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

Defendants.
----------X

CV-03-0786 (ADS) (MLO)

NOTICE OF MOTION

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT DILLONS' MOTION FOR A JUDGMENT ON THE PLEADINGS PURSUANT TO FRCP 12(c)

LORNA B. GOODMAN
Nassau County Attorney
One West Street
Mineola, New York 11501
Of Counsel: Liora M. Ben-Sorek (LMB 1971)
Deputy County Attorney
Attorneys for Defendant Dillon
(516) 571-3014

PRELIMINARY STATEMENT AND PROCEDURAL HISTORY

Defendant, the former Nassau County District Attorney Denis Dillon (hereinafter referred to as "Dillon" or the "County Defendant"), respectfully moves this Court, pursuant to Federal Rules of Civil Procedure Rule 12(c), for judgment on the pleadings dismissing the Amended Complaint.

Plaintiff, James M. Maloney, an attorney proceeding *Pro Se* (hereinafter referred to as "Plaintiff" or "Maloney"), commenced this action by filing a complaint on February 18, 2003. The complaint sought a declaration that sections 265.00 and 265.02 of New York State Penal Law Section which prohibit possession of "chuka" or "centrifugal" sticks are unconstitutional.

On April 15, 2003, a Stipulation and Order was filed dismissing this action, without prejudice, as against District Attorney Dillon. Thereafter, in October, 2004, plaintiff filed a motion for summary judgment against the remaining defendant, New York State Attorney General Eliot Spitzer.

By Order of this Court on August 31, 2005, plaintiff's summary judgment motion was denied. In its opinion, this Court concluded that Mr. Spitzer was not the appropriate defendant ("In a case such as this, where a plaintiff seeks a declaration that a particular statute is unconstitutional, 'the proper defendants are the government officials charged with the administration and enforcement of the statute.' . . . 'It is well established in New York that the district attorney, and the district attorney alone, should decide when and in what manner to prosecute a suspected offender.'" (citations omitted)). Thus, this Court granted plaintiff leave to amend his pleading to renew claims against District Attorney Dillon as a defendant.

Plaintiff's Amended Complaint, a copy of which is annexed hereto as Exhibit A, was filed on September 3, 2005, and an answer was interposed on behalf of Mr. Dillon on September 29, 2005.

The basis for the within motion is that (a) the Amended Complaint fails to state a cause of action for the violation of any rights secured by the First, Second or Ninth Amendments to the United States Constitution; and (b) plaintiff does not have standing to challenge the constitutionality of the Second Amendment.

STATEMENT OF FACTS

The Court, having ruled on plaintiff's Rule 56 motion for summary judgment, is already familiar with the facts of the Complaint. Hence, the following is a brief statement of facts. On August 24, 2000 plaintiff was arrested at his Port Washington, New York residence after a standoff with police. Plaintiff subsequently accepted a plea to disorderly conduct in satisfaction of all charges pending against him. As part of the plea, to which this Court may take judicial notice, was plaintiff's acquiescence to the destruction of weapons illegally possessed by plaintiff. One such weapon was a set of chuka sticks.

According to New York State Penal Law section 262.02, possession of chuka sticks is a criminal act, *per se*. No specific state of mind is required for the offense; mere possession is sufficient for a finding of criminal liability.

Plaintiff Maloney now seeks a declaration that the penal law prohibition of possession of such weapon is unconstitutional.

Plaintiff, in his Amended Complaint, explains that the intended use for the chuka sticks would be for plaintiff's continued martial arts training "to develop physical dexterity and

coordination." (Amended Complaint at ¶ 16). Significantly, though, plaintiff also acknowledges that chuka sticks constitute a weapon and his intent to utilize same outside of the home as a defensive weapon can reasonably be inferred (Amended Complaint at ¶ 17).

ARGUMENT

POINT I

USE OF CHUKA STICKS IS NOT GUARANTEED FREE EXPRESSION UNDER THE FIRST AMENDMENT

The First Amendment to the Constitution is not without limitation. It is well-settled that a government can impose reasonable restrictions upon an individual's expression or conduct when there is a legitimate governmental objective. Thus, for example, it was not considered a violation of a First Amendment right when religious Sikhs attempted to carry a Kirpan, or sword, as is required by their religion, in New York City. See People v. Singh, 135 Misc. 2d 701 (Queens County, 1987).

There, the New York City Administrative Code contained a provision which prohibited, with some exceptions, the wearing or carrying of knives because they were considered lethal weapons and dangerous objects. The Court (Milano, J.) conducted a balancing test and held that "[a]t best, the intrusion on the [individual's] First Amendment rights is de minimis and must yield by necessity to the State's primary duty to protect its citizens and to reduce the risk of crimes of violence and other conditions detrimental to the public peace and welfare. Singh at 705.

In the case presented, plaintiff Maloney asserts that he is being deprived the right to "peaceful training . . . and twirling of the nunchaku" which he considers expressive conduct (Amended Complaint at ¶ 41).

