

JAMES M. MALONEY (JM-5297)
Plaintiff *Pro Se*
33 Bayview Avenue
Port Washington, New York 11050
Telephone: (516) 767-1395

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
JAMES M. MALONEY,

Plaintiff,

- against -

KATHLEEN M. RICE,

Defendant.

**Declaration of James M.
Maloney in Further Support of
Plaintiff's Motion and in
Opposition to Defendant's
Cross-Motion**

Case No. 03-CV-786
(PKC) (ARL)

-----X

James M. Maloney, an attorney at law admitted to practice before this Honorable Court, declares under penalty of perjury as follows:

1. I submit this Declaration in further support of my post-remand Rule 56 motions for summary judgment in whole or part as to the First and Third Causes of Action as pleaded in the Second Amended Complaint, in opposition to Defendant's cross-motion as noticed January 27, 2014, and in support of counter-statements of fact made in the memorandum of law submitted herewith.

2. In connection with the counter-statements of fact referenced in the foregoing paragraph, I hereby affirm that I have never in my life made any illegal firearm purchase nor possessed any firearm that is *per se* illegal to possess (e.g., a "sawed-off shotgun"), but do note that I legally purchased a total of three revolvers from licensed gun stores in Florida or New Jersey during the 1980s or 1990s while a resident of those states. Annexed hereto as Exhibit 3 (sequential from those two exhibits provided with the earlier declaration submitted in support of these motions) is a true copy of a New Jersey Firearms Purchaser Identification Card that was issued to me in 1990, following which I purchased one of the subject revolvers (a .357 caliber Ruger) pursuant to a separately issued permit.

3. When the Nassau County Police raided my home in my absence on August 24, 2000, all three of my revolvers were secured in a locked safe in my home, unloaded and with no corresponding ammunition stored in the same space. They were seized by the Nassau County Police without a warrant by the use of explosives to open the safe (to which only I had the combination). Although I was in police custody at that very time, my consent to open the safe

was not sought. Notably, I had rendered two of the revolvers inoperable immediately upon bringing them into New York when I moved to Port Washington in 1996, and thus my possession of those two inoperable revolvers was not in violation of any law.¹ In January 2003, I pled guilty in state court to a charge of disorderly conduct, a violation, solely in connection with my possession in that locked safe within my home of the single revolver, a .38 caliber Smith & Wesson, that, due to its design, I had not been able to render inoperable as I had done with the two .357 caliber Ruger revolvers. Annexed hereto as Exhibit 4 is a true copy of a Nassau County police lab report identifying the three revolvers seized from my home and indicating that the two .357 caliber Ruger revolvers were inoperable until modified at that laboratory, but that the Smith & Wesson revolver was operable. Annexed hereto as Exhibit 5 is a true copy of a federal firearms trace summary for that Smith & Wesson revolver, with my date of birth redacted, indicating that I had purchased that revolver from a dealer in Jacksonville, Florida, while a resident there in 1984. (NOTE: The transcript of the aforementioned guilty plea is already part of the record herein, having been the very last document filed by Defendant in this action before appeal was taken, see exhibit to Document 89, filed January 25, 2007.)

4. Well before those revolvers were taken from my home by force and subsequently destroyed (a forfeiture and destruction to which I “consented” as part of the guilty plea), I had already become aware that firearms have attributes that make them in many ways less desirable than nunchaku as readily available home defense weapons. While firearms are vastly more effective than nunchaku, especially against multiple and/or armed intruders, keeping a loaded firearm readily available has its corresponding risks: children, or a burglar, could get hold of it, with possible tragic consequences in either case. On the other hand, a pair of sticks connected by a cord has no intrinsic stored energy (as does a loaded gun) and instead requires strength and skill to be used as a weapon. It is accordingly far less likely to be used by most burglars, or by most children, to injure anyone, either accidentally or intentionally. Nunchaku therefore can be kept in the home in a more readily available status than can firearms (as noted, mine were locked in a safe separate from the ammunition, but my nunchaku were found by the police under a couch).

