports*." *Id.* at 94-95 (emphasis added). But they have not: the Supreme Court denied *certiorari* in the *Bach* case on February 21 of this year.

The denial of *certiorari* in *Bach* raises a question that is almost a conundrum: under what circumstances would *certiorari* be granted on the question of whether the Second Amendment is applicable to the states? Often, when *certiorari* is denied, it is because the Court wishes to wait until more of the circuit courts of appeal have weighed in on the question to be decided. The Court then resolves the circuit split.

But on the question of the Second Amendment's applicability to the states, there is no circuit split. *Cf. 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). But the Second Circuit (like the Fourth and Sixth Circuits) held as it did (i.e., that the Second Amendment is not applicable to the states) because it felt that it was "compelled by the Supreme Court's opinion in *Presser v. Illinois*," *supra*, an 1886 case that had, in turn, held that the Second Amendment is not applicable to the states (albeit in an era of non-incorporation). If the Second, Fourth and Sixth Circuits are correct about the continued precedential authority of *Presser v.*

Illinois, then for one of the other circuit courts of appeal to hold that the Second Amendment *is* applicable to the states (thereby creating a circuit split) it must disobey the Supreme Court's on-point precedent in *Presser v. Illinois*. Thus, it would seem that only a breakdown of the hierarchical structure of authority in the federal court system would render the circuit split necessary to ensure that the nation's highest Court answer a most fundamental question about a provision of the Bill of Rights. Against this somewhat perplexing state of affairs, and before proceeding to his unenumerated-rights arguments (which are all that remain after the apparently best-fitting Bill of Rights provision has been effectively rendered a nullity), Plaintiff respectfully offers this Court the following two points:

1. Plaintiff expressly does not waive, and hereby preserves, his Second Amendment claim (Second Cause of Action, Amended Complaint at ¶¶ 47-52). This is not meant to suggest that this Court could or should disregard the Second Circuit's unambiguous and recent decision in *Bach*, but, rather, is based on: (a) the hope that there remains a chance, however slim, that the Supreme Court will decide that the Second Amendment is an "incorporated" provision of the Bill of Rights; and (b) the desire to preserve the issue for possible appellate review.

2. That the Second Amendment is not *per se* applicable to an analysis of the statutes as applied to criminalize simple in-home possession of nunchaku does not

necessarily also mean that the values it entrenches are irrelevant to a separate and distinct unenumerated-rights analysis of the statutes as applied. As the Supreme Court wrote in *Griswold v. Connecticut*, 381 U. S. 479 (1965):

> [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). Because *Griswold* analyzed a contraceptives-prohibiting statute, it did not mention the Second Amendment in its discussion of the "penumbras and emanations" of the specific guarantees in the Bill of Rights, since the Second Amendment would not have been relevant in that context. That is not to say, however, that the Second Amendment, in an appropriate context, is devoid of meaning. It remains a statement, among those others expressed in the Bill of Rights and in addition to those specifically mentioned in *Griswold*, of a value that may help to define an unenumerated right.

ARGUMENT

POINT I

BY PROHIBITING SIMPLE POSSESSION OF NUNCHAKU IN THE HOME, THE NEW YORK STATUTES, AS APPLIED, VIOLATE UNENUMERATED RIGHTS THAT ARE ENTITLED TO CONSTITUTIONAL PROTECTION

In *Lawrence v. Texas*, 539 U.S. 558 (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 upon which it was decided are equally applicable here. Simple possession of two sticks connected by a cord, for martial arts practice--or even for personal defense against intruders in one's home--is an activity no less entitled to constitutional protection under the various theories of unenumerated liberty rights than is sexual activity.

Although "substantive due process" has been the dominant Twentieth-Century 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

challenged 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 "consisting of two or more lengths of a rigid material joined together by a thong, rope or chain," New York Penal Law § 265.00 (14).

However, an alternative approach is worth considering. 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 gradually replaced by a more textually sound jurisprudence of unenumerated rights that relies instead on the Ninth Amendment, looking in large part to the principles articulated in 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 (and 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. As was introduced in the preceding section of this brief, *see* page 9, *supra*, that very 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 "substantive due process"-based "right to privacy" decisions including *Lawrence v. Texas*, *supra*.

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 the "penumbras and emanations" of the various Bill of Rights provisions cited in *Griswold* 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.

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," which was then incorporated against the states through the Due Process Clause of the Fourteenth Amendment (the latter step having been necessary because in 1965--until *Saenz v.*

Roe, 526 U.S. 489 (1999)--the Fourteenth Amendment's Privileges and Immunities Clause was still considered a "dead letter" entitled to no recognition at all). The *Griswold* approach has been built upon through the Supreme Court's subsequent jurisprudence up to an including *Lawrence v. Texas, supra.* In a long line of cases spanning some four decades, the Supreme Court has found an unenumerated "right to privacy" in the context of procreation and sex, originally (in *Griswold*) by looking to the other provisions in the Bill of Rights for clues in defining the parameters of unenumerated rights.

The Supreme Court has, thus far, not taken the step of inserting Professor Black's "keystone" (the Ninth Amendment) into the "arch" of its unenumerated-rights jurisprudence (see *supra* at page 12), instead relying textually on the Due Process Clauses of the Fifth and Fourteenth Amendments:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

Lawrence v. Texas, 539 U.S. at 578-579.

But it would be both paradoxical and repugnant to the principle of ordered

liberty if our unenumerated-rights jurisprudence were to recognize "components of liberty in its manifold possibilities" (quoted passage, *supra*) in many activities involving sex or procreation, but not in any activities involving non-sexual physical exercise or *self-preservation*. Such an approach would be as jurisprudentially unsound as it is biologically backward. As Professor Nicholas Johnson 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).