Plaintiff does not dispute that the Penal statutes were enacted by the New York State Legislature to further the overriding governmental interest in protecting the safety of its citizens. Instead, Exhibit 1 to plaintiff's Amended Complaint is a memorandum dated April 4, 1974 wherein the writer, one Arichibald R. Murray, opines that the proposed amendments to Article 265 of the Penal Law criminalizing the manufacture of possession "chuka" sticks "appears unreasonable. Notwithstanding that memorandum, however, the proposed amendments were passed and have remained as the law in New York State these past 32 years.

Moreover, as set forth in United States v. O'Brien, 391 U.S. 367 (1968), a restriction on a First Amendment right will be lawful when the restriction furthers a substantial governmental interest, is not enacted to suppress or limit free expression and if the regulation is only as restrictive as is needed to further the governments duty. O'Brien at 377. Thus, New York State's definition of "chuka" sticks as a weapon and prohibition against possession of same furthers a legitimate and non-discriminatory interest in protecting the public and limiting production, distribution and possession of an unlawful weapon.

POINT II

PLAINTIFF DOES NOT HAVE A SECOND AMENDMENT RIGHT TO POSSESS CHUKA STICKS

The Second Amendment to the Constitution does not guarantee citizens the right to possess arms and weaponry. "The Supreme Court has held that the Second Amendment right to keep and bear arms is meant to protect the right of the states to keep and maintain armed militia." United States v. Scanio, 1998 U.S. App. LEXIS 29415 at *5. (Citing to United States v. Miller, 307 U.S. 174 (1939); See Lewis v. United States, 445 U.S. 55, 65 n.8, (1980) (citing Miller for the proposition

that federal restrictions on the use of firearms by individuals do not "trench upon any constitutionally protected liberties"; United States v. Warin, 530 F.2d 103, 106 (6th Cir.) ("it is clear that the Second Amendment guarantees a collective rather than an individual right.") cert. den. 426 U.S. 948 (1976)).

Joining in the State defendants' arguments on this point, the County defendant contends that the Second Amendment refers "the right of the people to keep and bear Arms" as it relates to members of a militia and not individual citizens. NAACP v. AcuSport, Inc., 271 F.Supp.2d 435, 462-63 (E.D.N.Y. 2003). See e.g., United States v. Miller, supra.; Bach v. Pataki, 289 F. Supp.2d 217, aff'd, 408 F.3d 75, 84-87 (2d Cir. 2005), cert. den., 126 S.Ct. 1341 (2006); United States v. Toner, 728 F.2d 115, 128 (2d. Cir. 1984).

Consistent with the view that the right to bear arms is not a fundamental right, the Supreme Court has rejected the proposition that the entire Bill of Rights has been incorporated into the 14th Amendment Due Process clause to apply to the states. Hamilton v. Accu-Tek, 935 F.Supp. 1307, 1317-18 (E.D.N.Y. 1996). Moreover, and to the point of this case, the District Court in Bach found that the "'Second Amendment is not a source of individual rights'" and, hence, plaintiff Bach had "'not alleged an infringement of any Second Amendment Right.'" Bach, 408 F.3d 75, 83-83 (2d Cir. 2005) (citing to 289 F. Supp.2d 217, 226 (N.D.N.Y. 2003)).

In following the proposition asserted in Presser v. Illinois, 116 U.S. 252 (1886) ("the right of the people to keep and bear arms, . . . is a right only against the federal government, not against the States"), the Second Circuit held that David Bach had no federal constitutional right to "keep and bear arms" against the New York State regulatory scheme for issuing gun permits. Bach, 408 F.3d 75, 85.

Similarly, in the case at bar, plaintiff Maloney has no federal constitutional right under the Second Amendment to possess "chuka" sticks.

POINT III

THE NINTH AMENDMENT DOES NOT CONFER ANY RIGHTS TO PLAINTIFF

The Ninth Amendment to the Constitution sets forth "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." This amendment, though, does not confer any rights on an individual. "The Ninth Amendment is a rule of interpretation rather than a source of rights. . . . Its purpose is to make clear that the enumeration of specific rights in the Bill of Rights is not intended . . . to deny the existence of un-enumerated rights." Froehlich v. Wis. Dep't of Corr., 196 F.3d 800, 801 (7th Cir. 1999).