5. It is widely accepted that the nunchaku is well-suited for defensive uses, but requires skill and training to be used effectively. In skilled hands, it is a particularly effective weapon in defending against an intruder armed with a knife, which is a fairly common occurrence (the knife sometimes being taken from the kitchen of the home upon the sound of the homeowner rising). Further, it is my belief that many home invasions are committed by intoxicated and/or mentally ill individuals, who may not be deterred by a loaded gun (thereby placing the homeowner in a dilemma: kill the intruder or else risk being killed by him). The nunchaku, which readily lends

¹ Indeed, that specific holding was rendered by a court of competent jurisdiction in this state in connection with those very same two .357 caliber Ruger revolvers, *see Maloney v. Office of Court Administration*, Index No. 10898/06 (Supreme Court, New York County) (true copy of unreported July 19, 2006, opinion annexed hereto as Exhibit 6) at 4, *rev'd on other grounds* (specifically that my having been “**charged with, inter alia, illegal possession of a martial arts weapon [and] illegal possession of a .38 caliber revolver**” provided a rational basis for denial of a Secure Pass), 845 N.Y.S.2d 298 (1st Dep’t 2007) (emphasis added in bold).

itself to a measured response not necessarily requiring the use of lethal force, allows for a merciful means of subduing or controlling such an intruder without having to kill or maim. As I have adequately pleaded in various iterations in this action, 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.

6. It is for those reasons that, many years ago, the nunchaku became an integral part of my martial arts training and indeed of my home defense philosophy. Unfortunately, that training and philosophy are at odds with the legislated public policy of this state, and eleven years of effort have done nothing to change that.

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

Dated: February 27, 2014
Port Washington, New York

/s
JAMES M. MALONEY

State of New Jersey
Firearms Purchaser

IDENTIFICATION CARD

THIS IS TO CERTIFY THAT

NO. 623047B

James Michael Maloney

residing at

Number 30

Street Sterling Place

City Edgewater

State N.J.

is hereby granted permission to purchase and carry rifles and shot-
guns pursuant to provisions of N.J.S. 2A:151-32 and 41 with amend-
ments and supplements.

Ernest Lawlor

Signature of issuing authority

1/8/90
Date issued

Chief
Title

Edgewater P.D.
Department of Police

**POLICE DEPARTMENT, COUNTY OF NASSAU, NEW YORK
SCIENTIFIC INVESTIGATION BUREAU RECEIPT/REPORT**

PDCN 303B - REV. 11/94

DEFENDANT(S) OR SUSPECT(S)		ADDRESS		PAGE	OF
1. James M. Maloney		33 Bayview Avenue, Port Washington, New York			One
2.				DATE OF INCIDENT	08-24-00
3.				FILE CLASSIFICATION	FIREARMS
4.				S.I.B. NO.	F-242-00
RECEIVED BY			RECEIVED FROM		
Det. Robert Nemeth			Firearms Evidence Locker		
DATE	TIME	CRIME		D.D. NO.	
11-28-00	2304	Menacing Second, CPW 4th		00PW528	
WHERE RECEIVED				INVOICE NO.	
Laboratory				00-6974	

QUANTITY AND DESCRIPTION OF MATERIALS SUBMITTED

- GUN:
- .357 Magnum Ruger revolver, Model Security Six, Serial Number 158-56411 *- not*
 - .357 Magnum Ruger revolver, Model Security Six, Serial Number 158-61090 *- not operable*
 - .38 Special Smith and Wesson revolver, Model 60, Serial Number ADR5218 *operable*

REPORT OF ANALYSIS OR EXAMINATION

As submitted, the Ruger Security Six revolvers are not operable due to missing transfer bars. After substituting a laboratory transfer bar for the missing part, the revolvers were tested with laboratory ammunition and were operable.

The Smith and Wesson Model 60 revolver was tested with laboratory ammunition and is operable.

Microscopic comparisons to specific open case(s) will be made upon request.

