

07-0581-CV

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

*James M. MALONEY,
Plaintiff-Appellant,*

- 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-Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

APPELLANT' S BRIEF

JAMES M. MALONEY
Plaintiff-Appellant Pro Se
33 Bayview Avenue
Port Washington, NY 11050

(516) 767-1395

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JURISDICTIONAL STATEMENT

A. The court below had subject matter jurisdiction over the federal causes of action stated in the complaint, which sought a declaration as to the constitutionality of certain applications of state criminal statutes. The action arose under the Constitution of the United States, and the court below accordingly had subject matter jurisdiction pursuant to 28 U.S.C. § 1331, and, further, had the power to render declaratory judgment and the further equitable relief sought in the Amended Verified Complaint pursuant to 28 U.S.C. §§ 2201-2202.

B. This Court has jurisdiction over this appeal from a final order of the District Court pursuant to the provisions of 28 U.S.C. § 1291.

C. The District Court's Memorandum of Decision and Order from which appeal is taken was signed by the Honorable Arthur D. Spatt on January 17, 2007 (A-49 to A-68), with Judgment entered on January 25, 2007 (A-9; see Docket # 88). A motion for reconsideration as to certain causes of action not addressed in the Memorandum of Decision and Order was filed on January 18, 2007 (A-9 to A-10; see Docket # 86). Notice of Appeal was filed on February 16, 2007 (A-12). On May 14, 2007, the District Court denied the motion for reconsideration in an Order that was entered on May 18, 2007 (A-11; see Docket # 92; see also Order at A-69 to A-73). Following denial of the motion for reconsideration, an Amended Notice of Appeal was filed on June 12, 2007 (A-13).

D. This appeal is taken from a final Memorandum of Decision and Order disposing of all claims (A-49 to A-68).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the right or privilege to possess nunchaku, a traditional martial-arts weapon, for peaceful use in martial-arts practice within one's own home free from the governmental intrusion of defining and punishing such simple possession as a crime, is protected by the Constitution of the United States as an unenumerated right, derived from any of the following or any combination of the following: (a) the Ninth Amendment; (b) those rights recognized under the doctrine of 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 to the United States Constitution; and/or (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.

1. Whether the right or privilege to possess nunchaku, a traditional martial-arts weapon, for peaceful use in martial-arts practice within one's own home free from the governmental intrusion of defining and punishing such simple possession as a crime, is protected by the Second Amendment to the United States Constitution.

3. Whether this Court should reconsider its decision in *Bach v. Pataki*, 408 F.3d 75 (2d Cir. 2005), *cert. denied*, 546 U.S. 1174 (2006), and hold that the Second Amendment guarantees a personal right applicable as against the States.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The action dismissed below sought declaratory judgment, to wit, 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”¹ within one’s home, are unconstitutional and of no force and effect. The action never challenged the application of the statutes to the possession of nunchaku in any location other than the would-be possessor’s home or the application of the statutes to the possession of nunchaku with intent to harm another. The challenged New York criminal statutes define nunchaku or “chuka sticks” (as the Legislature chose to call them) as “any device designed primarily as a weapon, consisting of two or more lengths of a rigid material joined together by a thong, rope or chain in such a manner as to allow free movement of a

¹ “Nunchaku” (a word of Japanese origin that is properly used both in the singular and the plural) has been defined as “an Oriental martial arts weapon comprised of two pieces of wood or steel connected by a cord or chain and which can be held in the hands. It had its origin as a farm implement in Okinawa.” *United States v. George*, 778 F.2d 556, 558 n.1 (10th Cir. 1985). It is widely accepted as historical fact that the nunchaku was adapted for use as a weapon by the people of Okinawa as part of the development of karate during the early Seventeenth Century, after the Japanese invaded the island and banned the possession of traditional weapons such as sword and spear. *See, e.g.*, S. Halbrook, “Oriental Philosophy, Martial Arts and Class Struggle,” 2 *Social Praxis* 135, 139 (1974) (noting that the invading Japanese Satsuma clan “banned all weapons but its own and brutally suppressed the population” and that a “people’s revolutionary movement organized clandestinely, and its activities centered around the development of karate for peasant self-defense against the imperial dictatorship”).

portion of the device while held in the hand and capable of being rotated in such a manner as to inflict serious injury upon a person by striking or choking.” New York Penal Law § 265.00(14) (one of two subsections so numbered). The Amended Verified Complaint (which was the operative pleading at the time of dismissal) also sought contingent equitable relief as against the Attorney General. See A-24 to A-25 (Fourth Cause of Action).