The Sixth Circuit in United States v. Warin, supra., held that the Ninth Amendment did not confer addition rights to weapons possession. (We simply do not conceive of the possession of an unregistered submachine gun as one of those 'additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments." Warin 530 F.3d at 108, quoting Griswold v. Connecticut, 381 U.S. 479, 488 (1965)). See also Quilici v. Village of Morton Grove, 695 F.2d 261, 271 (7th Cir. 1982) ("[a]ppellants may believe the ninth amendment should be read to recognize an unwritten, fundamental, individual right to own or possess firearms; the fact remains that the Supreme Court has never embraced this theory") cert. den., 464 U.S. 863 (1983); San Diego County Gun Rights Comm. v. Reno, 98 F.3d 1121, 1125 (9th Cir. 1996) ("We join our sister circuits in holding that the Ninth Amendment does not encompass an unenumerated, fundamental, individual right to bear firearms. See William Van Alstyne, The Second Amendment and the Personal Right

to Arms, 43 Duke L.J. 1236, 1248 n.43 (1994) ("Recourse to the same materials to fashion a Ninth Amendment ('unenumerated') right is not only largely replicative of the Second Amendment inquiry, but also singularly inappropriate under the circumstances - the right to bear arms is not left to the vagaries of Ninth Amendment disputes at all.").

In the within lawsuit, plaintiff is seeking a declaration that New York State Penal Law section 265.02 as it applies to "chuka" or "centrifugal" sticks (defined in Penal Law §265.00 (14)) is unconstitutional. As such, the plaintiff is asking this Court to interpret a non-existent right under the Ninth Amendment. As noted from the cases cited herein, the Ninth Amendment neither confers rights on an individual nor has it been interpreted to grant individuals the right to bear arms.

Defendants request that this Court accept the holdings of other jurisdictions which have dealt with this inquiry and deny the relief requested by plaintiff.

CONCLUSION

In light of the foregoing, it is respectfully requested that this Court grant judgment on the pleadings in favor of defendant former Nassau County District Attorney Denis Dillon and dismiss the Amended Complaint in its entirety, with prejudice, and grant such other and further relief as this Court deems just and proper.

Dated: Mineola, New York
June 14, 2006

LORNA B. GOODMAN
Nassau County Attorney
One West Street
Mineola, New York 11501

Of Counsel: /s/
Liora M. Ben-Sorek (LMB 1971)
Deputy County Attorney
Attorneys for Defendant Dillon
(516) 571-3014

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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JAMES M. MALONEY,

Plaintiff,

- 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 his successors, DENIS DILLON, in his official capacity as District Attorney of the County of Nassau and their successors,

Defendants.
----------X

CV-03-0786 (ADS) (MLO)

NOTICE OF MOTION

PLEASE TAKE NOTICE that upon the accompanying Memorandum of Law submitted herewith, together with all prior pleadings and proceedings had herein, defendant Denis Dillon will move this Court before the Honorable Arthur D. Spatt, at the United States Courthouse located at 100 Federal Plaza, Central Islip, New York, on a date designated by the Court, pursuant to Rule 12(c) of the Federal Rules of Civil Procedure and applicable Local Rules, for judgment on the pleadings in favor of said defendant, together with such other and further relief as may be just, proper and equitable.

PLEASE TAKE FURTHER NOTICE that answering papers, if any, must be served within the time limits specified in the stipulation entered into by counsel for the parties.

Dated: Mineola, New York
June 14, 2006

LORNA B. GOODMAN
Nassau County Attorney
One West Street
Mineola, New York 11501

By: _____

Liora M. Ben-Sorek (LMB 1971)
Deputy County Attorney
(516) 571-3014
Attorneys for Defendant Dillon

To: James M. Maloney, Esq., Plaintiff *Pro Se*
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EXHIBIT A

JAMES M. MALONEY (JM-3352)
Plaintiff *pro se*
33 Bayview Avenue
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Telephone: (516) 767-1395

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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JAMES M. MALONEY,

Plaintiff,

- 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

AMENDED VERIFIED COMPLAINT

Case No. 03 Civ. 0786

(ADS)(MLO)

JAMES M. MALONEY, proceeding *pro se*, and pursuant to the Memorandum of Decision and Order of the Honorable Arthur D. Spatt dated August 31, 2005 (the "8/31 Order"), as and for his amended verified complaint against the above-named defendants solely in their official capacity, alleges:

PARTIES

1. At the commencement of this action and at all times hereinafter mentioned, Plaintiff was and is a natural person, a citizen of the United States, and a resident of the State of New York, of the County of Nassau, and of this District.

2. At the commencement of this action and at all times hereinafter mentioned,

Defendant ELIOT SPITZER was and is a natural person and was and is the Attorney General of the State of New York.

3. At the commencement of this action and at all times hereinafter mentioned, Defendant GEORGE PATAKI was and is a natural person and was and is the Governor of the State of New York.

4. The Governor is charged by Article IV, section 3 of the Constitution of the State of New York with the duty to take care that the laws are faithfully executed, and accordingly has sufficient connection with the enforcement of statutes to make him a proper defendant in a suit for declaratory relief challenging the validity of certain applications of New York statutes.

5. At the commencement of this action and at all times hereinafter mentioned, Defendant DENIS DILLON was and is a natural person and was and is the District Attorney of the County of Nassau (hereinafter, the "District Attorney").