I have completed the analysis of the above material on 11-29-00 and certify that I am a public servant of the County of Nassau, New York and am employed as a forensic scientist to examine the above described materials and the above report was made by me in the normal course of my duties. I understand that any false statements made herein are punishable as a class A Misdemeanor pursuant to section 210.45 of the Penal Law of the State of New York.

DATE	SIGNATURE OFFICER PERFORMING ANALYSIS OR EXAMINATION	SECTION SUPERVISORS INITIALS	COMMANDING OFFICERS INITIALS
11-30-00	<i>Robert Nemeth</i>	<i>JK</i>	<i>SW</i>

DEPARTMENT OF THE TREASURY
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS



NATIONAL TRACING CENTER

Phone: (800) 788-7133 Fax: (800) 578-7223

Print Date: July 18, 2001

FIREARMS TRACE SUMMARY

Trace Number: T20000197366

Request Date: December 02, 2000

KEVIN KELLEHER
MELVILLE FIELD OFFICE
135 PINELAWN ROAD, ROOM 200 S0
MELVILLE, NY 11747-3133

Badge No:
Investigation No:

KEVIN KELLEHER
BUREAU OF ALCOHOL
6 WORLD TRADE CTR-RM 620
NEW YORK, NY 10007-0000

Badge No:
Investigation No:

FIREARM INFORMATION

Manufacturer: SMITH & WESSON
Model: 60
Caliber: 38
Serial Number: ADR5218
Type: REVOLVER
Country: UNITED STATES OF AMERICA
Importer:
Obliterated:
Identifying Marks:
NIBIN:
Gang Name:

PURCHASER INFORMATION

Purchase Date: 03/24/1984

JAMES MICHAEL MALONEY
1216 N MAIN ST
JACKSONVILLE, FL 32206
UNITED STATES OF AMERICA

Race: WHITE Height: 6 ft. 1 in.
Sex: Male Weight: 170 lbs.
ID 1: FL DRIVER'S LICENSE #: M45045358421
ID 2: #:

Purchaser may be associated with 2 other trace(s)/multiple sale(s).
Contact the local ATF office for additional information.

RECOVERY INFORMATION

Recovery Date: 11/30/2000

33 BAYVIEW AV
PORT WASHINGTON, NY 11050
UNITED STATES OF AMERICA

Recovery location may be associated with 2 other trace(s).

Possessor: JAMES M MALONEY DOB: [REDACTED]
Possessor may be associated with 2 other trace(s)/multiple sale(s).
Contact the local ATF office for additional information.

Time to Crime: 6095 days

DEALER INFORMATION

SOUTHSIDE GUN INC
6041 ATLANTIC BLVD
JACKSONVILLE, FL 32211-0000
Phone: N/A

Ship Date:

Out of Business

ADMINISTRATIVE INFORMATION

NCPD SIB NUMBER: F-242-00 2 OF 3 TRACES
SCPD CC NUMBER:

SUMMARY OF RESULTS

THE TRACE HISTORY OF THIS FIREARM WAS DERIVED FROM THE RECORDS OF A FEDERAL FIREARMS LICENSEE (FFL) THAT HAS DISCONTINUED BUSINESS AND HAS SUBMITTED THEIR RECORDS TO THE NATIONAL TRACING CENTERS (NTC) OUT-OF-BUSINESS RECORDS SECTION (OBR) AS REQUIRED BY FEDERAL LAW. THEREFORE, THE TRACE RESULTS MAY NOT REFLECT THE COMPLETE SALES HISTORY OF THIS FIREARM. IF YOU HAVE QUESTIONS ABOUT THIS TRACE, PLEASE CONTACT THE NTC CUSTOMER SERVICE GROUP AT (800)-788-7133 EXT. 772

Additional Remarks:

The information in this report must be validated with the Federal Firearms Licensee (FFL) prior to use in any criminal proceedings.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, I.A.S. PART 55

-----X
In the Matter of an Article 78 Proceeding

JAMES M. MALONEY,

Petitioner,

-against-

OFFICE OF COURT ADMINISTRATION,

Defendant.
-----X

INDEX NO. 101898/06

DECISION, ORDER and
JUDGMENT

SOLOMON, J.

