

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, and his
successors,

Defendants.

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**Declaration of
James M. Maloney**

CV 03-786 (ADS) (MLO)

Plaintiff, James M. Maloney, in support of his Rule 56 motion for summary judgment, declares and affirms under penalty of perjury as follows:

1. I hereby reaffirm, *with the exception set forth in paragraph 3 below*, all statements of fact made in my Verified Complaint dated February 18, 2003, a true copy of which is attached hereto as **Exhibit 1**.

2. A true copy of the Answer in this action is attached hereto as **Exhibit 2**.

3. Subsequent to the filing and service of my Verified Complaint, it has come to my attention that one state in addition to New York (California) has prosecuted simple possession of nunchaku within a home. Paragraph 24 of my Verified Complaint reads as follows:

24. Upon information and belief, no State in the United States, other than New York, has ever defined and prosecuted as a crime the simple possession of nunchaku within one's own home.

I have subsequently learned that the foregoing is incorrect. I first learned of California's having prosecuted in-home possession of nunchaku while doing on-line research in July 2003. Specifically, I found an appellate opinion that indicated that a juvenile had been prosecuted when nunchaku were found by police in his bedroom, and that the conviction had been upheld on appeal. On or about July 25, 2003, I provided Dorothy Oehler Nese, Esq., Assistant Attorney General, with a writeup of that information, a true copy of which is attached hereto as **Exhibit 3**. Subsequently, I have learned of an additional California prosecution, which I

shall detail here because it describes a prosecution and conviction that would also be possible under the challenged New York statute. Specifically, on July 18, 2004, I received a telephone call from a gentleman named Harold Vaughn, who currently resides in San Jose, California, although he is domiciled in Virginia. I have spoken with Mr. Vaughn subsequently, up to and including August 7, 2004. Upon information and belief, Mr. Vaughn has been a martial artist for over 30 years, was the Virginia director of the U.S. National Karate Association, and currently resides in California because he completed a J.D. program there earlier this year and, before his recent conviction, was preparing for the California bar exam, which he has subsequently postponed for obvious reasons. Upon information and belief, in early 2004, police who had legally entered Mr. Vaughn's residence saw a nunchaku on display on the wall with his martial arts certificates and found other nunchaku in his home pursuant to a consent search. Upon information and belief, the State of California subsequently charged Mr. Vaughn with six counts of violation of California Penal Code § 12020, a misdemeanor, for his possession of the nunchaku in his home. Upon information and belief, on July 19, 2004, Mr. Vaughn, threatened with prosecution for six misdemeanor counts with consecutive sentencing leading to six years of incarceration, represented by Deputy Public Defender Alfred Spielmann, Esq. of the Santa Clara County Office of the Public Defender, pled "no contest" to a single count of violation of Penal Code § 12020 in Department 50 of the California Superior Court, Santa Clara County (Stafford, J.), Case No. CC00452996.

4. I am aware of no jurisdiction in the United States other than New York and California that has ever defined or prosecuted simple possession of nunchaku in one's home as a crime.

5. Attached hereto as **Exhibit 4** is a true copy of a press release from the Office of the Attorney General dated October 17, 2002 ("Press Release"), as faxed to me by the Office of the Attorney General on March 2, 2004, and referenced in ¶6 of my **Rule 56.1 Statement dated May 11, 2004**, submitted herewith. In its second paragraph (first page following fax cover sheet), the Press Release refers to "illegal weapons" including "chuka sticks." In its fifth paragraph, the Press Release quotes the Attorney General as saying that such weapons "have no place . . . in our homes." On its second page, in bullet points, the Press Release notes that the terms of settlement between an out-of-state martial-arts equipment supplier and the Attorney General included the requirements that the company provide the Attorney General with a list of New York customers who had purchased "illegal" weapons from the company and that the company deliver written notice to their New York customers advising them to surrender their "illegal" weapons to law enforcement agencies. On its second page, in the second paragraph below the bullet points, the Press Release notes that a similar settlement was reached with another martial-arts equipment supplier in 2000.

6. Based on the foregoing, it is respectfully submitted that the Attorney General has taken meaningful and effective steps toward applying the challenged statutes so as to prevent New Yorkers from possessing nunchaku in their homes, and accordingly is a proper defendant in this action for declaratory judgment.

7. Attached hereto as **Exhibit 5** is a true copy of a 1974 article, “Oriental Philosophy, Martial Arts and Class Struggle,” from a scholarly journal entitled *Social Praxis*, which was referenced in ¶7 of my **Rule 56.1 Statement dated May 11, 2004**, submitted herewith.

8. Attached hereto as **Exhibit 6** are true copies of pages 62 through 64 of a book entitled, *The Complete Martial Arts*, authored by Paul Crompton (1989) and published by McGraw-Hill Publishing Company. Pages 62 through 64 begin the chapter on “Ryukyu Kobujutsu,” which is one of the terms for the branch of karate or martial arts that involves ancient Okinawan weaponry. Upon information and belief, the term *kobujutsu* is used interchangeably with the term *kobudo*.