6. The District Attorney is the personal responsible for the potential prosecution of Plaintiff under the criminal statutes in question. As more fully appears herein, Defendant DENIS DILLON has actually prosecuted Plaintiff under said criminal statutes.

JURISDICTION AND VENUE

7. This action arises under the Constitution of the United States. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331, and has the power to render declaratory judgment and further relief pursuant to the provisions of 28 U.S.C. §§ 2201-2202.

8. Venue is properly placed in the United States District Court for the Eastern District of New York pursuant to 28 U.S.C. § 1391(b).

GENERAL BACKGROUND

9. On or about August 24, 2000, Plaintiff possessed in his home one or more martial arts devices known as nunchaku or "chuka sticks," consisting of foot-long wooden sticks connected by a cord, the possession of which is defined as a crime by sections 265.00 *et seq.* of the Penal Law of the State of New York, as more fully appears herein.

10. On or about August 24, 2000, The People of the State of New York, through the office of Defendant DENIS DILLON, charged Plaintiff with criminal possession of a weapon in the fourth degree, a Class A misdemeanor defined at section 265.01 of the Penal Law of the State of New York, based on Plaintiff's possession within his home of a nunchaku that was found by Nassau County Police in Plaintiff's home.

11. The aforementioned criminal charge for possession of a nunchaku was based solely on allegations of simple possession of said nunchaku in Plaintiff's home, and was not supported by any allegations that Plaintiff had: (a) used said nunchaku in the commission of a crime; (b) carried or displayed the nunchaku in public; or (c) engaged in any other improper or prohibited conduct in connection with said nunchaku except for such simple possession within his home, nor is any such conduct an element of the defined crime.

12. The aforementioned criminal charge for possession of a nunchaku remained pending against Plaintiff for a period of approximately 29 months, until it was eventually dismissed on or about January 28, 2003.

13. Upon information and belief, said dismissal was not based on any explicit or implicit recognition by the District Attorney that said statutes, as applied against Plaintiff and defining as a crime the simple possession of nunchaku within one's home, are or were unconstitutional.

PLAINTIFF'S BACKGROUND AND STANDING TO SUE

14. Plaintiff has been a student of the martial arts since approximately 1975, when he began studying Uechi-Ryu, an Okinawan style of karate, under the tutelage of Vincent Pillari in Fort Lee, New Jersey. Plaintiff has subsequently studied various styles of martial arts, including other Okinawan styles of karate, the Ving Tsun or "Wing Chun" style of kung fu, and aikido. Drawing from these and other influences, Plaintiff formulated his own martial arts style, known as Shafan Ha-Lavan, beginning in 1998. Shafan Ha-Lavan incorporates the use of the nunchaku as an integral and essential part of its training and technique.

15. Since 1975, Plaintiff has trained in a peaceful manner with the nunchaku, and has acquired numerous nunchaku, which are or were his personal property.

16. Plaintiff has never used a nunchaku to inflict harm or physical injury on another human being or on an animal, and has used nunchaku only for socially acceptable purposes within the context of martial arts, and to develop physical dexterity and coordination.

17. Plaintiff first became interested in the nunchaku, and began training with it in 1975, in part because the weapon is particularly effective in defense against an assailant armed with a knife or other sharp instrument, and in part because Plaintiff's father, John Maloney, had been fatally stabbed in 1964, when Plaintiff was five years old.

18. Since 1980, Plaintiff has served honorably as, and remains, a commissioned officer in the U.S. Naval Reserve. From 1986 to 1995, he served as a paramedic in New York City's 911 Emergency Medical Services system, and observed numerous instances of serious injury or fatality due to wounds inflicted by assailants armed with knives and other sharp instruments.

19. Plaintiff has ties to and roots in the State of New York (including being licensed to

practice law in all of the State's courts and in four federal courts sitting therein, consisting of two District Courts, the Court of Appeals for the Second Circuit, and the Court of International Trade) and cannot conveniently relocate, nor does he wish to do so.

20. Because Plaintiff was charged with a Class A misdemeanor for the simple possession of a nunchaku in his own home, and for more than two years lived under the constant threat of being imprisoned for up to one year in punishment therefor, Plaintiff must reasonably either: (1) forgo possession of any nunchaku within his own home; (2) move from the State; or (3) risk being the target of another prosecution for disobeying the same law.

21. In addition to having already been arrested and prosecuted for the possession of nunchaku in his home, Plaintiff intends to possess nunchaku in his home provided that he may do so lawfully. Thus, Plaintiff is forced to choose between risking further criminal prosecution and forgoing what may be constitutionally protected conduct (i.e., possessing nunchaku in his home for legitimate purposes).

22. Plaintiff accordingly has standing to seek declaratory judgment on the question of the constitutionality of those New York statutes that criminalize the simple possession of nunchaku within one's home.