In the four-year course of the litigation below, the District Court issued three substantive memoranda and/or orders. The first (A-38 to A-48) denied Plaintiff’s motion for summary judgment on the basis that “Plaintiff ha[d] no reasonable fear of prosecution by the Attorney General” (A-46), but granted Plaintiff “leave to serve and file a supplemental summons and amended complaint adding the entity allegedly responsible for the potential prosecution of the Plaintiff under the statutes in question” (A-47). Significantly, in that decision the court articulated the standards for an “injury in fact” sufficient to meet Article III standing requirements and found that Plaintiff met them, but not as against the Attorney General (see A-43 to A-45). Accordingly, the court *sua sponte* granted leave to amend the complaint, see A-46 to A-47.

The Amended Verified Complaint added the Governor and the District Attorney as defendants, and challenged the ban on simple in-home possession of nunchaku on three independent constitutional bases: (1) the First Amendment right to freedom of expression; (2) the Second Amendment right to keep and bear

arms; and (3) unenumerated rights as protected under various constitutional provisions and/or theories. The court below, ruling on Rule 12(b) and 12(c) motions by the various defendants in the Memorandum of Decision and Order from which appeal is taken (A-49 to A-68): (a) dismissed the Governor and the Attorney General (the “State Defendants”) as improper parties (A-59 to A-60); (b) found that the First Amendment claim failed because the twirling of nunchaku as expressive conduct does not convey a particularized message that is likely to be understood by those viewing it and is more akin to athletic activity than to speech (A-61 to A-65); and (c) otherwise found the statutes to be wholly constitutional as applied to prohibit simple in-home possession of nunchaku even absent any intent whatsoever to harm another (A-66 to A-67). In rendering this final part of its decision, the court below articulated its consideration only of the Second and Ninth Amendment claims, *see id.*, but did not address at all the claims made in subparagraphs (b) through (e) of paragraph 54 of the Amended Verified Complaint, which were based on: (b) rights recognized under the doctrine of substantive due process; (c) rights as recognized by the United States Supreme Court in *Lawrence v. Texas*; (d) rights guaranteed by the Fourteenth Amendment; and (e) 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. See Amended Verified Complaint, Third Cause of Action (A-24).

Plaintiff moved for reconsideration on the basis of the foregoing omission, arguing, *inter alia*, that

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.

Plaintiff's Reply Memorandum on Motion for Reconsideration, January 25, 2007, at page 4 (Docket # 90; omitted from Joint Appendix per F.R.A.P. 30(a)(2)).

Plaintiff respectfully requested, *see id.*, 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." The District Court, although it denied the motion for reconsideration, nevertheless kindly accommodated Plaintiff's request by setting forth its reasoning in some detail in the five-page Order that denied the motion (A-69 to A-73). Plaintiff then filed a timely Amended Notice of Appeal, incorporating reference to the conclusions of law set forth in that Order (A-13).

STATEMENT OF FACTS

The complete ban on any and all possession of nunchaku in New York occurred in 1974, notwithstanding a memorandum to the Governor dated April 4 of that year from the State of New York Executive Department's Division of Criminal Justice Services, urging the Governor *not* to sign the bill into law, pointing out that nunchaku have legitimate uses in karate and other martial-arts training, and opining that "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." A-29.

A separate memorandum, entitled "Report No. 184" and dated April 29, 1974, was prepared and submitted by the Committee on State Legislation of the New York County Lawyers' Association, recommending 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:

While the possession of these items with demonstrable criminal intent is a proper subject for legislation, the proposed legislation goes further, making mere possession (even absent criminal intent) a criminal offense. If it is the desire of the legislature to prohibit the use of nunchaku in criminal conduct, a more narrowly drawn statute can be fashioned to achieve this end.

