UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Courthouse at Foley Square 40 Centre Street, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 07-0581-cv

Motion for: postpone argument/stay appeal

Set forth below precise, complete statement of relief sought:

Postpone argument/stay appeal until the Supreme Court has decided District of Columbia v. Heller, 07-290 (cert. granted)

Caption [use short title]

James M. Maloney,
Plaintiff-Appellant,
-against-
Andrew Cuomo et al.,
Defendants-Respondents.

MOVING PARTY: James M. Maloney

☑ Plaintiff ☐ Defendant
☑ Appellant/Petitioner ☐ Appellee/Respondent

OPPOSING PARTY: Andrew Cuomo et al.

MOVING ATTORNEY: James M. Maloney, Esq.
[name of attorney, with firm, address, phone number and e-mail]

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OPPOSING ATTORNEY [Name]: 1)Cecelia Chang, Esq. 2)Karen Hutson, Esq.
[name of attorney, with firm, address, phone number and e-mail]

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Mineola, NY 11501
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khutson@nassaucountyny.gov

Court-Judge/Agency appealed from: Eastern District of New York - Hon. Arthur D. Spatt

Please check appropriate boxes:

Has **consent** of opposing counsel:
A. been sought? ☑ Yes ☐ No
B. been obtained? [see below]*

Is **oral argument** requested? ☐ Yes ☑ No
(requests for oral argument will not necessarily be granted)

Has **argument** date of appeal been **set**? ☐ Yes ☑ No

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

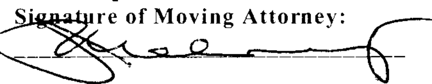
Has request for relief been made **below**? ☐ Yes ☐ No

Has this relief been previously sought in this Court? ☐ Yes ☐ No

Requested return date and explanation of emergency:

* Such consent was sought by letter dated November 28, 2007. County Attorney Hutson (for Appellee RICE) expressly takes no position on the motion. Assistant Solicitor General Chang (for Appellees CUOMO and SPITZER) did not respond.

Signature of Moving Attorney:



Date: 12/10/2007

Has **service** been effected? ☑ Yes ☐ No
[Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is **GRANTED DENIED**.

FOR THE COURT:
ROSEANN B. MacKECHNIE, Clerk of Court

Date: ____________________ By: ____________________

Form T-1080 (Revised 10/31/02).

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
--X
JAMES M. MALONEY,

Plaintiff-Appellant,

- against -

07-0581-cv

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.
--X

MEMORANDUM IN SUPPORT OF MOTION

Plaintiff-Appellant JAMES M. MALONEY, an attorney at law admitted to practice before this Court, proceeding *pro se* herein, respectfully submits this motion to postpone argument and/or stay the hearing of this appeal until the United States Supreme Court has decided *District of Columbia v. Heller*, Docket No. 07-290 (*cert. granted* November 20, 2007), a case in which the Court will definitively decide, for the first time in history, whether the Second Amendment to the United States Constitution confers an individual right.

The basis for the motion is that the highly unusual circumstance of the United States Supreme Court's first-time interpretation of the essential meaning and basic application of a provision in the Bill of Rights, coupled with the fact that that same Bill or Rights provision is a core basis to the constitutional challenge at bar, favors the staying of the hearing of this appeal until the Supreme Court's opinion in *Heller* is available to guide this Court.

ARGUMENT

This case challenges 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 a martial-arts weapon known as "nunchaku" or "chuka sticks" within one's home. The case does not challenge and has never challenged the application of those statutes to: (a) the possession of nunchaku in any location other than the would-be possessor's home; nor (b) the possession of nunchaku coupled with the intent to use them to harm another.

A primary basis for this constitutional challenge to New York's total ban on nunchaku, even as to simple possession in one's own home, was and remains the Second Amendment.

Plaintiff-Appellant has carefully preserved his Second Amendment claim for this appeal. This was done in a brief filed below on June 14, 2006 (A-83), 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) (which held that the Second Amendment was inapplicable as against the states under very old Supreme Court precedent), but before the Court of Appeals for the D.C. Circuit had decided *Parker v. District of Columbia*, 478 F.3d 370 (2007), *cert. granted sub nom. District of Columbia v. Heller*, Docket No. 07-290.[1]

In *Parker*, the D.C Circuit had held that the Second Amendment guarantees an individual right, and that that right was violated by D.C.'s total ban on any and all possession

[1] The grant of *certiorari*, on November 20, 2007, was limited to the following question: "Whether the following provisions - D.C. Code §§ 7-2502.02(a)(4), 22-4504(a), and 7-2507.02 - violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes?"

of functional firearms in the home. Now that *certiorari* has been granted in the *Parker* case (*sub nom. Heller* because Heller was the only plaintiff held to have had standing), most commentators agree that *Heller* will likely be the highest-profile case on the Supreme Court's docket this Term, and that it promises to be among the most closely watched constitutional law cases in decades. This is unsurprising given that the case is nothing short of the long-awaited end of the "arrested jurisprudence"[2] of the Second Amendment that had persisted through the Twentieth Century.