THE NUNCHAKU AND ITS REGULATION BY VARIOUS GOVERNMENTS

23. Upon information and belief, the nunchaku was originally a farm implement, and was developed centuries ago for use as a weapon on the island of Okinawa after invading oppressive governments attempted to disarm the people there.

24. Upon information and belief, the nunchaku had already been used as an "arm" or weapon for the common defense, by the citizens' militias of Okinawa, well before the dates of

the ratification of the United States Constitution and of the first ten amendments thereto.

25. The nunchaku, unlike most other weapons, including firearms, knives, swords and all other penetrating weapons, is capable of being used in a restrained manner such that an opponent may be subdued without resorting to the use of deadly physical force.

26. The nunchaku, in comparison with most other arms, including firearms, is relatively safe and innocuous, such that a child or person untrained in the weapon's proper use would be unable to inflict serious injury upon him- or herself, either accidentally or intentionally.

27. Accordingly, nunchaku kept in the home, even if not secured in a locked compartment, are far less likely to be associated with serious injury or fatality than are most other weapons or even common household objects such as kitchen knives and scissors.

28. Upon information and belief, the States of Connecticut, Massachusetts and Pennsylvania all have enacted statutes defining as a crime the possession of nunchaku in certain places, such as in a vehicle (Connecticut General Statutes § 29-38), on one's person in public areas (Massachusetts General Laws, Chapter 269, § 10), or on school grounds (Pennsylvania Statutes § 13-1317.2(g)).

29. Upon information and belief, no state other than New York and California has defined and prosecuted as a crime the mere possession of nunchaku within one's own home.

30. New York Penal Law § 265.00 (14) (one of two subsections so numbered) defines a "chuka stick" (i.e., nunchaku) in substantial part as follows: "any device designed primarily as a weapon, consisting of two or more lengths of a rigid material joined together by a thong, rope or chain in such a manner as to allow free movement of a portion of the device while held in the hand and capable of being rotated in such a manner as to inflict serious injury upon a person by striking . . ."

31. New York Penal Law §§ 265.01 and 265.02 define the possession of a "chuka stick" (i.e., nunchaku) as a Class A misdemeanor and as a Class D felony, respectively, and make no exception from criminal liability for the simple possession of a nunchaku or "chuka stick" within one's own home. As alleged in paragraphs 9 through 11, *supra*, the District Attorney interpreted § 265.01 as reaching such simple possession in prosecuting Plaintiff.

32. Upon information and belief, the New York bill that made mere possession of nunchaku, even in one's own home, a crime, was signed into law on April 16, 1974, and became effective on September 1, 1974.

33. Upon information and belief, a memorandum from the State of New York Executive Department's Division of Criminal Justice Services to the office of the Governor dated April 4, 1974, pointed out that nunchaku have legitimate uses in karate and other martial-arts training, and opined 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." A true copy of said memorandum is annexed hereto as Exhibit 1.

34. Upon information and belief, the memorandum annexed hereto as Exhibit 1 was received by the office of the Governor on April 9, 1974, before the bill banning nunchaku in New York was signed into law.

35. Upon information and belief, a letter and report from the Committee on the Criminal Court of the New York County Lawyers' Association to the Governor dated May 3 and April 29, 1974, respectively, opined 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." True copies of said letter and report annexed hereto as Exhibit 2.

36. Upon information and belief, the letter and report annexed hereto as Exhibit 2 were received by the office of the Governor on May 7, 1974, after the bill banning nunchaku in New York had already been signed into law.

37. Since 1974, courts outside the State of New York have recognized that nunchaku have socially acceptable uses. In 1981, an Arizona appellate court sustaining a conviction for criminal possession of nunchaku 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).

38. A District of Columbia appellate court 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).

39. In 1984, an Ohio appellate court 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).

CONSTITUTIONAL BASES FOR THE CHALLENGE

40. This action challenges the constitutionality of the application of the aforementioned New York statutes to criminalize possession of nunchaku in one's own home without criminal intent on three independent bases, corresponding to the first three causes of action.

41. The first basis is that peaceful training with and twirling of the nunchaku is expressive conduct, which conduct is protected by the First Amendment to the Constitution of the United States ("First Amendment").

42. The second basis is that the application of the aforementioned New York statutes to criminalize possession of nunchaku in one's own home without criminal intent would violate rights specifically conferred by the Second Amendment to the Constitution of the United States ("Second Amendment"), provided that the Second Amendment guarantees a personal right and is applicable as against the states.

43. The third basis is that the application of the aforementioned New York statutes to criminalize possession of nunchaku in one's own home without criminal intent would violate unenumerated rights, including those involving protection of the person from unwarranted government intrusions into a dwelling or other private place, as recently recognized by the United States Supreme Court in *Lawrence v. Texas*, 123 S. Ct. 2472 (2003).