In sum, the Supreme Court's unenumerated-rights jurisprudence, developed in in the context of procreation and sex, is equally applicable to an evaluation of the constitutionality of the state's criminalization of simple in-home possession of a martial-arts weapon. This is so whether one adopts an underlying constitutional theory based on (a) "substantive due process" derived from the Due Process Clauses of the Fifth and Fourteenth Amendments or (b) the Ninth Amendment. The real question is not one of finding a liberty interest entitled to protection, but of balancing that liberty interest against the state's legitimate interests, if any.

POINT II

THE STATE OF NEW YORK HAS NO LEGITIMATE INTEREST IN PROHIBITING SIMPLE POSSESSION OF NUNCHAKU IN THE HOME

The Supreme Court in *Lawrence v. Texas* made it clear that it was considering the legitimate interests of the state, if any, that should be balanced against the liberty interests of the petitioners:

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter."

Lawrence v. Texas, 539 U.S. at 578.

Particularly in the context of unenumerated rights, it is appropriate for courts to balance the interests of the government against the liberty interests of the individuals) claiming infringement of those liberty interests. This approach, in one mode of application or another, is virtually ubiquitous among constitutional courts in democracies the world over, and in continental European courts is a

highly refined process generally referred to under the rubric of "proportionality." *See, e.g.*, T. Jeremy Gunn, "Deconstructing Proportionality in Limitations Analysis," 19 Emory International Law Review 465 (2005) (" The term 'proportionality' is becoming an increasingly important concept in jurisprudence. . . . German judges and scholars are traditionally credited with having developed the first and most comprehensive approach to proportionality, though the concept has been traced as far back as ancient Greece."); *cf.* Donald P. Kommers, The Constitutional Jurisprudence of the Federal Republic of Germany 46 (2d ed. 1997) ("In much of its work, the [German constitutional] court seems less concerned with interpreting the Constitution--that is, defining the meaning of the documentary text--than in applying an ends-means test for determining whether a particular right has been overburdened in the light of a given set of facts.").

Turning to the legitimate interests of the State of New York in criminalizing the possession of "two or more lengths of a rigid material joined together by a thong, rope or chain" in one's own home, it unclear what public interest, if any, is being served. In the case of prohibition of carrying nunchaku in public, such an interest would be clear. Likewise, in the case of firearms, which are inherently dangerous and capable of inflicting fatal injury by unleashing lethal energy stored in the cartridge, the state's interest in regulating home possession is more readily

apparent. But 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 nonetheless can be particularly effective in defense against an intruder armed with that ubiquitous but deadly weapon, the knife. Moreover, it is an instrument that has a long tradition as a martial-arts weapon. *Cf.* Amended Complaint at ¶ 26-27; *see also* discussion at page 3, *supra* (discussing 1974 memorandum of 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"); *In re S.P., Jr.*, 465 A.2d 823, 827 (D.C. 1983) (court "recogniz[ing] that the nunchaku has socially acceptable uses within the context of martial arts and for the purpose of developing physical dexterity and coordination").

Similarly, the state's interest in controlling the flow of illegal firearms into the state, which would arguably justify its prohibition of in-home possession of same, has no counterpart in the regulation of "chuka sticks." The nunchaku, unlike the firearm, requires no complex manufacturing process to be brought into existence, and can be readily manufactured with little more than a dowel, a saw,

some nylon cord, and a drill. Since nunchaku can easily be fashioned with simple tools and commonly available materials virtually anywhere, a complete prohibition of in-home possession is highly unlikely to "stem the tide" of illegal nunchaku entering the state, and indeed the Attorney General has found another means, namely civil litigation, to achieve that end far more effectively. See discussion at pages 2-3, *supra*.

It is respectfully submitted that one of the "components of liberty in its manifold possibilities," *Lawrence, supra*, has been compromised, *with no countervailing public benefit*, by the state's having criminalized the simple possession of nunchaku in the home.

POINT III

THE ATTORNEY GENERAL IS A PROPER PARTY
BASED ON THE ANCILLARY EQUITABLE RELIEF SOUGHT

Defendants SPITZER and PATAKI argue, Brief at 18, that this Court's prior decision and order requires that this action proceed *only* against the Nassau County District attorney. However, this Court's prior decision and order did not dismiss any parties. Moreover, the Amended Complaint at ¶¶ 55-64 (Fourth Cause of Action) seeks contingent equitable relief, under the provisions of 28 U.S.C. § 2202, in a form such as an affirmative injunction requiring the Attorney

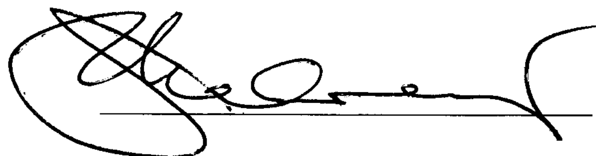
General to notify any persons who received notice that their home possession of nunchaku is illegal (see discussion at page 3, *supra*) that they may not be criminally prosecuted for the simple possession of nunchaku in their own homes. See also Amended Complaint, "Wherefore Clause" number 3, at page 13.

Should this Court declare, as it should, that the state's prohibition of simple possession of nunchaku in one's home is unconstitutional, it would also have the power to order the Attorney General to notify all those persons who have previously been advised to surrender their nunchaku of this Court's declaration. Accordingly, the Attorney General (who has already caused a number of persons in the state to be notified that they may not continue to possess their nunchaku and should surrender them) is a proper party to this action.

CONCLUSION

For all of the foregoing reasons, the Rule 12(b) motion to dismiss made by Defendants SPITZER and PATAKI should be DENIED, and the application of the New York statutes to criminalize simple possession of nunchaku in one's home should, upon further consideration, be declared unconstitutional and of no force and effect.

Dated: June 6, 2006
Port Washington, New York



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