Indeed, for more than two centuries, the Second Amendment has remained a wholly unexplained provision in the Bill of Rights, having received no attention from the Supreme Court since 1939, when the Court, in *United States v. Miller*, 307 U.S. 174 (1939), held only that

> [i]n the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.

Id. at 178.

Miller is, however, so inscrutable an opinion that both sides in the *Parker/Heller* case

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[2] Some thirteen years ago, Professor William Van Alstyne of Duke Law School published an essay, "The Second Amendment and the Personal Right to Arms," 43 Duke L. J. 1236 (1994), in which he described the "arrested jurisprudence" of the Second Amendment: "The main reason there is such a vacuum of useful Second Amendment understanding . . . is the *arrested jurisprudence* of the subject as such, a condition due substantially to the Supreme Court's own inertia--the same inertia that similarly afflicted the First Amendment virtually until the third decade of this twentieth century when Holmes and Brandeis finally were moved personally to take the First Amendment seriously (as previously it scarcely ever was)." *Id.* at 1240 (emphasis added) (footnote omitted).

argue that it supports their position. The truth is, of course, that the Supreme Court has *never* clearly stated whether the Second Amendment, like the other provisions of the Bill of Rights, guarantees an individual right. And although this Court correctly stated in *Bach v. Pataki*, 408 F.3d 75 (2d Cir. 2005), *cert. denied*, 546 U.S. 1174 (2006), that it was bound by the Supreme Court's opinion in *Presser v. Illinois*, 116 U.S. 252 (1886), to hold that the Second Amendment has not yet been "incorporated" as against the states, the Supreme Court's forthcoming guidance in *Heller*, which is virtually certain to answer the question of whether the Second Amendment guarantees an individual right, will likely also illuminate the path for lower courts to take in considering the question of incorporation.[3]

Significantly, as in *Heller*, the statutes challenged here amount to a *complete* ban that extends to any and all possession of a nunchaku, even in one's home (which New York enacted in 1974). Thus, the Supreme Court's examination of the balance between an individual right to keep arms on the one hand, and the reach of society's need to control possession and use of weaponry on the other, is highly likely to be on point in this case.

In sum, the pending *Heller* case is of such great import and relevance to this case that prudence, discretion and justice all urge strongly that this Court wait for that decision before deciding this appeal. Since *Heller* will undoubtedly be decided by the end of the current Term (i.e., June 2008), it would also be prudent to delay oral argument until then so that the parties may have an opportunity to address *Heller*'s implications.

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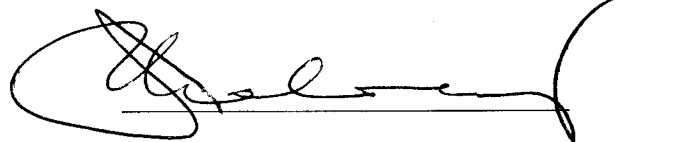
[3] It is quite unlikely that the Supreme Court will directly reach the question of incorporation in *Heller*, because the District of Columbia is not a state and the question is not before the Court, but if the Court does hold that the Second Amendment guarantees an individual right, it will likely also provide indicia of the nature of that right that would be relevant for purposes of incorporation inquiries, and the Court may well offer some guidance on the continuing vitality of *Presser v. Illinois* in light of all that has come since.

Finally, although this Court once commented that "a motion to stay an appeal made by parties that appealed a district court judgment [is] an anomalous motion," *Teachers Ins. and Annuity Ass'n of America v. Butler*, 803 F.2d 61, 62 (2d Cir. 1986), and that "[s]uch an anomalous motion is not an everyday occurrence," *id.*, it is an even *rarer* occurrence for a Bill of Rights provision that has never been explained by the Supreme Court for more than two centuries to be finally taken up for review. Indeed, it is an *unprecedented* occurrence, as no other single Amendment has been ignored for nearly so long. Given that the Second Amendment--and the Supreme Court's interpretation of it--are essential to the case at hand, which challenges New York's 33-year-old complete ban of a simple martial-arts weapon (and which ban would more justly remain in force for a few additional months awaiting this Court's review than be examined without benefit of the Supreme Court's forthcoming jurisprudence), it is respectfully urged that the within motion be GRANTED.

Dated: December 10, 2007
Port Washington, New York

Respectfully submitted,



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