44. As more fully appears herein, unenumerated rights are specifically guaranteed by the Ninth Amendment to the Constitution of the United States ("Ninth Amendment"), but have largely been recognized in American constitutional jurisprudence under the doctrine of substantive due process. Either approach may draw inferentially from the first eight amendments to the Constitution of the United States and/or from other sources in establishing the scope and content of rights not enumerated.

FIRST CAUSE OF ACTION

45. Plaintiff repeats and realleges each and every allegation set forth in the foregoing paragraphs 1 through 44 as if fully set forth herein.

46. New York Penal Law §§ 265.00 through 265.02, to the extent that said statutes criminalize the simple possession of nunchaku within one's home and therefore criminalize peaceful training with and twirling of the nunchaku in the privacy of one's own home, violate the provisions of the First Amendment of the Constitution of the United States.

SECOND CAUSE OF ACTION

47. Plaintiff repeats and realleges each and every allegation set forth in the foregoing paragraphs 1 through 44 as if fully set forth herein.

48. New York Penal Law §§ 265.00 through 265.02, to the extent that said statutes criminalize the simple possession of nunchaku within one's home, violate the provisions of the Second Amendment of the Constitution of the United States.

49. In *Bach v. Pataki*, 408 F.3d 75 (2d Cir. 2005), the Second Circuit held that the Second Amendment is inapplicable to the states.

50. Upon information and belief, a petition for panel rehearing and petition for rehearing *en banc* were filed by the Plaintiff-Appellant in *Bach v. Pataki*, and said petitions were denied.

51. Upon information and belief, the denial of said petitions was issued as a Mandate on August 4, 2005, thereby starting the 90-day period for the Plaintiff-Appellant in *Bach v. Pataki* to petition the United States Supreme Court for *certiorari*. A true copy of the Mandate is annexed hereto as Exhibit 3.

52. Given the foregoing, and the resultant possibility of reversal of *Bach v. Pataki*, this cause of action is not frivolous even though it is not actually viable at the time of filing this amended verified complaint.

THIRD CAUSE OF ACTION

53. Plaintiff repeats and realleges each and every allegation set forth in the foregoing paragraphs 1 through 44 as if fully set forth herein.

54. New York Penal Law §§ 265.00 through 265.02, to the extent that said statutes criminalize the simple possession of nunchaku within one's home, violate unenumerated rights, including, without limitation: (a) those rights guaranteed by the Ninth Amendment; (b) those rights recognized under the doctrine substantive due process; (c) those rights recognized by the United States Supreme Court in *Lawrence v. Texas*, 123 S. Ct. 2472 (2003); (d) those rights guaranteed by the Fourteenth Amendment and (e) those rights the existence of which may be drawn inferentially ("penumbras and emanations") from a reading of the first eight amendments to the Constitution of the United States and/or of the Declaration of Independence.

FOURTH CAUSE OF ACTION (AS AGAINST THE ATTORNEY GENERAL)

55. Plaintiff repeats and realleges each and every allegation set forth in the foregoing paragraphs 1 through 54 as if fully set forth herein.

56. Upon information and belief, in 2000 and 2002, the Attorney General reached settlements in two civil lawsuits against out-of-state martial arts equipment suppliers, Family Defense Products, Inc. of Ocala, Florida, and Bud K World Wide, Inc. of Moultrie, Georgia (collectively, the "Companies"), which had provided nunchaku to New York residents by mail order and/or Internet sales.

57. Upon information and belief, as part of these settlements, the Companies were required to provide the Attorney General with a list of the names and addresses of all New York customers who had ever purchased nunchaku from the Companies.

58. Upon information and belief, as part of these settlements, the Companies also were required to deliver written notice to their New York customers advising them to surrender their weapons to law enforcement agencies. A true copy of the draft form of one such written notice is annexed hereto as Exhibit 4.

59. Should this Court find that those portions of sections 265.00 through 265.02 of the New York Penal Law that define and punish as a crime the simple possession of nunchaku within one's home are unconstitutional and of no force and effect, the statutes themselves would remain unchanged unless the legislature amended them.

60. Many persons who received the written notices described above would likely still be under the impression that simple possession of nunchaku in their own homes for peaceful use in martial arts training is illegal and could subject them to up to a year in prison.

61. Such persons would also be aware that the State of New York has their names and addresses by virtue of the Attorney General's settlements as described above.

62. Accordingly, equity would require that such persons be notified of any decision by a court protecting their right to possess nunchaku in their own homes for peaceful use in martial arts training.

63. Further, because the Attorney General received a list of the names and addresses of New York customers who had purchased nunchaku from the Companies (see paragraph 57, above), notifying those persons of such a decision would not be unduly burdensome.