A-33.

But the memoranda from the Division of Criminal Justice Services and the

New York County Lawyers' Association did not stem the tide that favored a total ban on any and all possession of two sticks connected by a cord or chain. Indeed, the "Governor's Bill Jacket" for Chapter 179 of the Laws of New York 1974 is filled with numerous documents opining that the nunchaku have *no legitimate use whatsoever*, including: (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, then-Counsel to the Governor, 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 letter dated May 7, 1974, from the District Attorney of the County of New York, stating categorically that "there is no known use for chuka sticks other than as a weapon."; (c) a 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 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 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.” See A-90.

Then-Attorney General Louis J. Lefkowitz himself weighed in with a Memorandum for the Governor dated April 8, 1974 (four days after the aforementioned memorandum from the Executive Department’s Division of Criminal Justice Services that had urged the Governor not to sign the bill into law). Mr. Lefkowitz’s memorandum described the bill as one that “would place controls on the use of an instrument . . . which has apparently been widely used by muggers and street gangs and has been the cause of many serious injuries.” A-85. The Attorney General concluded: “I find no legal objection to this bill.” A-86.

Thus, the bill banning any and all possession of nunchaku, even absent an intent to harm another and even in the privacy of one’s own home for peaceful martial-arts practice, was signed into law on April 16, 1974, to become effective on September 1, 1974. It remains in full force and effect today and has thus far withstood the only constitutional challenge ever brought against it.

ARGUMENT

POINT I

THE TOTAL BAN ON ALL POSSESSION OF NUNCHAKU, EVEN IN ONE'S HOME FOR PEACEFUL MARTIAL-ARTS PRACTICE, WAS ENACTED BASED UPON A FAULTY PREMISE

The bill banning any and all possession, for whatever purpose, of two sticks connected by a cord or chain, throughout the State of New York, was enacted based on the factual-legal proposition that nunchaku can have no legitimate purpose. But, as one court wrote more than 150 years ago: “The legislature has no power to legislate the truth of facts.” *Dougherty v. Bethune*, 7 Ga. 90, 92 (1849).

Since New York's 1974 enactment, several courts have expressly recognized that the nunchaku does indeed have 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 Verified Complaint at ¶ 16 (A-17). 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). And even an Arizona case sustaining a conviction for nunchaku possession 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).

None of the foregoing cases involved possession of nunchaku in the home (although that distinction is not relevant to the proposition for which they are cited here). In two of the three (*Maloney* and *Swanton*), possession in an automobile was at issue, while *In re S.P.* involved possession of nunchaku by a juvenile in public. The jurisdictions involved (Ohio, Arizona, and the District of Columbia, respectively) have apparently never criminalized possession of nunchaku in the home, it appearing that New York and California are the only jurisdictions that have ever done so. See A-87 to A-88.

In any event, it is clear that the factual-legal premise upon which the total ban was based, i.e., that nunchaku can have no legitimate purpose, has since been discredited. Yet New York’s ban continues in full force and effect to prevent martial artists from possessing nunchaku in their homes--under threat of up to a year’s imprisonment should they be caught doing so. N.Y. Penal Law § 265.01.

Plaintiff-Appellant, a martial artist who has trained with the nunchaku since

1975 (A-17), has actually been prosecuted by New York for such simple in-home possession of “chuka sticks,” and the court below found it to be “undisputed that the criminal charge for possession of a nunchaku was not supported by any allegations that the Plaintiff had used the nunchaku in the commission of a crime; that he carried the nunchaku in public; or engaged in any other prohibited conduct in connection with said nunchaku except for possession in his home.” A-40.

The recently deceased American playwright Arthur Miller is credited with having said: “The structure of a play is always the story of how the birds came home to roost.” In the ongoing tragedy of the draconian ban of nunchaku in the State of New York, the prescient words of New York’s own Division of Criminal Justice Services (“[I]n view of the current interest and participation in [martial arts] 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.”) are like those metaphorical birds on their flight home. Whether they will eventually roost or be shot down enroute is, at this stage of the litigation (and probably definitively), entirely up to this Court.