9. The foregoing materials indicate that the nunchaku, like the other weapons of Ryukyu Kobujutsu or Kobudo, was adapted for use as a weapon by the People of Okinawa during the early Seventeenth Century. As noted in Exhibit 5 at page 139, “Karate developed into its own after the conquest of Okinawa in the early seventeenth century by the Satsuma clan of Kyushu [Japan], which again banned all weapons but its own and brutally suppressed the population. A people’s revolutionary movement organized clandestinely, and its activities centered around the development of karate for peasant self-defense against the imperial dictatorship.” As noted in Exhibit 6 at page 63, “The conquest of Okinawa was carried out by the Satsuma clan of southern Japan. . . . As soon as Okinawa had been conquered, the Japanese leader Iehisa Shimazu decreed that the possession or carrying of weapons was forbidden. . . . The Okinawans also began to train with the improvised weapons that they made from farming implements.” Accordingly, it is respectfully submitted that 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. *Cf.* Verified Complaint (Exhibit 1) at ¶¶ 18-19.

10. Upon information and belief, the New York legislature first banned the possession of nunchaku or “chuka sticks” effective September 1, 1974. *See* Chapter 179 of the Laws of New York 1974 (Session Laws).

11. On August 5, 2004, I obtained a microfiche of the “Governor’s Bill Jacket” for Chapter 179 of the Laws of New York 1974 at the library of the Supreme Court, Nassau County, and made true copies of documents included therein, which are introduced below.

12. Attached hereto as **Exhibit 7** are true copies of the following documents included in the “Governor’s Bill Jacket” for Chapter 179 of the Laws of New York 1974:

- (a) a letter dated April 2, 1974, from Assemblyman Richard Ross (one of the sponsors of Assembly Bill 8667-A, the bill that was eventually signed into law banning the nunchaku in New York) to Michael Whiteman, Counsel to Governor Wilson, urging approval of the bill and stating: “The chuka stick is an instrument that may be purchased or easily assembled from two pieces of wood and a piece of thong, cord or chain. With a minimum amount of practice, this instrument may be effectively used as a garrote, bludgeon, thrusting or striking device. The chuka stick is designed primarily as a weapon and has no purpose other than to maim or, in some instances, kill.”;
- (b) a similar letter dated May 7, 1974, from the District Attorney of the County of New York, stating that “there is no known use for chuka sticks other than as a weapon.”;
- (c) a similar letter dated April 1, 1974, from the District Attorney of Dutchess County, stating: “There is no conceivable innocent used [sic] for this device and, accordingly, there can be no possible invasion of anyone’s right to use it innocently.”;
- (d) a similar letter dated March 28, 1974, from the Mayor of the City of New York, stating: “This instrument may be purchased or easily assembled from two pieces of wood and a piece of thong, cord or chain. With a minimum amount of practice it may be effectively used as a garrote, bludgeon, thrusting or striking device. The chuka stick is designed primarily as a weapon and has no purpose other than to maim or, in some instances, kill [*cf.* subparagraph (a), *supra*].”; and
- (e) a similar letter dated April 1, 1974, from the District Attorneys Association of the State of New York, stating: “As a result of the recent popularity of ‘Kung Fu’ movies and shows, various circles of the state’s youth are using such weapons. The chuka stick can kill, and is rightly added to the list of weapons prohibited by section 265.00 of the Penal Law.”

13. In addition to the above, numerous documents found in the “Governor’s Bill Jacket” for Chapter 179 of the Laws of New York 1974, including letters from police departments, urged the Governor to sign the bill banning possession of nunchaku into law, all on the putative basis that the nunchaku or “chuka stick” had no legitimate purpose.

14. Upon information and belief, the New York legislature acted to ban the nunchaku shortly after it became widely known due to the release of the martial-arts film *Enter the Dragon*, starring the late Bruce Lee, in 1973, followed by other martial-arts films. See Crompton, *The Complete Martial Arts*, at 63 (Exhibit 6) (“Audiences were inspired by *Enter the Dragon*’s] dynamic triumph of good over evil, and the nunchaku became all the rage for several years.”); ¶ 12(e), *supra*, and portion of Exhibit 7 referenced therein (“As a result of the recent popularity of ‘Kung Fu’ movies and shows, various circles of the state’s youth are using such weapons.”).

15. Attached hereto as **Exhibit 8** is a true copy of a document included in the “Governor’s Bill Jacket” for Chapter 179 of the Laws of New York 1974 entitled “MEMORANDUM FOR THE GOVERNOR Re: Assembly 8667-A.” The document analyzes the bill that was eventually signed into law banning the nunchaku in New York, and is signed by then-Attorney General Louis J. Lefkowitz. The memorandum concludes: “I find no legal objection to this bill.”