64. Under the provisions of 28 U.S.C. § 2202, this Court has the power to grant the relief sought herein.

WHEREFORE, Plaintiff respectfully requests that this Court:

(1) assume jurisdiction over this action;

(2) declare that those portions of sections 265.00 through 265.02 of the New York Penal Law that define and punish as a crime the simple possession of nunchaku within one's home are unconstitutional and of no force and effect;

(3) grant appropriate equitable relief as described in the Fourth Cause of Action, such as an affirmative injunction requiring the Attorney General to notify any persons who received the notice described in paragraph 58, above, that they may not be criminally prosecuted for the simple possession of nunchaku in their own homes for peaceful use in martial arts training; and

(4) grant such other, further, and different relief as this Court may deem just and proper.

Dated: September 3, 2005
Port Washington, New York

/s/

JAMES M. MALONEY (JM-3352)
Plaintiff *pro se*
33 Bayview Avenue
Port Washington, New York 11050

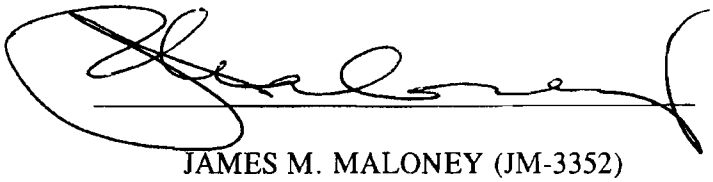
(516) 767-1395

VERIFICATION

I, James M. Maloney, state that I am the plaintiff in this action, *Maloney v. Spitzer et al.*, Case No. 03 Civ. 0786 (E.D.N.Y.), that all statements of fact alleged in the foregoing amended verified complaint are true to my own personal knowledge, except the matters therein stated to be alleged upon information and belief, and that, as to those matters, I believe them to be true following reasonable investigation of the truth of such statements of fact.

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

Executed on: September 3, 2005
Port Washington, New York



JAMES M. MALONEY (JM-3352)

EXHIBIT 1

A 8667-A

Memorandum APR 9 RECD

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
DIVISION OF CRIMINAL JUSTICE SERVICES

April 4, 1974

TO: Michael Whiteman

FROM: Archibald R. Murray

RE: A. 8667-A

Purpose

To amend a number of sections in Article 265 of the Penal Law to penalize the possession of, manufacture or dealing in "chuka sticks."

Discussion

This bill proposes to outlaw the possession, manufacture or shipment of "chuka sticks," as that device is defined in bill section 1. By placing the basic prohibition in Penal Law section 265.05(3), the possession of chuka sticks is made per se criminal, i.e., no mens rea is required and the crime, therefore, is one of absolute liability. Even if the chuka stick is being employed with significant frequency as a weapon in the commission of violent crimes, its inclusion in the per se category is of doubtful wisdom and questionable legality.

It is our understanding that chuka sticks are also used in karate and other "martial arts" training. 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. There are alternative ways in which the problem can be handled. If it is desired to keep chuka sticks in the per se prohibited class, an exception could be drafted for those who possess them for lawful martial arts training. Such a course is employed for switchblade and gravity knives, which are also prohibited in this same subdivision (P.L. sec. 265.05[3]). In their case, section 265.20(5) permits their possession for hunting or fishing by a person who has a hunting or fishing license.

A second, and more appropriate, alternative would be to treat chuka sticks under Penal Law section 265.05(9) where, to constitute the crime, possession must be coupled with "an intent to use the same unlawfully against another." This would put chuka sticks in the same category as other objects which are potential weapons but which also have legitimate uses, such as knives and razors.

page 2

It should be noted that the first version of this bill (S. 8667) in fact pursued precisely this latter course.

A technical -- probably typographical -- error appears on page 1, line 4. The word "designated" probably should read "designed."

Recommendation

In view of the foregoing, we cannot recommend approval of this bill in its present form.

EXHIBIT 2

chap 179

A 8667-A

MAY 7 RECD

14 VESEY STREET — FACING ST. PAUL'S
NEW YORK, N. Y. 10007
CORTLANDT 7-6646

For further information
please communicate with:
Gregory J. Perrin, Esq.
225 Broadway, R-2515
New York, N. Y. 10007
349-1390

May 3, 1974

Hon. Malcolm Wilson
Executive Chamber
Albany, N. Y. 12224

My dear Sir:

The Committee on the Criminal Court of the New York County Lawyers' Association has disapproved the following bill and believes that it should not become law:

A. 8359-A
A. 8667-A

A copy of a report recommending disapproval is enclosed.

Very truly yours,

BENJAMIN LEVINE

Chairman, Committee on State Legislation

INTRODUCED BY ASSEMBLYMAN MANNIX
INTRODUCED BY SENATORS PISANI, ACKERSON, GORDON, FLYNN, KNORR
INTRODUCED BY ASSEMBLYMAN ROSS; Multi-sponsored by: ASSEMBLYMEN BROWN, HURLEY, LEVY, LOPRESTO, MANNIX, SUCHIN, VOLKER, ABRAMSON
INTRODUCED BY SENATORS BARCLAY, PADAVAN

April 29, 1974 Report No. 184 A. 8359-A
Same as S. 7685
A. 8667-A
Same as S. 9034

NEW YORK COUNTY LAWYERS' ASSOCIATION
14 Vesey Street - New York 10007

Report of Committee on the Criminal Court on Assembly Bill 8359-A same as Senate Bill 7685, Assembly Bill 8667-A same as Senate Bill 9034, which seek to amend Sections 265.00, 265.05, 265.10, 265.15 of the Penal Law with regard to the possession of certain weapons.