POINT II

THE TOTAL BAN ON ALL POSSESSION OF NUNCHAKU, EVEN IN ONE'S HOME FOR PEACEFUL MARTIAL-ARTS PRACTICE, IS AT ODDS WITH OUR CONSTITUTIONAL TRADITION AND VIOLATES UNENUMERATED RIGHTS

Eighty-four years ago, when discussing the scope of the liberty guaranteed by the Fourteenth Amendment's requirement that "[n]o state . . . shall deprive any person of life, liberty or property without due process of law[,]" the United States Supreme Court wrote:

While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. . . . *The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect.* Determination by the Legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts.

Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923) (emphasis added). Here, it is beyond dispute that banning the simple possession of nunchaku in the privacy of one's home simply *lacks* any "reasonable relation to [any] purpose within the competency of the state to effect." In the case of prohibition of carrying nunchaku

in public, the reasonable relation to a public interest is clear. Likewise, in the case of firearms--which are inherently dangerous and capable of inflicting serious or fatal injury (even accidentally) by firing bullets or other projectiles using energy stored in the gunpowder--the state's interest in regulating even home possession is indisputably reasonable. But a pair of sticks connected by a cord--unlike a firearm--is not inherently dangerous by virtue of the possibility of accidental discharge. Moreover, the nunchaku is an instrument that has a long tradition as a martial-arts weapon, see Amended Verified Complaint at ¶¶ 23-24 (A-18 to A-19), and its socially acceptable uses in that context are well recognized.

The “established doctrine” referenced in the *Meyer* passage quoted above, which is commonly known as “substantive due process,” has long taken into account the difference between a State’s regulating activities that take place in public and those that take place in the privacy and sanctity of the home. Four years ago, in *Lawrence v. Texas*, 539 U.S. 558 (2003), the Supreme Court’s opinion began:

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.

Id. at 562. Although *Lawrence* involved a criminal prosecution for a different activity, namely, engaging in consensual homosexual sex, the principles upon which it was decided are equally applicable here. Simple possession of two sticks connected by a cord for use in martial-arts practice--or even for personal defense

against potential illegal intruders into one's home--is an activity no less entitled to constitutional protection under the various theories of unenumerated liberty rights (including but not limited to "substantive due process") than is sexual activity. And, although the court below found the case not to be "controlling," see A-73 (Order on motion for reconsideration), *Lawrence's* opening statement about the State's proper role, in our constitutional tradition, in regulating activities that occur within the home and that harm no one, is quite applicable to the case at bar. That both cases (this one and *Lawrence*) involved criminal prosecutions is also worthy of consideration: the idea that one may be *imprisoned by the State* for possessing in one's home for legitimate purposes a traditional martial-arts weapon, or for engaging in consensual sexual activity in one's home with a member of the same sex, is especially offensive to our constitutional tradition. Indeed, the right of self-defense is both time-honored and integral to one's personal autonomy.

Although "substantive due process" has been the dominant Twentieth-Century approach taken by the federal courts in developing a jurisprudence of unenumerated rights, it is not the only possible approach, nor is it necessarily the best-supported in terms of either text or history. It is, however, established. Thus, it is one possible approach that this Court may take to find that the statutes challenged here, although constitutional as applied generally, unduly infringe on liberty and privacy interests when applied so as to criminalize simple in-home possession of a martial-arts instrument "consisting of two or more lengths of a

rigid material joined together by a thong, rope or chain,” New York Penal Law § 265.00 (14).

