

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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JAMES M. MALONEY,

Plaintiff,

- against -

CV 03-786 (ADS) (MLO)

ANDREW CUOMO, in his official capacity as
Attorney General of the State of New York, ELIOT
SPITZER, in his official capacity as Governor of
the State of New York, and KATHLEEN A. RICE,
in her official capacity as District Attorney of the
County of Nassau, and their successors,

NOTICE OF MOTION

Defendants.
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PLEASE TAKE NOTICE THAT Plaintiff, James M. Maloney, pursuant to the Federal Rules of Civil Procedure and pursuant to Local Civil Rule 6.3, respectfully moves the Court for reconsideration in the above-captioned matter, on the basis that the Court, in rendering its Memorandum of Decision and Order of January 17, 2007, appears to have overlooked and failed to consider subparagraphs (b) through (e) of paragraph 54 of the Plaintiff's Amended Verified Complaint, as well as the case law and constitutional principles cited and referenced therein, as is more fully described in the memorandum submitted herewith.

Dated: January 18, 2007
Port Washington, New York



JAMES M. MALONEY (JM-5297)

Plaintiff *pro se*

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TO:

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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Plaintiff,

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CV 03-786 (ADS) (MLO)

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County of Nassau, and their successors,

**MEMORANDUM IN
SUPPORT OF MOTION
FOR RECONSIDERATION
OF DECISION AND ORDER
OF JANUARY 17, 2007**

Defendants.

-----X

Plaintiff, James M. Maloney, pursuant to the Federal Rules of Civil Procedure and pursuant to Local Civil Rule 6.3, respectfully moves this Court for reconsideration of its Memorandum of Decision and Order of January 17, 2007 (“Decision”), on the basis that the Court has overlooked and/or failed to consider subparagraphs (b) through (e) of paragraph 54 of the Plaintiff’s Amended Verified Complaint, as well as the case law and constitutional principles cited and referenced therein.

Specifically, paragraph 54 of the Plaintiff’s Amended Verified Complaint, in pleading the Third Cause of Action, alleges that “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.”

While the Decision includes a reasoned opinion regarding the First and Second Causes of Action, it addresses the Third Cause of Action only in respect of paragraph 54, subparagraph (a), i.e., the Ninth Amendment, but makes no mention whatsoever of sources of unenumerated rights secured under the established doctrine of “substantive due process,” nor of the teachings of the U.S. Supreme Court in *Lawrence v. Texas*, 539 U.S. 558 (2003) (*see, e.g., id.* at 562: “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.”). Moreover, the Decision’s only mention of the Fourteenth Amendment is at page 19:

So while the Ninth Amendment may provide the basis for recognition of unenumerated rights, which themselves may be enforceable against a State under the Due Process Clause of the Fourteenth Amendment, the Ninth Amendment itself provides no substantive right.

It is unclear how this conclusion supports dismissal, since the application of the Fourteenth Amendment, and the doctrine of substantive due process, were both pleaded as part of the Third Cause of Action and briefed fully by Plaintiff (along with, finally, ¶ 54(e)’s reference to “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,” which Mr. Venditti also did not address). WHEREFORE, reconsideration of the motions to dismiss is respectfully urged.

Dated: January 18, 2007
Port Washington, New York

/s/
JAMES M. MALONEY (JM-5297)
Plaintiff *pro se*
33 Bayview Avenue
Port Washington, New York 11050
(516) 767-1395