RECOMMENDATION: DISAPPROVAL

Both of these bills seek to add "nunchakus" to the list of weapons the possession of which is proscribed by Article 265 of the Penal Law.

Both bills have been amended and recommitted by substitute bill in Assembly. The amendments, in both cases, removed from the proposed legislation the presumption, from mere possession, of an intent to use the proscribed device unlawfully against another. In place of this presumption, both bills now make unlawful the mere possession of nunchakus, without regard to the issue of unlawful intent.

While it is true that nonchakus, chuka sticks and like objects are capable of use in criminal conduct, it is the sense of this Committee that they are not properly included in the provisions of Article 265 of the Penal Law as proposed.

While the possession of these items with demonstrable criminal intent is a proper subject for legislation, the proposed legislation goes further, making 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.

Respectfully submitted,

COMMITTEE ON THE CRIMINAL COURT

Gregory J. Perrin, Chairman

Report prepared for the Committee by
MR. ALAIN M. BOURGEOIS

EXHIBIT 3

MANDATE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

Roseann B. MacKechnie
CLERK

ndny/alny
02-cv-1500
S
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At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 21st day of July two thousand five.

U.S. DISTRICT COURT
N.D. OF N.Y.
FILED
AUG 10 2005
LAWRENCE K. BAERMAN, CLERK
ALBANY

UNITED STATES COURT OF APPEALS
FILED
JUL 21 2005
SECOND CIRCUIT

DAVID D. BACH,

Plaintiff-Appellant,

v. 03-9123

GEORGE PATAKI, in his official capacity as Governer of New York, ELIOT SPITZER, in his official capacity as Attorney General of New York, JAMES W. MCMAHON, in his official capacity as Superintendent, New York State Police and RICHARD BOCKELMANN, in his official capacity as Ulster County Sheriff,

Defendants-Appellees.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant David D. Bach. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk
by
Arthur M. Heller, Motions Staff Attorney

A TRUE COPY
Roseann B. MacKechnie, CLERK
By
DEPUTY CLERK

ISSUED AS MANDATE: 8/4/05

EXHIBIT 4

DRAFT

[DATE]

[CONSUMER NAME]
[CONSUMER ADDRESS]
[CITY],NY [ZIP CODE]

IMPORTANT CONSUMER NOTICE

Dear Consumer:

This notice is being sent to you pursuant to a civil settlement agreement between our company and the office of Eliot Spitzer, the Attorney General of New York State.

According to our records, you purchased [SPECIFY ITEMS] from us. In New York State, the item or items listed are considered to be weapons. The possession of the item or items is a violation of New York Penal Law 265.01, commonly known as criminal possession of a weapon in the fourth degree. A person could be arrested and prosecuted for possessing the weapon that you purchased.

However, the law allows a person to possess a weapon such as the items or items listed above for the purpose of voluntarily surrendering the weapon to the New York State Police, their county sheriff, or their local police. Law enforcement officials have been provided with a list of consumers who received prohibited items.

Therefore, if you are in possession of the item or items listed above you should immediately contact the New York State Police, your county sheriff, or your local police precinct and arrange to surrender the item or items listed above. If you have given the item or items to another person and the item is currently possessed in New York, you should advise that person to voluntarily surrender the item as described above.

Very Truly yours,

Clint H. Kadel
President, Bud K Worldwide, Inc.

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

Defendants.
----------X

CV-03-0786 (ADS) (MLO)

CERTIFICATE OF ELECTRONIC SERVICE

I, Liora M. Ben-Sorek, Deputy County Attorney in the Office of the Nassau County Attorney, hereby certify that on June 14, 2006 the foregoing documents (Notice of Motion for Judgment on the Pleadings, Memorandum of Law in Support of Defendant Dillon's Motion and Exhibit A – Copy of Plaintiff's Amended Complaint) were filed with the Clerk of the Court and served in accordance with the Federal Rules of Civil Procedure, and/or the Eastern District's Local Rules, and/or the Eastern District's Rules on Electronic Service upon the following parties and participants:

James M. Maloney, Esq.
33 Bayview Avenue
Port Washington, New York 11050
Plaintiff *Pro Se*

Asst. Atty. General Dorothy O. Nese.
Office of the New York State Attorney General
200 Old Country Road, Suite 460
Mineola, New York 11501
Attorney for Defendants Spitzer and Pataki

Respectfully submitted,

/s/
Liora M. Ben-Sorek (LMB 1971)
Deputy County Attorney