Petitioner James M. Maloney, Esq. brings this Article 78 proceeding pro se, seeking an order compelling respondent Office of Court Administration of the State of New York (OCA) to grant his application for an Attorney Secure Pass ID Card (Secure Pass). A person with a Secure Pass is allowed to enter New York State courthouses without passing through metal detectors or being subject to a search. Petitioner has also commenced a related plenary action in which he challenges the Secure Pass program on State constitutional grounds.¹

Prior to September 11, 2001, attorneys could bypass the metal detectors by showing the court officers at the entrance an attorney identification card issued by OCA. Those cards were issued without a background investigation. Shortly after September 11, 2001, all persons, including attorneys, who sought to enter a State courthouse were required to pass through the magnetometers at the entrance. In April 2002, in order to reduce the delay in court business caused by attorneys having to wait on

¹ Maloney v Lippman, index number 103119/06.

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NEW YORK

line and to pass through the magnetometers, OCA instituted the Secure Pass program. Applicants for a Secure Pass must consent to a background investigation pertaining to their criminal history, if any.

Petitioner is an attorney in private practice who was admitted to the New York State bar on June 17, 1996. He is a member of the bar in good standing, and has served as an officer in the United States Naval Reserve since 1980. He applied for a Secure Pass on January 31, 2003. Following certain correspondence between petitioner and various employees of OCA's Office of the Inspector General (OIG), petitioner received, on or about November 3, 2003, an unsigned memorandum letter, ostensibly dated June 16, 2003, but mailed in an envelope postmarked October 30, 2003, informing him that his application had been denied "due to information revealed in a routine criminal background check conducted of all applicants as part of the application process." Verified Petition, Exh. 5. Following extensive further correspondence between petitioner and OCA, in which petitioner was advised, among other things, that he could commence an informal appeal of the denial of his application by writing to Chief Administrative Judge Jonathan Lippman, petitioner wrote to Judge Lippman on September 18, 2004. After petitioner sent several follow-up letters to Judge Lippman, he received a letter dated October 17, 2005, from Matthew O'Reilly, the OCA Chief of Public Safety. Mr. O'Reilly wrote:

Based on your written appeal letter dated
March 1, 2005, for inclusion in the Secure

Pass program. Please note that we have given great consideration to your application, but unfortunately you do not meet the criteria.

Verified Petition, Exh. 8. The letter was silent as to what criteria petitioner had been found not to meet. The letter was also silent as to the nature of Mr. O'Reilly's authority to speak on behalf of Judge Lippman. By letter dated October 21, 2005, petitioner asked Mr. O'Reilly to send him a copy of the written criteria pertinent to the denial of his application.

That letter was answered by a letter dated November 14, 2005, from OCA Assistant Deputy Counsel Shawn Kerby, which informed petitioner that there are no written criteria governing OCA's consideration of Secure Pass applications or appeals from the denial of such applications. Her letter explained, however, that:

All Secure Pass applicants consent to a criminal history search. Where the underlying facts and circumstances of an applicant's criminal history reflect violence or dishonesty, the Secure Pass application is denied, as the applicant is deemed a risk to courthouse security. We believe that your criminal history meets these criteria.

Verified Petition, Exh. 9.

Ms. Kerby represents OCA in this proceeding. In her affidavit opposing the petition, she states that:

[i]f an attorney applicant's criminal history consisted of violations, arrests, or even convictions for minor offenses that did not reflect a propensity for violence or dishonesty, the applicant received approval for an attorney Secure Pass ... [but w]here the underlying facts and circumstances of [an applicant's criminal history] reflected violence or dishonesty, the Secure Pass application was denied.