However, an alternative approach is worth considering. The late Professor Charles L. Black, Jr., in the last book he published during his life, argued passionately and persuasively that the doctrine of substantive due process should be gradually replaced by a more textually sound jurisprudence of unenumerated rights that relies instead on the Ninth Amendment, looking in large part to the principles articulated in the Declaration of Independence for content, and made applicable as against the states through the Privileges and Immunities Clause of the Fourteenth Amendment. C.L. Black, Jr., *A New Birth of Freedom: Human Rights, Named and Unnamed* (1997). Of substantive due process, Professor Black wrote the following:

Necessity, it is said, is the mother of invention. Sometimes the necessity is so pressing that it gives birth to an invention that doesn't work very well. That is how we got “substantive due process.” It was unthinkable that in a supposedly free country the component States could at their own will [engage in various deprivations of liberty] “[S]ubstantive due process” is an invention that now and then works a little bit in practice, but *does not work* intellectually. It has had perhaps a good transitional function, like the wood-frame support of an arch before you put the keystone in.

Id. at 106 (emphasis in original).

Professor Black's “keystone” is the Ninth Amendment, which, as he puts it, “declares as a matter of law--of constitutional law, overriding other law--that

some other rights are ‘retained by the people,’ and that these shall be treated as *on equal footing* with rights enumerated.” *Id.* at 13 (emphasis in original).

The Ninth Amendment has received respect (although, at first glance, not much content) from the federal courts, including this Court, in various opinions. *E.g.*, *United States v. Bifield*, 702 F.2d 342, 349 (2d Cir. 1983) (noting that the Ninth Amendment means that “[t]he full scope of the specific guarantees is not limited by the text”); *Henne v. Wright*, 904 F.2d 1208, 1216 (8th Cir. 1990) (“There are such things [as unenumerated rights] in constitutional law We know that much . . . from the Ninth Amendment.”) (Arnold, J., concurring in part and dissenting in part). As to its content, Professor Black’s thesis is that the Declaration of Independence, particularly its assertion of the “unalienable Rights [including] Life, Liberty, and the Pursuit of Happiness,” provides a textual basis for the content of the Ninth Amendment. Black, *supra*, at 38.

Another approach to defining the content of the Ninth Amendment (and an approach not at all inconsistent with Professor Black’s) would be to look to the rest of the Bill of Rights for clues as to what sort of rights should be protected. Indeed, that very approach is evident in the Supreme Court’s opinion in *Griswold v. Connecticut*, 381 U. S. 479 (1965), the case that is generally accepted as having begun the series of “substantive due process”-based “right to privacy” decisions including *Lawrence v. Texas*, *supra*. As the Supreme Court wrote in *Griswold*:

[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. . . . Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers “in any house” in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

Griswold, 381 U.S. at 484 (citations omitted).

Thus, although it is widely cited as the seminal substantive due process or “right to privacy” case of the Twentieth Century, *Griswold* could equally be viewed as the seminal Ninth Amendment case, for the “penumbras and emanations” of the various Bill of Rights provisions cited in *Griswold* could *only* have given rise to an unenumerated right that was to “be treated as on equal footing with rights enumerated,” *cf.* Black, *supra*, if the Ninth Amendment had been implicitly given some recognition in the process.

The *Griswold* approach was to look to other Bill of Rights provisions relating to the inviolability of the home and of the person (primarily the Third and Fourth Amendments) as a basis for the “right to privacy,” which was then incorporated against the states through the Due Process Clause of the Fourteenth

Amendment (the latter step having been necessary because in 1965--until *Saenz v. Roe*, 526 U.S. 489 (1999)--the Fourteenth Amendment's Privileges and Immunities Clause was still considered a "dead letter" entitled to no recognition at all). The *Griswold* approach has been built upon through the Supreme Court's subsequent jurisprudence up to and including *Lawrence v. Texas*, *supra*. In several lines of cases spanning some four decades, the Supreme Court has found unenumerated rights, originally (in *Griswold*) by looking to the other provisions in the Bill of Rights for clues in defining the parameters of unenumerated rights.

The Supreme Court has, thus far, not taken the step of inserting Professor Black's "keystone" (the Ninth Amendment) into the "arch" of its unenumerated-rights jurisprudence (see *supra* at page 16), instead relying textually on the Due Process Clauses of the Fifth and Fourteenth Amendments. But the Supreme Court is cognizant that, as the Ninth Amendment declares, rights as against governmental intrusion are not limited to those expressly enumerated:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

Lawrence v. Texas, 539 U.S. at 578-579.

