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

Plaintiff,

- against -

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,

Defendants.
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CV 03-786 (ADS) (MLO)

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

Plaintiff, James M. Maloney, pursuant to the Federal Rules of Civil Procedure and pursuant to Local Civil Rule 6.3, respectfully replies to the "MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR RECONSIDERATION OF THIS COURT'S JANUARY 17, 2007 MEMORANDUM OF DECISION AND ORDER" submitted this date by Defendant RICE (hereinafter, "Reconsideration Opposition Memorandum").

As this shall most assuredly be Plaintiff's last word in the matter before this Honorable Court, I shall now, for the first time in my briefing, take the liberty of using the first person.

I do not share Defendant RICE's view that a request for reconsideration permits briefing anew, and I therefore respectfully decline to address the citations to case law, etc., that are included in the Reconsideration Opposition Memorandum.

I have asked only that the Court address--guided by briefing already submitted--subparagraphs (b) through (e) of paragraph 54 of the Plaintiff's Amended Verified Complaint, which alluded to: (b) those rights recognized under the doctrine substantive due process; (c) those rights recognized by the United States Supreme Court in *Lawrence v. Texas*; (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. In moving for reconsideration in that limited manner, I had, and have, absolutely no intention that the Court, should it grant my request, be guided by anything beyond the briefing already submitted.

All of the sources of unenumerated rights listed in subparagraphs (b) through (e) of paragraph 54 of the Plaintiff's Amended Verified Complaint have a clear place in this Nation's established jurisprudence of unenumerated rights, more so indeed than does the Ninth Amendment, which was the only source addressed in the Court's opinion.

First, as to subparagraph (b) (substantive due process), that approach to unenumerated-rights jurisprudence was addressed in detail, both directly and in contradistinction to other approaches, in my Memorandum of Law in Opposition to 12(b) Motion by Defendants Spitzer and Pataki, dated June 6, 2006, at pages 10-15. In part because it had already been briefed so fully there, and in part because Defendant RICE's motion to dismiss had done little to attack that approach which had not already been addressed, I did not repeat or renew any substantive due process briefing in my Memorandum of Law in Opposition to 12(c) Motion by Defendant Denis Dillon, dated July 14, 2006.

As to (c), *Lawrence v. Texas*, that case's presence in my briefing was virtually continuous. The Court did not address *Lawrence v. Texas* in dismissing this case, nor does the Reconsideration Opposition Memorandum address those aspects of the decision on which I relied, namely, that there is a sphere of activities in which one may engage in the privacy of one's home with constitutional protection from laws that would criminalize conduct that harms no one (whether such conduct is sexual activity or martial-arts practice with nunchaku).

As to (d), as noted in my initial moving papers on this reconsideration motion, the

Court's only mention of the Fourteenth Amendment in its January 17 decision 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.

The Court there appears to be saying that the Ninth and Fourteenth Amendments might together give rise to a cognizable right as against the State (which I briefed). But the Court went no further, and dismissed the case notwithstanding that both the Ninth and Fourteenth Amendments were pleaded and addressed in my briefing.

As to the Reconsideration Opposition Memorandum's mention of procedural due process rights guaranteed by the Fourteenth Amendment, that is inapposite, as I have never briefed or argued that *procedural* due process is a consideration in this case at all. Surprisingly, it is in providing this unnecessary briefing in her final memo of law that counsel has chosen to file an exhibit--the transcript of the disposition of the criminal charges against me some four years ago--even though exhibits are usually attached to affidavits and even though Local Civil Rule 6.3 (Motions for Reconsideration or Reargument) expressly provides: "No affidavits shall be filed by any party unless directed by the court."

Moving on to the last subparagraph (e), which refers 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 and/or of the Declaration of Independence," this does not, as the Reconsideration Opposition Memorandum, "violate[ ] Fed. Rules Civ. P. 8(a)(2)" by "asking the Court to infer claims." Rather, it relies explicitly on the text of the seminal case in the Supreme Court's modern jurisprudence of unenumerated rights, *Griswold v. Connecticut*, 381 U. S. 479 (1965), wherein the Court wrote: "[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . ." *Id.* at 484. The application to *Griswold* and its

progeny to my claim for a right to engage in peaceful martial-arts practice with nunchaku in my own home was briefed fully, and indeed I quoted the above passage at length in my Memorandum of Law in Opposition to 12(b) Motion by Defendants Spitzer and Pataki, dated June 6, 2006, at page 9.

Without a recognition of unenumerated rights, whether founded on substantive due process, the Ninth Amendment, or some other approach, we are left with only the specific guarantees of liberty set forth in the first eight amendments to the Constitution, with the Second Amendment notably and perhaps irrevocably erased from any meaningful application. The consequence of those erasures and limitations as applied here means that a citizen may not keep within his home two pieces of wood connected by a rope for practice in a time-honored martial arts tradition that originated some four centuries ago, well before the founding of this Nation--with all its promises of liberty--unless he or she be willing to risk the draconian consequence of criminal prosecution for such simple possession, including up to a year of incarceration and a lifelong criminal record.

That having been said, and this Court having already rendered its decision, I have asked only, and with due deference to this Court's decision, that the reasons for giving no recognition to the liberty interest--to the extent asserted, pleaded, and briefed but not yet addressed--be set forth.

Dated: January 25, 2007
Port Washington, New York

/s/

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