Ms. Kerby represents that "[t]he denial of [petitioner's] application purely was based upon his violent and dishonest criminal history." That history consists of five arrests. In two of those instances, the charges were dismissed. In 1983, petitioner pled guilty to a New Jersey charge of driving while under the influence of alcohol. In the remaining two cases, petitioner pled guilty to a charge of disorderly conduct. In one of those, in 1981, petitioner had been arrested for giving a demonstration of the use of a nunchaku in a public space. A nunchaku, or "chuka stick," consists of two pieces of a rigid material joined by a cord or chain. It is a martial arts weapon that originated in Okinawa, and it is among the weapons the mere possession of which is prohibited in New York. Penal Law § 265.01. Petitioner's other plea, in 2000, was in connection with possession of a .38 caliber revolver in a locked safe in his home. Petitioner also had two inoperable .357 magnums in his safe. Possession of an inoperable firearm is not a crime. People v Longshore, 86 NY2d 851 (1995). In addition, petitioner had a nunchaku in his home.

In neither of the instances where petitioner pled to disorderly conduct was there any allegation that petitioner had used, or had intended to use the weapon in connection to which he entered the plea, or any other weapon, to commit an act of violence. There also is no allegation of dishonesty. The "underlying facts and circumstances" here are no more than mere possession. Ms. Kerby's account of the "underlying

circumstances" of petitioner's 2000 arrest is considerably more dramatic, however, and it exemplifies one of the flaws in OCA's consideration of petitioner's application. She writes: "[t]he underlying circumstances of this arrest revealed that the police responded to petitioner's home after a telephone worker reported that petitioner pointed a rifle with a telescope lens at him while he was working on a telephone pole near petitioner's home." It is undisputed, however, that petitioner did not have a rifle, and that he had not pointed any weapon at the telephone worker. Ms. Kerby's statement, that "[t]he ultimate disposition of a criminal case does not negate the presence of violent or dishonest underlying facts and circumstances," is correct, as a general matter, but for a rational administrative process such facts must be found, not invented, or merely suspected. It is evident that OCA's decision to deny petitioner's application was based, at most, on charges that have been brought against him. Charges, however, do not establish facts. Notwithstanding Ms. Kerby's oft repeated use of the phrase "violent and dishonest" in her affidavit, she is unable to describe a single proven or admitted act of violence or dishonesty on the part of petitioner. Compare Munsiff v Office of Court Administration, -- AD3d --, 2006 WL 155001 (1st Dept 2006) (petitioner had a lengthy list of convictions).

The hallmark of rational administrative action is an adherence to articulated objective standards, against which a particular determination can be measured. Matter of Nicholas v

Kahn, 47 NY2d 24 (1979); see also Matter of Levine v Whalen, 39 NY2d 510 (1976). OCA has acknowledged that it has no written standards governing the consideration of applications for a Secure Pass' from persons with a criminal history. In this case, moreover, it became clear at oral argument that OCA applied no objective standards whatsoever to the consideration of petitioner's application. Ms. Kerby, who was repeatedly asked to identify the standards by which OCA judges applications from persons with a criminal history, was entirely unable to do so. Inasmuch as OCA failed to articulate objective standards to guide its determinations of such applications, its denial of petitioner's application was arbitrary and capricious. See Matter of Nicholas v Kahn, 47 NY2d supra.

Moreover, while this court holds, in petitioner's plenary action, that it was within the constitutional authority of the Chief Administrative Judge to institute the Secure Pass program, the court notes the apparently informal nature of the Chief Administrative Judge's delegation of authority with respect to the administration of that program. It is somewhat anomalous for Ms. Kerby to have been assigned to give reasons for the denial of petitioner's application, a decision purportedly made by Mr. O'Reilly, and then to have been assigned to defend that determination in court.

Accordingly, it hereby is

ORDERED and ADJUDGED that the petition is granted, and respondent Office of Court Administration is directed to issue an Attorney Secure Pass ID Card to petitioner within 15 days of service upon it of a copy of this order with notice of entry.

This constitutes the judgment of the court.

Dated: July 19, 2006

ENTER:



J.S.C.

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JUL 25 2006

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NEW YORK

JANE S. SOLOMON