The Supreme Court's established unenumerated-rights jurisprudence, applied in cases cited above such as *Meyer v. Nebraska* (striking down statute forbidding teaching of German in schools), *Lawrence v. Texas* (striking down statute criminalizing consensual homosexual sex), and *Griswold v. Connecticut* (striking down statute banning contraceptives), as well as in cases such as *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (striking down zoning ordinance that violated unenumerated rights by defining certain categories of relatives who may live together and declaring that others may not, making it a crime for a grandmother to live with both her grandsons), is wholly applicable to an evaluation of the constitutionality of New York's irrational criminalization of simple, peaceful, in-home possession of a martial-arts weapon. This is so whether one adopts an underlying constitutional theory based on (a) "substantive due process" derived from the Due Process Clauses of the Fifth and Fourteenth Amendments, (b) the Ninth Amendment, or (c) any other approach urged in the Amended Verified Complaint (Third Cause of Action, *q.v.*, at A-24). The real question is not one of *finding* the liberty interest entitled to protection, but of *balancing* that liberty interest against the state's legitimate interest, if any, in the challenged application of the statute. It is respectfully submitted that New York, which enacted the total ban on nunchaku possession based on the faulty factual-legal premise that nunchaku can have no legitimate purpose, *see supra* Point I, lacks any such legitimate, rational interest as to banning simple home possession.

POINT III

THE TOTAL BAN ON ALL POSSESSION OF NUNCHAKU, EVEN IN ONE'S HOME FOR PEACEFUL MARTIAL-ARTS PRACTICE, VIOLATES THE SECOND AMENDMENT

Plaintiff-Appellant preserved his Second Amendment claim for this appeal. A-83 (stating that “Plaintiff expressly does not waive, and hereby preserves, his Second Amendment claim”). This was done in a brief filed below on June 14, 2006 (Docket # 67), after this Court had decided (and after the Supreme Court had denied *certiorari* in) *Bach v. Pataki*, 408 F.3d 75 (2d Cir. 2005), *cert. denied*, 546 U.S. 1174 (2006), but before the Court of Appeals for the D.C. Circuit had decided *Parker v. District of Columbia*, 478 F.3d 370 (2007), *pet. for cert. filed* September 12, 2007 (Docket No. 07-335).

In *Bach*, this Court held that it was “compelled by the Supreme Court’s opinion in *Presser v. Illinois*,” 116 U.S. 252 (1886), to hold that the Second Amendment is inapplicable as against the states. 408 F.3d at 84. More recently, in *Parker, supra*, the D.C. Circuit held that the Second Amendment guarantees an individual (as opposed to a collective) right, but of course did not reach the question of whether that right is incorporated as against the states (because the District of Columbia is not a state).

It is respectfully submitted that, following the denial of *certiorari* in *Bach* and the decision in *Parker*, this Court should now revisit the questions of whether

the Second Amendment guarantees an individual right and, if so, whether that right is incorporated as against the states. On the question of the Second Amendment's applicability to the states, there is as yet no circuit split. *Cf. Peoples Rights Org., Inc. v. City of Columbus*, 152 F.3d 522, 538 n.18 (6th Cir. 1998) (stating that "the Second Amendment guarantees a collective rather than an individual right" and going on to state that "[t]he Supreme Court has held that the Due Process Clause of the Fourteenth Amendment does not incorporate the Second Amendment; hence, the restrictions of the Second Amendment operate only upon the Federal Government"); *Love v. Pepersack*, 47 F.3d 120, 123-24 (4th Cir. 1995) (stating that "[t]he Second Amendment does not apply to the states" and going on to state that it is a collective rather than an individual right). But the very fact that *Presser* held that the right was not to be incorporated implies (as does the Amendment's use of the phrase "the right of the People") that it is an individual rather than a collective right.² That implication's now having been made an express holding by a sister circuit for the first time in *Parker*, coupled with the Supreme Court's denial of *certiorari* in *Bach*--and, most importantly, the fact that *Presser* was decided in an era of non-incorporation of the provisions of

² As one scholar put it: "The collective rights theory obviates . . . problems dealing with incorporation. If no individual can claim the right to bear arms, there is no issue. If the 'right' exists in the State, incorporation against state interference is utterly incomprehensible." L.A. Powe, Jr., "Guns, Words, and Constitutional Interpretation," 38 *William & Mary L. Rev.* 1311, 1374 (1997)

the Bill of Rights generally--all combine to provide this Court with both the rationale and the justification to examine first the question of whether the Second Amendment guarantees an individual right and, if so, whether that right is incorporated as against the states.

