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(c) MOTION BY
DEFENDANT DENIS DILLON
(SUCCEEDED BY KATHLEEN RICE)

James M. Maloney (JM-5297)
Plaintiff *pro se*
33 Bayview Avenue
Port Washington, New York

(516) 767-1395

TABLE OF CONTENTS

PRELIMINARY STATEMENT

This memorandum of law opposes the Rule 12(c) motion to dismiss made by Defendant DENIS DILLON, in his official capacity as District Attorney of the County of Nassau (succeeded in that capacity by Kathleen M. Rice). 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" or "chuka sticks" 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. *Cf.* Memorandum of Law in Support of Defendant Dillons' [*sic*] Motion for a Judgment on the Pleadings Pursuant to FRCP 12(c) (hereinafter, "County Brief") at 3 (overlooking this limitation by stating: "Plaintiff Maloney now seeks a declaration that the penal law prohibition of such weapon is unconstitutional."); 4 (arguing that Plaintiff's "intent to utilize same outside of the home can reasonably be inferred").

It is respectfully submitted that the limitation of the challenge brought here (i.e., only the ban on simple in-home possession) is an important factor in deciding this case in the context of our constitutional tradition, and that inferences of other intended use should not be entertained to obscure that limitation.

COUNTER-STATEMENT OF FACTS

Defendant Dillon/Rice has taken some liberties in stating "facts" that are neither set forth in the pleadings nor part of the record in this case. *See* County Brief at 3-4. Unfortunately, many of the facts as thus set forth are inaccurate. While it may be that those inaccurately stated facts are largely immaterial to the resolution of the Defendant Dillon/Rice's 12(c) motion for judgment on the pleadings, the facts as stated in the County Brief imply culpable behavior on the part of Plaintiff that should not be allowed to stand uncorrected.

The County Brief also includes considerable legal argument in its "Statement of Facts."

Accordingly, Plaintiff briefly addresses his key points of opposition, both factual and legal, to Defendant Dillon/Rice's "Statement of Facts" below, under point headings that quote the disputed text (which, as noted, appears at pages 3-4 of the County Brief).

"[P]laintiff was arrested at his . . . residence after a standoff with police."

Plaintiff was arrested not "at" his residence but outside it, and, more importantly, the phrase "standoff" implies that there were threats made both by the police and to them. Although armed police surrounded Plaintiff's home for 12 hours on August 23, 2000, all in response to an uncorroborated allegation that a

"telephone worker" had been "menaced" from within the home, Plaintiff never made any threats to police or other persons during that lengthy ordeal, nor was he ever charged with any such act. All that Plaintiff did (repeatedly, in fact) was demand that police produce a warrant for his arrest, as was his right under *Payton v. New York*, 445 U.S. 573 (1980), of which Plaintiff was well aware at the time. The police, however, failed to obtain any warrant despite having had 12 hours to do so, and instead coerced him, through a third party pretending to be acting as Plaintiff's counsel, into waiving his *Payton* rights and leaving his home to be arrested outside.

"[P]laintiff . . . accepted a plea . . . in satisfaction of all charges . . ."

At the disposition of the criminal charges in January 2003, the attorney for Plaintiff (there a criminal defendant) noted on the record --without any objection by the People--that the charge relating to the "menacing" allegation would in any event have been dismissed as a matter of law, and then joined the People's application as to the "other matters," which included *only* charges relating to items possessed by Plaintiff in his home, including the nunchaku. Thus, the very allegation that started the entire ordeal of August 23, 2000 (the alleged "menacing" of the "telephone worker") was dismissed separately and distinctly from the plea bargain.

"As part of the plea, to which [sic] this Court may take judicial notice, was plaintiff's acquiescence to the destruction of weapons illegally possessed . . ."

It is unclear whether Defendant Dillon/Rice is arguing that the consent to the destruction of the nunchaku was tantamount to an acknowledgment that the possession of same was illegal. In any event, no such specific acknowledgment was ever made: Plaintiff simply gave his consent for the People to destroy specified items--without any commentary as to either the underlying legality of Plaintiff's having possessed those items or, for that matter, of the police's having seized them from Plaintiff's home in his absence without consent, exigency or a warrant. No waiver of Plaintiff's right to challenge the constitutionality of prohibition of simple possession of nunchaku in the home could reasonably have resulted from the consent to destroy the nunchaku given at the disposition.

"Significantly . . . plaintiff . . . acknowledges that chuka sticks constitute a weapon and his intent to utilize them outside of the home . . . can reasonably be inferred."

The above-quoted passage (and with it, the entire "Statement of Facts") ends by citing paragraph 17 of the Amended Complaint, which, in turn, states:

> 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.

It is unclear how an "intent to utilize [nunchaku] outside of the home as a defensive weapon can reasonably be inferred" by a reading of paragraph 17 of the amended complaint. To make such an inference would require that one presume, at the very least, that knife attacks never occur *in* the home. Yet burglars and other persons illegally entering homes commonly attack the occupants with knives, either brought in from outside or obtained from within the victims' own homes (typically the kitchen). As an example, the late George Harrison (of The Beatles) made worldwide news after having been stabbed several times (including one chest wound that collapsed a lung) in late 1999 by one such intruder/assailant, Michael Abrams, who invaded the Harrisons' home. Of course, home stabbings also often occur here in the U.S. In June 2006, for example, 37-year-old Yolanda Meraza of Lakewood, California was fatally stabbed by an intruder who used a kitchen knife to attack Meraza and two other residents of the home. And in July 2006, Santos Ibarra of Fort Collins, Colorado, was fatally stabbed inside his home.