16. Attached hereto as **Exhibit 9** is a true copy of a document included in the “Governor’s Bill Jacket” for Chapter 179 of the Laws of New York 1974 consisting of a memorandum dated April 4, 1974, from Archibald R. Murray of the State of New York Executive Department’s Division of Criminal Justice Services. The document analyzes the bill that was eventually signed into law banning the nunchaku in New York, and comments: “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.” The memorandum goes on to note that nunchaku have uses in karate and other martial-arts training, and states: “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.” The memorandum then proposes less objectionable alternative legislative solutions and notes that a prior version of the bill followed one such alternative course, that of including an intent element to make nunchaku possession unlawful.

17. Attached hereto as **Exhibit 10** is a true copy of a document included in the “Governor’s Bill Jacket” for Chapter 179 of the Laws of New York 1974 consisting of a cover letter dated May 3, 1974, and a “Report No. 184” dated April 29, 1974, both submitted by the New York County Lawyers’ Association in recommendation that the Governor veto Assembly Bill 8667-A, the bill that was eventually signed into law banning the nunchaku in New York. Report No. 184 noted that the bill would make “mere possession (even absent criminal intent) a criminal offense” and that “a more narrowly drawn statute can be fashioned” to achieve legislature’s desire “to prohibit the use of nunchakus in criminal conduct[.]”

18. Attached hereto as **Exhibit 11** is a true copy of an article entitled “From Civilian Tool to Military Weapon,” by Scott Wasser, as printed from the on-line edition of *Reserve and National Guard Magazine*, <http://www.reserve-nationalguard.com/general/civiliantool.html>, on July 22, 2004. The article is referenced at page 18 of the memorandum of law submitted herewith.

19. Attached hereto as **Exhibit 12** is a true copy of a commercial web page, as printed on July 22, 2004, from <http://www.orcuttopn.com/about.htm>, which indicates that “over 200 law enforcement agencies across the United States have field tested and adopted [a nunchaku designed for police use] as their primary control device.” The web page points out that an advantage of the nunchaku is that it is “non-lethal.” *Cf.* Verified Complaint (Exhibit 1) at ¶ 20 (“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.”). The nunchaku, while as capable of deadly force as any other blunt instrument, may be effectively used to subdue an opponent, even an opponent armed with a knife or other lethal weapon, without resorting to the use of deadly force, by striking at the hand holding the weapon, the knees, etc.. As such, the nunchaku, in contrast to a long gun such as a shotgun or even a knife (both of which may be legally possessed in one’s home for self-defense consistently with the laws of the State of New York), is a weapon that may be used for home defense against an intruder in a merciful manner that does not require the use or threat of deadly force. Further, a nunchaku, in contrast to a firearm or even a knife, is not likely to cause serious accidental self-injury in the hands of a child. *Cf.* Verified Complaint (Exhibit 1) at ¶¶ 20-22. Upon information and belief, nunchaku have had military application and were used by Navy SEALs during the Vietnam War. *See, e.g.,* Massad Ayoob, *The Truth About Self-Protection* 300 (1983).


20. The use of nunchaku in the martial arts is often a form of performance akin to and indeed not readily distinguishable from dance. In my own training, I have practiced many movements with the nunchaku that are of little or no utility in a combat situation but which are nonetheless visually interesting (e.g., twirling and juggling). Upon information and belief, this use of nunchaku as a tool of expression through movement is not unusual, and there is at least one website of which I am aware that includes such visual displays of nunchaku use in creative fashion (<http://www.jugglingwithatwist.com>). I have also taken photographs of myself using nunchaku and had intended to make a video displaying various techniques that I have practiced. I am prevented from engaging in this expressive conduct in the State of New York because merely possessing nunchaku in my home may subject me to criminal prosecution.

21. I respectfully disagree with the statements of Assemblyman Richard Ross, the sponsor of the bill to ban the nunchaku in New York, and of New York City's Mayor Beame (*see supra* ¶ 10 at subparagraphs (a) and (d), respectively), to the effect that the nunchaku "is designed primarily as a weapon and has no purpose other than to maim or, in some instances, kill." Based upon my knowledge and experience, including but not limited to my experience as a martial artist, Naval Reserve officer, and paramedic, I know that the nunchaku has legitimate uses not only as a physical training device for the development of strength, speed, manual dexterity, coordination, and concentration, but also as a legitimate and merciful weapon for home defense that allows one to subdue an intruder, even one armed with a knife, *without* maiming or killing.

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

Executed on: August 8, 2004
Port Washington, New York

A large black rectangular redaction box covers the signature area. A thin black line loops around the left side of the box, and two thin horizontal lines extend from the right side of the box.

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