The nunchaku has an undisputed historical connection to a citizens' militia (albeit one in Asia) that preexisted the ratification of the Constitution by nearly two centuries. Amended Verified Complaint at ¶¶ 24-25 (A-18 to A-19).³ As to the contemporary relevance of the nunchaku as an "arm" of the militia, the weapon is used for controlled non-lethal force by "over 200 law enforcement agencies across the United States," A-92 (¶ 19) and source cited therein, and appears to have had military application during the 20th Century, see, e.g., M. Ayoob, *The Truth About Self-Protection* 300 (1983) (noting that the weapon was used by Navy SEALs in Vietnam); see also A-92 (¶ 18) and source cited therein. The nunchaku is particularly effective against an opponent armed with a knife or other edged weapon without resort to lethal force (Amended Verified Complaint at ¶¶ 17, 25 (A-17, A-19)).

As the *Parker* court expressly recognized, possession of a weapon in the home differs from possession in public, "so we need not consider the *more difficult issue* whether the District can ban the carrying of handguns in public, or

³ In any event, facts in the pleadings of the non-moving party are to be considered true for purposes of 12(b) and 12(c) motions to dismiss.

in automobiles.” 478 F.3d at 400 (emphasis added); *see also id.* at 374 (noting that the appellants were “not asserting a right to carry such weapons outside their homes”); *cf. Andrews v. United States*, 922 A.2d 449, 456 (D.C. 2007) (distinguishing *Parker* on the basis that it dealt only with possession of weapons in the home).

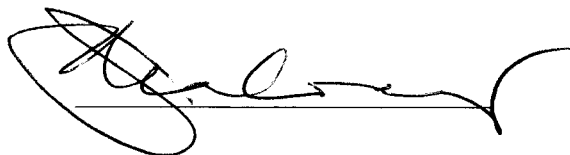
Finally, even if this Court should decide not to reconsider its decision in *Bach*, which would mean that the Second Amendment would not be *per se* applicable to an analysis of the statutes as applied to criminalize simple in-home possession of nunchaku, that does not necessarily also mean that the values the Second Amendment entrenches are irrelevant to the separate and distinct unenumerated-rights analysis of the statutes as applied (see Point II, *supra*). For the Supreme Court’s approach as first articulated in *Griswold*, see discussion at 17-19, *supra*, was to look to other Bill of Rights provisions relating to the inviolability of the home and of the person as a basis for the unenumerated right asserted, which was then incorporated against the states through the Due Process Clause of the Fourteenth Amendment. Nothing less should be done here, and the Second Amendment should not be written out of the Constitution so entirely and so finally as to allow a State to impose criminal sanctions for the mere possession in one’s home, for peaceful use in martial-arts practice and/or for home defense, of two sticks connected by a cord or chain.

CONCLUSION

For all of the foregoing reasons, the decision of the court below should be REVERSED, and this Court should hold 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 within one's home, are unconstitutional and of no force and effect.

Dated: September 24, 2007
Port Washington, New York

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'James M. Maloney', written over a horizontal line.

James M. Maloney
Plaintiff-Appellant *Pro Se*
33 Bayview Avenue
Port Washington, NY 11050

(516) 767-1395
maritimelaw@nyu.edu

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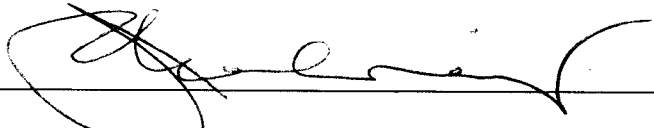
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Attorney for Plaintiff-Appellant

Dated: September 24, 2007