Defendant Dillon/Rice's self-serving attempt to create a "reasonable inference" of Plaintiff's intent to use nunchaku for self-defense *outside* the home--in this case that challenges nothing more that the state's prohibition of simple possession of nunchaku *inside* the home--should not be countenanced by this Court. Nor does the Amended Complaint support any such inference.

ARGUMENT

THERE IS NO OVERRIDING GOVERNMENTAL INTEREST IN BANNING SIMPLE HOME POSSESSION OF NUNCHAKU THAT TRUMPS INDIVIDUAL LIBERTY INTERESTS

Defendant Dillon/Rice would have the Court believe that there is an "overriding governmental interest" in prohibiting the simple possession of nunchaku in the homes of martial artists for legitimate martial-arts practice. See County Brief at 4-5.

During the more than thirty years during which the nunchaku has been completely banned in New York, courts in other jurisdictions have 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.* Amended Complaint at ¶ 16 ("Plaintiff . . . has used nunchaku only for socially acceptable purposes within the context of martial arts, and to develop physical dexterity and

coordination."). 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 in a car 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).

Defendant Dillon/Rice, upon arguing the existence of an "overriding governmental interest" in prohibiting simple in-home possession of nunchaku, invites the Court to engage in a balancing test. County Brief at 4 (citing *People v. Singh*, 135 Misc. 2d 701 (Supreme Court, Queens County 1987), 5 (citing *United States v. O'Brien*, 391 U.S. 367 (1968).

It is respectfully submitted that the state's obvious public-safety interest in regulating the wearing or carrying of swords in public (*People v. Singh*, *supra*) is readily distinguishable from any interest it may have in prohibiting martial artists from possessing nunchaku in the privacy of their own homes for peaceful martial-arts training. As for the *O'Brien* test for balancing governmental interests against

free-expression rights, that test, even as articulated by Defendant Dillon/Rice, County Brief at 5, leads inescapably to the conclusion that the ban of simple in-home possession fails to pass constitutional muster.

In *O'Brien* (which upheld the application of a statute prohibiting the wilful destruction or mutilation of Selective Service certificates, or "draft cards," against protesters who had publicly burned their draft cards to protest the Vietnam War), the Court set up a four-part test for analyzing government regulations that incidentally infringe on First Amendment freedoms, writing:

> [W]e think it clear that a government regulation is sufficiently justified [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial government interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377 (bracketed numbers added).

Defendant Dillon/Rice, County Brief at 5, phrases the fourth part of the *O'Brien* test as requiring that the challenged law or regulation be "only as restrictive as is needed to further the governments [*sic*] duty." It is clear that the ban on simple in-home possession goes farther than that, banning any in-home possession of the instrument, even for the purpose of making a training video, giving a demonstration, or other expressive conduct. Thus, under any reasonable

balancing test, including that developed in *O'Brien*, the ban on simple in-home possession must fail.

Outside the First Amendment context (i.e., in the area of unenumerated rights), a balancing test is equally appropriate. As was previously noted in Plaintiff's memorandum of law opposing the State Defendants' 12(b) motion, the Supreme Court, in *Lawrence v. Texas*, 539 U.S. 558 (2003), 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* Plaintiff's memorandum of law opposing the State Defendants' 12(b) motion (Item #67 on the Docket Sheet) at 16-17.

In sum, as 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 is unclear what overriding public interest, if any, is being served. In the case of prohibition of carrying nunchaku in public, such an interest would be obvious, as indeed was the case under the facts of *People v. Singh*, *supra*. 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 is an instrument 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. *See* discussion at 4-5, *supra*. Similarly, the state's interest in

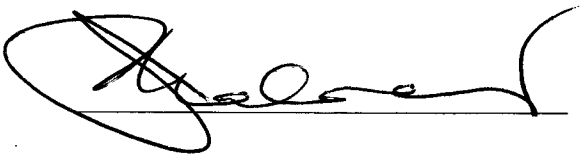
controlling the flow of illegal firearms into the state, which would arguably justify its prohibition of in-home possession of firearms, has no counterpart in the regulation of "chuka sticks." The nunchaku, unlike the firearm, requires no complex manufacturing process to be brought into existence, and 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.

It is respectfully submitted that one of the "components of liberty in its manifold possibilities," *Lawrence v. Texas*, 539 U.S. at 578-579, has been compromised, *with no countervailing public benefit*, by the state's having criminalized the simple possession of nunchaku in the home.

CONCLUSION

For all of the foregoing reasons, the Rule 12(c) motion to dismiss made by Defendant DILLON 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: July 14, 2006
Port Washington, New York



James M. Maloney (JM-5297)
Plaintiff *pro se*
33 Bayview Avenue
Port Washington, New York

(516) 767-1395